

ADDRESS

A gallows of hung parliaments — a Western Australian perspective*

C P Shanahan SC**

1. Introduction

The current Parliaments of the United Kingdom, Canada and Australia all have hung Parliaments. In addition to these national Parliaments, a number of the Australian States have also recently returned hung Parliaments, including each of Tasmania (20 March 2010) and Western Australia (6 September 2008). I have chosen a ‘gallows’ as the collective noun to describe these shared electoral outcomes. I feel completely free to do so because the term ‘*hung Parliament*’ itself is only of recent vintage being used for the first time in 1974.¹ Two interesting and important issues emerge out of this rash of indecisive elections. First, why has there been such a widespread tightening of political support for both conservative and non-conservative parties right across the western world at this time? Second, we are now in a position to compare (i) how our own Constitution dictates that Parliament must operate in such a setting with (ii) recent examples both overseas and at home. What lessons, if any, can we take from the nature of the process by which the current Western Australian Government was formed following the election on 6 September 2008?

My analysis is to be primarily from a legal perspective so that the first question being largely political and social falls outside my immediate remit. It is to the second question that this paper is directed, what if anything does the Western Australian response to a hung Parliament tell us about the nature and health of our own State’s Parliamentary democracy and is there any need for change.

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** Former Vice President of the Western Australian Bar Association and served as Acting Commissioner of the Corruption and Crime Commission of Western Australia.

2. *Hung parliaments*

A hung Parliament is a Parliament in which no single party has an absolute majority, that is no party can form a Government in its own right because no party has more than half the available seats in the House of Parliament in which government is formed. In the Western Australian bicameral Parliament Governments are formed in the lower house, the Legislative Assembly. This is why the Premier (person who forms the Government) is always a Member of the lower House. The Legislative Assembly in Western Australia currently has 59 seats, thus an absolute majority requires 30 seats.

3. *Caretaker governments*

When a hung Parliament occurs the incumbent Government prior to the general election continues to govern in ‘*caretaking mode*’, with the Prime Minister or Premier remaining in that capacity. Just as Francois Rabelais, French writer, doctor and Renaissance humanist (1494–1553), suggested that nature abhors a vacuum so does government — it is for this reason that the incumbent Government continues after the election albeit in care-taking mode. Thus, following the 2008 Western Australian election the then Western Australian Labor Government led by Mr Alan Carpenter continued to govern as a ‘*caretaker*’ Government in accordance with established protocols and conventions. It continued in office until the formation of the new Barnett minority Government.

This paper examines the legal framework within which that transition occurred, its origins, some relevant precedents and the risks associated with a hung Parliament in this State.

The caretaker period begins at the time the House of Representatives is dissolved (in anticipation of a general election) and continues until: (i) if the election result is clear and there is a change of government, until the new government is appointed, or (ii) if the election result is unclear, when Parliament is recalled and the new Government proves it enjoys the confidence of the House. During the caretaker period, the business of government continues to deal with the ordinary matters of administration. However, the ‘*caretaker conventions*’ apply, which aim to ensure that the actions of the caretaker administration do not bind the new Government. In general, a caretaking government must avoid: (i) major policy decisions that may commit an incoming government; (ii) making significant appointments; or (iii) entering major contracts or undertakings

The reasons why the caretaker period extends to the recall of a new Parliament dates back to England in the period before 1868. It was only at the general election in 1868 that the Second Reform Act of 1867 came into effect and the urban working classes in England and Wales were given the vote.²

Before 1868 no government could be defeated until after the election, when its majority was tested on the floor of the recalled Parliament. It is important to appreciate that prior to 1868 there was a very narrow franchise dictated by property holdings in which members of Parliament (because they were elected by a small ‘*well-heeled*’ section of their local community) were often well known personally to their constituents and voted more independently because many Members were not formally members of a political party. This meant that support for a Government could change quickly, and the only way to determine who enjoyed the confidence of the House with any certainty was to have a Parliament vote.

The first Prime Minister of Canada, Sir John MacDonal, called individual Members of Parliament without a formal allegiance to a political party ‘*loose fish*’.³ The reference to ‘*loose fish*’ can be found in the Honourable Eugene Forsey’s article ‘*The Courts and the Conventions of The Constitution*’ in the *University of New Brunswick Revue De Droit*.⁴ Even now ‘*loose fish*’ appeals as an apt description of Independents in a contemporary Australian hung Parliament dominated by well established large political Parties, as they are wooed for support and seek to negotiate their own political priorities. Forsey also makes the interesting observation that any suggestion that a Government must resign when an Opposition wins a majority at the polls would have been ‘*the wildest heresy*’ before 1868 because the Government’s right to test its majority on the floor of the returned Parliament was seen as fundamental. Indeed it was Disraeli who broke with this tradition for the first time after the 1868 election by resigning once it was clear that his Government had been defeated.⁵ Clearly times have changed in the sense that we are all familiar with the established *convention* that when an Opposition wins a clear majority on election day the Government leader will, in the ordinary course, give a television speech conceding defeat. However, the pre-1868 convention continues to apply when there is a hung Parliament. We will see that this is a particularly important dimension for Western Australia because in this State, under our Constitution, only the Premier can recall Parliament following an election.

4. *The 2008 WA election*

In the 2008 Western Australian election the voters delivered a hung Parliament. In the immediate post-election Parliament the ALP had the largest number of seats of any party, 28, and the Liberal Party, 24. The numbers have changed a little since the election, and Table 1 shows how political allegiances in the Chamber of the Legislative Assembly have shifted:

It is important to note that the 2008 was the first election following the one-vote one-value legislation and the first election in which there were 59 seats in the lower House.⁶

Table 1: Comparative Numbers in the Western Australian Legislative Assembly ⁷

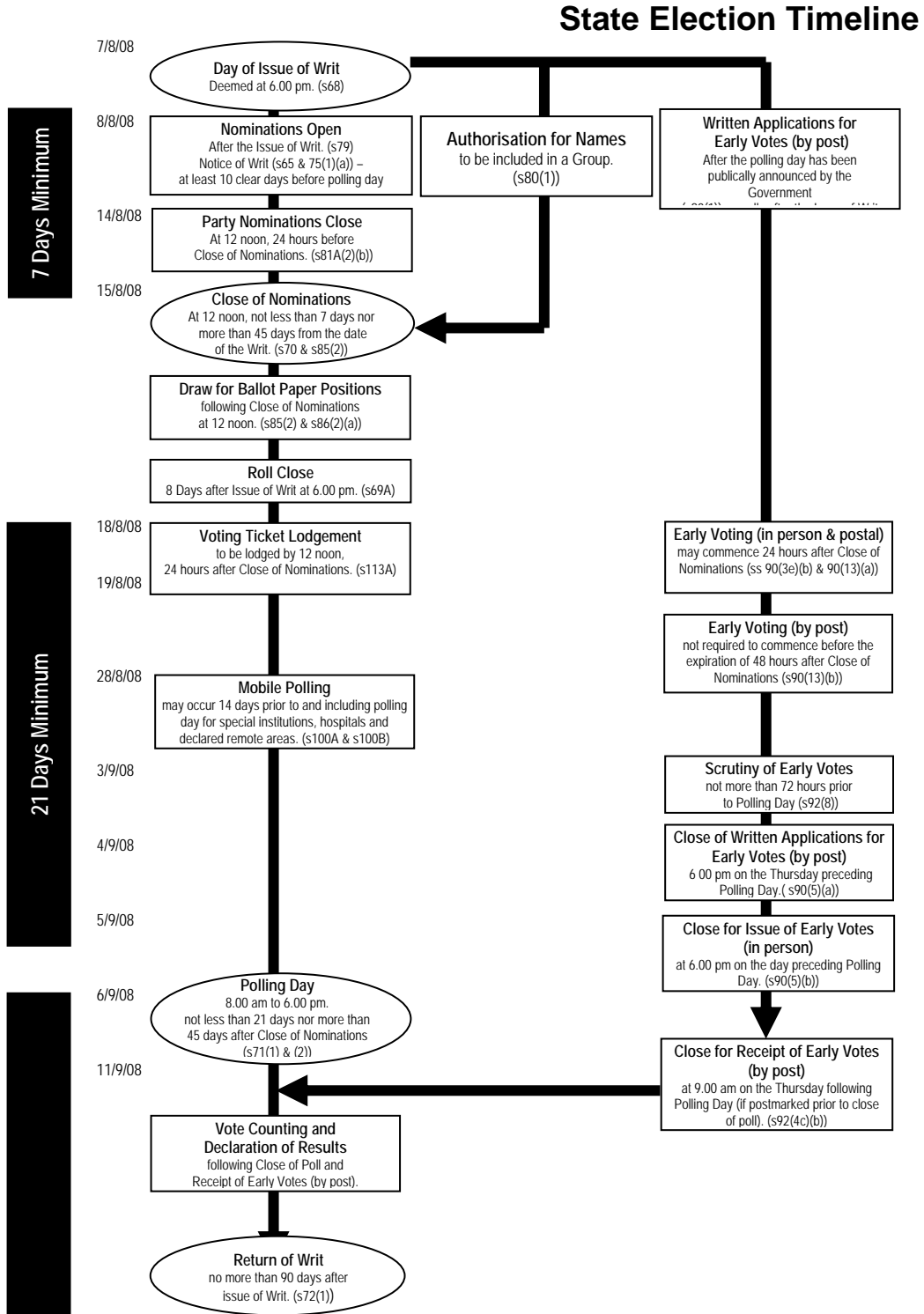
	PRIOR	ELECTION '08	NOW
ALP	30	28	26
LIBERAL	15	24	24
NATIONAL	5	4*	5*
INDEPENDENT	7	3	4
GREEN	0	0	0
TOTAL	57	59	59

The election results are shown in Table 1, changes since the election excluding by-elections which have gone the way of the out-going incumbent's political party have included: (1) the by-election for Fremantle after the 2008 Election elected a Green candidate, Ms Adele Carles, in place of the former Labor Attorney-General Mr Jim McGinty; (2) an ALP member, Mr Vince Catania MLA, Member for North-West, left the ALP to join the Nationals, and (3) the Green Member for Fremantle ultimately left the Greens to become an Independent, albeit a '*green Independent*'. These changes demonstrate how things can change relatively quickly even in a political system dominated by political parties. It also emphasises the importance of Independents in the Parliament, even now the ALP Opposition could form government with the support of all four of the current Independents. Perhaps one should note in passing that in a contemporary Australian Parliament many Independents are ex-members of a major political party or associated therewith.

On 7 August 2008, the Governor caused two Writs to be issued to the Electoral Commissioner to proceed with elections in all Legislative Assembly districts and Legislative Council regions in Western Australia. Table 2 shows the process as it appears in the Western Australian Electoral Commission's *2008 State General Election Results and Statistics Report* at page 7.

Polling day was designated as Saturday 6 September 2008. Statements of results for the general election were returned to the Electoral Commissioner as required by the *Electoral Act 1907 (WA)* within the time specified on the Writs. On Friday 3 October 2008, the Electoral Commissioner returned the Writs to the Governor and advised the Clerk of the Legislative Assembly and the Clerk of the Legislative Council of the names of the elected members and gave each of them a copy of the relevant certified Writ.

Table 2: Western Australian Election 2008 Timetable



5. *The election result and its aftermath*

Thus by the morning of the Western Australia poll on 6 September 2008 the then incumbent Labor Government was serving in caretaking mode. By the end of the evening it remained in that position because the election result (see Table 1) had delivered no clear outcome. The reasons why the election did not deliver a clear victory were essentially that:

- (1) Unlike the National Party of Australia which is a member of the federal coalition that is a formal long-standing coalition between the Liberal Party of Australia, the Liberal National Party of Queensland, the National Party of Australia and the Country Liberal Party, the National members elected to the WA Parliament in 2008 eschewed such a coalition with the Western Australian division of the Liberal Party of Australia, and thus their support for a possible Barnett Liberal Government was unclear — in the end these 4 votes proved decisive;
- (2) The three Independents elected at the 2008 election included:
 - Dr Elizabeth Constable (**Churchlands**);
 - Dr Janet Woollard (**Alfred Cove**), and
 - John Bowler (**Kalgoorlie**)

Of the three Independents, the Member for Churchlands was first elected as an Independent in 1991 for Floreat (subsequently Churchlands) after unsuccessfully contesting pre-selection as the Liberal Party candidate for that seat. Dr Constable currently serves as Minister for Education and Tourism in the Barnett Ministry. She is the only Independent politician in Australia to hold cabinet office.⁸ Like the Member for Churchlands, Dr Woollard the Member for Alfred Cove was originally a member of the Liberal Party but stood as an Independent in the February 2001 WA Election for the '*Liberals for Forests*'. Dr Woollard has since been re-elected in 2005 and 2008.

Unlike the first two Independents John Bowler was previously a member of the Australian Labor Party and a Minister in the Carpenter Government. The Premier Alan Carpenter sacked Mr Bowler following a Western Australian Corruption and Crime Commission report in February 2007. Mr Bowler was re-elected as the Independent Member for Kalgoorlie at the 2008 WA election.

Following the 2008 election the four Nationals met to decide which of the major parties that they would support. This was crucial because Labor (28 seats) could not secure the support of the two Independents it needed to govern, and the Liberals (24) could not govern even with the support of all three Independents. The Nationals met to decide which party they would support following a week of negotiations with both major parties. Mr Bowler threw his support behind the Nationals. Ultimately, the Nationals announced their decision to support the Liberal Party and this subsequently led to the formation of the Barnett Government.⁹ However, the WA Nationals were not prepared to enter a formal coalition with the

Liberal Party, resulting in the formation of a minority Barnett Government with the support of the Nationals (and Mr Bowler). Whilst the Nationals have a number of Ministers in the Barnett Government they are not bound to support all Cabinet decisions (that is limited cabinet collective responsibility) hence the WA Nationals are not part of a formal coalition. This is why the current Government is properly described as a '*minority Barnett Government*', not a '*Barnett-Grylls Government*'. The minority Barnett Government also has the formal support of the Independent Dr Constable. At the time this paper was being written the green Independent, Adele Carles, was publicly reported as having guaranteed supply and confidence to the Barnett Government in return for an additional staffer. Further, that the other two Independents, Janet Woollard and John Bowler had agreed to support the minority Barnett Government of questions of supply and confidence.

The thrust of this paper is to consider what would have happened in September 2008 if Alan Carpenter had continued to govern Western Australia as the leader of a caretaker Government and refused to recall Parliament?

6. *A recalcitrant WA caretaker government*

Unlike the federal Government and other States of Australia there is no express period limited by the Western Australian Constitution (which is contained within two principal Acts) within which a Premier is required by law to recall Parliament following an election.¹⁰

In contrast, the period within which an Australian federal Government can continue in caretaker mode is limited by section 5 of the Constitution which requires that the Governor-General summon Parliament within 30 days after the date appointed for the return of the Election Writs. In Tasmania the Governor is obliged by that State's Constitution [see s.8B of the Constitution Act 1834 (Tas)] to commission a new Ministry within 7 days of the return of the Election Writs thus limiting the period of incumbency of a care-taking Government.

It must be immediately acknowledged that in some polities, such as England and New Zealand, the Constitutions are described as '*unwritten*', and described in terms of '*conventions*'. As Australians found out on the 11 November 1975 (some 35 years ago) much of the practical application and effect of a Constitution can be governed by unwritten conventions. Of course, the dismissal of the Whitlam Government in 1975 can be seen from two different perspectives, either: (i) the successful operation of such conventions, or (ii) the need to amend Constitutions to ensure that situations, such as that in 1975, are governed by specific constitutional provisions so that the risk of civil unrest and potential violence is avoided.

Thus when I say that Western Australia's Constitution does not expressly provide for a period within which the Premier must recall Parliament following an election, I immediately note that there are relevant unwritten conventions that many would argue govern such a situation. I also note that in his paper '*The Western Australian Constitution*' which was prepared to '*assist Western Australians to engage in*

informed discussion on constitutional Issues of importance to the State' the Chief Justice, Wayne Martin, writing in his former capacity as a Queens Counsel, poses this question when itemising issues that were previously raised with the Commission on Government and which might be considered by a Peoples' Convention as possible amendments to the Western Australian Constitution (emphasis added):

Power of Parliament to recall Parliament

Under existing practice, the Premier determines when the State Parliament is convened. Accordingly, when the Government does not have a majority in the Legislative Assembly, it would be possible for the Government to stay in office by the Premier not convening Parliament. Should the State Constitution make provision for some other mechanism for convening Parliament under these circumstances?

My contention is that the answer to this question is clearly 'Yes'.

It is interesting to note that the power conferred on the Governor at section 3 of the *Constitution Act 1889 (WA)* is in fact in the following terms (emphasis added):

3. Governor may fix place and time of sessions, prorogue Houses and dissolve Assembly

It shall be lawful for the Governor to fix the place and time for holding the first and every other session of the Legislative Council and Legislative Assembly, and from time to time to vary the same as he may judge advisable, giving sufficient notice thereof: and also to prorogue the Legislative Council and Legislative Assembly from time to time, and to dissolve the Legislative Assembly by Proclamation or otherwise whenever he shall think fit.

Certainly the practice in Western Australia has been for the Premier to determine when the Legislative Assembly sits by advising the Governor as to the summoning of the Parliament. However, section 3 confers a power on the Governor to 'fix the place and time for holding the first and every other session of the Legislative Council and Legislative Assembly', and one might speculate whether, despite the practice in this State, this provision confers power on the Governor to summon Parliament — such a power being implicit in the power to '*fix the date and time*' for such a sitting. This paper proceeds on the assumption that the current practice will be strictly adhered to and that the Western Australian Constitution, the express terms of which appear in two principal Acts — the *Constitution Act 1889 (WA)* and *Constitution Acts Amendment Act 1899 (WA)* — does not empower the Governor to summons Parliament without the advice of the Premier to that effect.

7. The risks if constitution remains unchanged

Historically the significance of the power to recall parliament is graphically illustrated by the period leading up to the English civil war. Many will be familiar with the images of Charles I dissolving Parliament with armed soldiers and casting out the parliamentarians. Charles ruled for eleven years between 1629 and 1640 without calling a Parliament (described, depending on one's sympathies, as the

'Personal Rule' or the *'eleven Years Tyranny'*). It was only with the Triennial Act passed by the Long Parliament in 1641 that the law required Parliament to be summonsed once every three years. How different would be a recalcitrant caretaking WA Premier's position from that of Charles I? The bitter and bloody English Civil War vividly demonstrates the risks associated with Charles I's ambition to rule without Parliament.

Charles I's primary difficulty was raising money in the absence of Parliament, and it was only the difficulty of raising money for foreign wars against the Spanish and the Scots that ultimately forced him to recall Parliament and to accept the Triennial Act. Obviously a recalcitrant caretaker WA Government would also need money to govern. Usually that is secured by a Parliamentary vote for supply. If Parliament were not recalled then the caretaking Government would have to seek to raise money outside the normal course. Forsey speculates in his paper that were this to occur in Canada then such a caretaker Government might continue for a limited period by means of Governor-General's special warrants.¹¹

The reality in Western Australia is that it would be unlikely that a recalcitrant administration could continue for any significant period of time without the support of the Governor because of the Governor's reserve powers.

Whilst the Western Australian Governor's capacity to authorise expenditure or borrowings by such a caretaker Government is untested, the reserve powers of a Governor — powers that the Governor may, in certain circumstances, exercise without, or contrary to, ministerial advice, are reasonably well established, they include:

- (1) The power to appoint a Premier if an election has resulted in a hung Parliament and the caretaking Premier voluntarily resigns — to do so the Queen's representative, he or she must form a view as to who in his or her opinion should be appointed as Premier because that person *'has or is most likely to have the confidence'* of the relevant House of Parliament;
- (2) The power to dismiss a Premier where the Premier has lost the confidence of the Parliament;
- (3) The power to dismiss a Premier when the Premier is acting unlawfully; and
- (4) The power to refuse to dissolve the Legislative Assembly despite a request from the Premier not to do so.

It is hard to imagine that a Western Australian Governor would seek to support a recalcitrant caretaker administration. But even were the recalcitrant Government to continue for only a short period before the Governor sought to exercise the governor's reserve powers by (i) first dismissing the caretaking government, and then (ii) commissioning the person who in the Governor's opinion *'has or is most likely to have the confidence'* of the relevant House of Parliament as Premier, so that (iii) the new Premier could recall Parliament, there could still be an uncomfortable, and potentially violent, period of time in which political and legal

authority were ambiguous and uncertain. Such a period should be avoided, that is the strongest case for Constitutional change in this regard in Western Australia. Can we imagine a scenario in which a Governor might support such a recalcitrant caretaking administration? One circumstance that suggests itself in which a Governor might so, is where widespread allegations of electoral fraud or misconduct put the legality and accuracy of the election result in doubt. What happens then if the Governor refuses to accept the apparent electoral outcome as either illegal or requiring significant investigation? The South Australian election in 1968 offers us some compass in this situation and, when we consider the factors that fell to be considered by the Governor when seeking to establish which person '*has or is most likely to have the confidence*' of the House of Assembly demonstrates the *Parliamentary* nature of our parliamentary democracy.

8. *South Australia 1968*

In South Australia in the March 1968 elections when the then Dunstan Labor Government went to the polls and won 19 seats in the South Australian lower House to the Liberal Country League's 19 seats with a single Independent. The Independent publicly declared his support for the LCL suggesting that the leader of the LCL could form a Government.

The ALP had won the seat of Millicent by 1 vote and, as one might expect, there was a dispute over that result and a number of other close counts in various seats also suggested further electoral disputes. The constitution of the South Australian Court of Disputed Returns in 1968 legally required the recall of Parliament.

In these circumstances one can imagine the quandary in which the Governor, Sir Edric Bastyan, was placed. The Governor took submissions from both sides of politics as to what should be done. Those submissions contained legal advice as to the Governor's obligations and powers. The submissions made by each leader and that of the Attorney-General, and the form of the Governor's ultimate action, are usefully set out verbatim in an article by Harris and Crawford in the Adelaide Law Review, titled '*The Powers and Authorities Vested in Him — The Discretionary Authority of State Governors and the Power of Dissolution*'.¹²

One of the crucial dilemmas in South Australia in 1968 was that the operation of the Court of Disputed Returns required the recall of Parliament, and thus disputed results could not be legally resolved until Parliament was recalled. The process of commencing a complaint to the Court of Disputed Returns at that time required a petition to be tabled in the House of Assembly, the lower House of the South Australian Parliament — hence the need to recall Parliament. The Opposition candidate for Millicent had, immediately following the general election, advised the Returning Officer for the State that he intended to present a petition to the House of Assembly disputing the election result in Millicent to be heard by the Court of Disputed Returns.¹³

In contrast in Western Australia section 157 of the *Electoral Act 1907* (WA) provides that the validity of any election or return can only be disputed by a petition addressed to the Court of Disputed Returns, not the Parliament:

157. Method of disputing validity of elections or returns

- (1) The validity of any election or return may be disputed by petition addressed to the Court of Disputed Returns, and not otherwise.
- (2) A judge of the Supreme Court sitting in open Court shall constitute the Court of Disputed Returns.

The Court is constituted by a Judge of the Supreme Court of Western Australia sitting in open Court. The Court of Disputed Returns has jurisdiction to hear petitions in which the validity of any election or return is disputed.

A single Supreme Court Judge exercises this jurisdiction for Parliamentary Elections and a Magistrate for Local Government Elections. Section 158 describes what is required in the petition:

158. Requisites of petition

Every petition disputing an election or return, in this Part called the petition, shall —

- (1) set out the facts relied on to invalidate the election or return;
- (2) contain a prayer asking for the relief the petitioner claims to be entitled to;
- (3) be signed by a candidate at the election in dispute;
- (4) be attested by 2 witnesses whose occupations and addresses are stated;
- (5) be filed in the Central Office of the Supreme Court within 40 days after the return of the writ.

This means that a recalcitrant incumbent caretaker Government in Western Australia could not prevent, hinder or preclude the processes of the Court of Disputed Returns.

Whilst the situation regarding the Court of Disputed Returns in South Australia in 1968 could not occur in Western Australia there were other dilemmas confronting the South Australian Governor.

The caretaker Premier, Don Dunstan, advised the Governor that there were at least two seats that would be the subject of challenges in the Court of Disputed Returns, being Millicent (won by the ALP by one vote) and Chaffey (won by the Liberal Country League) and that there was a real possibility that following proceedings in the Court of Disputed Returns either the Labor government or the Opposition could end up with a majority of 20 seats.

Mr Dunstan also raised the issue that the ALP had overwhelmingly won the popular vote but failed to win a commensurate number of seats because of an electoral gerrymander. Further, that the effect of the gerrymander had created a significant popular backlash. He concluded by advising the Governor that as a consequence the Government Ministry should not resign but should meet Parliament where the matter of confidence would be determined.

It is well established that the critical matter for the formation of Government is support on the floor of the House.

The popular vote and any measure of that vote is irrelevant to the question of legitimacy in a Parliamentary democracy. This is because the electoral result is to be given effect by measuring the backing that a prospective government enjoys calculated by the number of Members — holders of seats in the Parliament — that support it. Any electoral gerrymander is a parameter known to all and applying prior to the conduct of the election. Thus Dunstan could not rely on the fact that, as a result of a gerrymander, the LCL had won the same number of seats on 42.8% of the vote that Labor had won on 50.7% of the vote as a reason for the Governor preferring him over the Opposition leader as that person who ‘*has or is most likely to have the confidence*’ of the House of Assembly.

Mr Dunstan also provided advice to the Governor in his capacity as Attorney-General. In his memorandum to the Governor in that capacity, Mr Dunstan pointed out that,

... it has been recognised as being virtually axiomatic in both Britain and Australia for more than one hundred years that a Prime Minister or Premier who faces the possibility of a hostile majority in the lower House of a newly elected Parliament must be given the opportunity to prove that he has lost the confidence of the House before any further steps are taken to deal with the constitutional situation.

Interestingly Mr Dunstan observed that he could ‘... find no precedent where a Government has not voluntarily resigned ... [following an election] ... before meeting Parliament for a Governor’s refusal to accept advice given by the Ministers that they should meet Parliament’. This raises the questions whether: the incumbent caretaker Government has a right, if it so advises the Queen’s representative, to meet Parliament to test the confidence of the House, and if so, that right trumps the Governor’s right to exercise his or her reserve powers in a manner that contradicts the advice given by the leader of the incumbent caretaker Government, or a Minister thereof. Mr Dunstan would have been correct prior to 1868, but is that the case today?

It certainly remains prudent for the Queen’s representative to eschew the political ‘*bear pit*’ and allow Parliament to determine where the confidence of the House lies. However, in a clear case where the leader of the incumbent caretaker Government simply refuses to acknowledge the outcome of a popular election could the Queen’s representative exercise his or her reserve powers?

It appears that the answer to this question is ‘*Yes, if that representative concluded that the Premier was acting illegally*’. That of course raises the questions who determines illegality in that situation — is it simply the Governor after taking advice? Where would Sir Edric Bastyan have got such advice in 1968 when the Attorney-General was also the caretaker Premier? Would the Premier have to be acting illegally to justify such intervention or are there circumstances short of illegality that would justify such action?

The Governor should always avoid unnecessary intervention because ultimately the question of Parliament's support must be determined on the floor of the Parliament in any event. If the Queen's representative '*backs the wrong horse*' that will damage the structure, reputation and operation of Parliamentary democracy. Indeed any dismissal of a Government can lead to years of recriminations and Constitutional debate.

Here I note that a different situation exists where the incumbent Prime Minister or Premier chooses to resign following the election, such as Mr Brown's resignation at the last general election in the United Kingdom. There it falls to the Queen or her representative, the Governor-General or Governor, to commission the person who '*has or is most likely to have the confidence*' of the relevant House to form a Government.

It is interesting that the Queen commissioned Mr Cameron, the Conservative leader, to form a Government at a time when the Conservative Party was yet to enter the formal agreement with the Liberal Democrats that ultimately secured their Parliamentary majority. Perhaps the Queen considered Gordon Brown's resignation as Prime Minister as evidence that supported the inference that of the major parties only the Conservatives were likely to command a majority in the Commons.

Returning to South Australia in 1968 the election result could not be confirmed without the return of Parliament and that added a significant complication to any political negotiation concerning which party might enjoy the confidence of the House. It created doubt regarding the outcome of the election. It made it very difficult for the Governor to form a view about the person who '*has or is most likely to have the confidence*' of the relevant House.

The Opposition leader submitted that the Governor should exercise his reserve powers in favour of the Liberal Country League and commission him to form a Government on the basis that he could demonstrate the support of a majority in the house of Assembly, being the 19 LCL Members plus the Independent.

The Opposition leader pointed out that the Governor was not obliged to accept the advice presented by the Premier either in that capacity or as Attorney-General because he was being asked to exercise a reserve power. More particularly the leader of the opposition addressed the issue of the Court of Disputed Returns:

It is respectfully submitted that Your Excellency's decision should not be influenced by the possibility of appeals being made to the Court of Disputed Returns by any defeated candidates. Whether such appeals be instituted and whether they be successful cannot affect the representation in the House of assembly at its first meeting. The members who have now been declared to be elected will take their seats and occupy them unless and until a decision of the Court of Disputed Returns adverse to them be given.

Thus the proposition before the Governor was that he either recognise the right of the incumbent caretaker government to test their majority in the House or to

exercise his reserve powers and commission the leader of the Opposition as the person who '*has or is most likely to have the confidence*' of the House of Assembly.

The Governor issued an early Proclamation summoning Parliament for two purposes, to enable the House of Assembly to constitute the Court of Disputed Returns, and to enable the House to decide, upon the floor of the House of Assembly, which party commands the confidence of the House.

The Governor does not indicate, quite sensibly, whether he chose this course to honour some right or convention that allows an incumbent caretaker Government to test its support on the floor of the House, or whether this was just the simplest way or resolving the political and Constitutional situation without appearing to descend into the political arena.

In the end it is hard to imagine a situation in which a Queen's representative would not leave the question of the confidence of the House to the Parliament itself which may, at first glance, appear to be the entrenchment of a right in the incumbent caretaker Government to test its support on the floor of the House, but in reality is simply a sensible way of determining who enjoys the confidence of the House where it appears uncertain.

Perhaps one such situation occurs when the caretaker Premier of a State seeks to ignore the result of a popular election and govern without recalling Parliament. I return to this proposition at Section 10 below.

9. *Forming a government following a hung parliament*

Before returning to the question posed in respect of the WA Constitution concerning the power of the Premier to recall Parliament it is worth summarising the process that occurs when a hung Parliament is returned.

Forming a Government following a hung Parliament demonstrates the *Parliamentary* nature of our Parliamentary democracy. There are a series of Constitutional conventions based on the concept of who commands the confidence of the lower House that dictate what occurs when there is a hung Parliament, and determine when, and if, the Queen's representative will invite the leader of a party other than that making up the members of the incumbent caretaker Government to form a government.

Following a general election an incumbent Prime Minister or Premier must now resign once the result becomes clear, and the custom is that he or she would then advise the Queen's representative to commission the leader of the majority party in the lower House to form a Government. This is so despite the status of the Prime Minister or Premier evaporating upon his or her resignation, because having resigned their Constitutional status the outgoing Prime Minister or Premier's advice loses its constitutional authority which suggests that the matter is one for the Queen's representative alone. Where an incumbent caretaker Prime Minister or

Premier resigns, then following their resignation he or she has no power or right to advise the Queen, or the Queen's representative, to dissolve Parliament and call a further general election — a further election will be necessary only if the new Parliament cannot function and that is a matter for the Queen or the Queen's representative.

However, if the election result remains unclear the incumbent caretaker Government continues subject to intervention by the Queen's representative or the recall of Parliament. When the result is in doubt the incumbent Prime Minister or Premier can remain in office in care-taker mode until the result of the election becomes clear by a vote on the floor of the House, or a new Government is formed as a consequence of the intervention of the Queen's representative. This process is, of course, limited in certain jurisdictions by Constitutional timelines. For example section 5 of the Commonwealth Constitution (period within which Parliament must be recalled) and section 8B of the Tasmanian Constitution (time within which the Governor must appoint a new Government).

When the result remains uncertain and the Prime Minister or Premier chooses to resign, arguably like Gordon Brown's resignation at a time when the Conservative opposition were still to enter a formal coalition with the Liberal Democrats, the matter must be one for the Queen or her representative alone.

10. *The WA Constitution revisited*

Thus returning to the Western Australian Constitution how does the power of the Premier to recall Parliament effect the principles set out above, and should the WA Constitution make provision for some other mechanism for convening Parliament when there is a hung Parliament?

The answer to this question turns on the nature of the reserve powers that can be exercised by the Governor, and whether the Governor should ever be placed in a position that he or she may have to interfere and dismiss a WA Premier who refuses to recall Parliament. My contention is that the mere possibility that the WA Governor *might* be asked to dismiss a Premier is a powerful argument for amendment so that the constitutional power to recall Parliament lies with the Governor, as in other Australian States. Further, that the WA Governor could not dismiss an incumbent caretaker Government without denying that Government the right to test its support on the floor of the House. One imagines that the Governor may choose to do so because the Premier had refused a request by the Governor that he recall Parliament for that purpose and thus, arguably, it was the Premier who was responsible for effectively denying his or her Government that opportunity.

There has been some speculation that a Governor may have a reserve power to dismiss such a recalcitrant Premier (even where he has not acted illegally) where he or she has delayed recalling Parliament for an 'unconscionable' period, even where the Governor has made no request that parliament be recalled. This raises obvious

difficulties regarding what constitutes an ‘*unconscionable*’ period of delay, and who can (or should) determine when this period has expired?

Forsey suggests that this period expires when the Governor’s intervention does not deny the Assembly’s right to determine who should govern but when it is necessary to preserve the Assembly’s right to do so (for example when a WA Premier refused to recall Parliament). He cites the example of two Canadian elections in 1925 and 1972 and suggests:

Only if Mr King, in 1925–26, or Mr Trudeau in 1972–73, had attempted to carry on for an extended period without calling Parliament (financing the country’s business by means of Governor-General’s special warrants) would His Excellency have had the right, indeed the duty, to insist on the summoning of Parliament. He would have had to refuse to sign any more special warrants; if the Prime Minister had still refused to advise the summoning of Parliament, the Governor-General would have had to dismiss him and call on the leader of the largest party to form a Government and advise the summoning. In taking this action he would not be usurping the right of the House of Commons to decide who should form the Government: he would have been preserving its right to do so.¹⁴

Thus the answer to the WA Constitutional position may simply be that were the Premier of an incumbent caretaker Government following the return of a hung Parliament to seek to raise funds for the process of Government other than by the recall of Parliament then the Governor could dismiss the incumbent caretaker Premier and call upon the Opposition leader to form a Government and summon Parliament. The mechanics of the process would require the Governor to first form the view that it was necessary to dismiss such a caretaker Premier to preserve the Parliament’s role (as against the Premier’s) as the arbiter of which party enjoys its confidence and, consequently, is entitled to govern. In forming an opinion as to whether the grounds for the exercise of a reserve power exist (such as the dismissal of a Premier) the Queen’s representative is entitled to take advice both legal and political, albeit only the Queen’s representative can, in the absence of the Queen, form the necessary opinions and exercise the relevant reserve power.

The Governor having dismissed the incumbent Premier would then have to consider who ‘*has or is most likely to have the confidence of the House*’ before inviting that person to form a Government and summon Parliament, enabling Parliament to express its will on the floor of the House.

I agree with Twomey that the touchstone against which the Governor must measure confidence in a hung Parliament must be based on *the ability of a political leader to command support from those holding seats in the hung Parliament*, not the popular vote understood either in absolute terms or as a two party preferred vote. This is because it is the confidence of the House not the electorate that is the issue for the plenipotentiary. Because the inquiry is in respect of the elected members rather than their electors issues such as a the result of a gerrymander or the popular vote should not be relied upon by the Governor. The electoral system is a political issue for the Parliament.

Because confidence is measured by the support of elected members on the floor of the House the *potential stability and merits of a prospective Government* is a matter for the Parliament not the Queen's representative — and for the Governor-General or Governor to consider such matters is to descend to the political and breach the conventions that guide such action. Equally, the political promises made in the run up to the election are irrelevant for the Queen, or the Queen's representative, these are political matters for the House to assess.

The risks of popular dissatisfaction and civil violence around a dismissal of an elected Government by the Governor make it essential that such a possibility be removed by amendment to the WA Constitution.

Whilst the lessons learnt in the lengthy struggle between the King and Parliament and the extension of the franchise in England are often seen as of historical interest only they remain relevant when we seek to understand how our public political institutions born of the Anglo-Saxon tradition operate, and how such institutions may need to be changed to accommodate a contemporary modern democracy. As Churchill observed:

Many forms of Government have been tried, and will be tried in this world of sin and woe. No one pretends that democracy is perfect or all-wise. Indeed, it has been said that democracy is the worst form of government except all those other forms that have been tried from time to time.

Sir Winston Churchill, Hansard, November 11, 1947



Endnotes

¹ The term used to describe such a Parliament was originally a 'Balanced Parliament' rather than a 'hung Parliament'. The term 'hung Parliament' was first used in the press by journalist Simon Hoggart in *The Guardian* in 1974, see Blick, Andrew; Stuart Wilks-Heeg (April 2010). 'Governing without majorities: Coming to terms with balanced Parliaments in UK politics'. Liverpool: Democratic Audit p2
http://www.democraticaudit.org/download/HungParliament_final.pdf.

² *Representation of the People Act 1867* (UK), 30 & 31 Vict. c.102

³ It is important to note that much of the primary material that I have used was gathered using references from Anne Twomey's useful article entitled *Governor-General's Role in the Formation of a Government in a Hung Parliament* that can be downloaded from the Social Science Network Electronic Library of the University of Sydney

⁴ Forsey, Eugene, A., (Hon) the Constitution and the Conventions of The Constitution (1884) 33 *University of New Brunswick Law Journal* 11, at 15

⁵ *ibid*

⁶ The *Electoral Amendment and Repeal Act 2005 (No.1 of 2005)* passed on 20 May 2005

⁷ Sources include the Western Australian Electoral Commission's *2008 State General Election Results and Statistics Report*

⁸ Outside Norfolk Island, where political parties are not organised

⁹ 14 September 2008

¹⁰ *The Constitution Act 1889 (WA)* and *Constitution Acts Amendment Act 1899 (WA)*

¹¹ Forsey, at page 23

¹² Harris, M.C., and Crawford, J.R., 'The Powers and Authorities Vested in Him — The Discretionary Authority of State Governors and the Power of Dissolution' (1967–1970) 3 *Adelaide Law Review* 303

¹³ *ibid* at 307, Memorandum from the Premier to the Governor dated 20 March 1968

¹⁴ Forsey, at 23