

Appointing the Premier in a Hung Parliament — The Tasmanian Governor's Choice

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Introduction

The Tasmanian Governor's choice to grant a commission to David Bartlett as Premier in April 2010 proved to be highly controversial. Fortunately, the Governor, the Hon. Peter Underwood, published on the internet his reasons¹ and the documents upon which he had relied.² It is important that a more permanent record is made of these constitutionally significant events. This article, therefore, sets out the background to this controversy, the events leading up to the Governor's decision and the Governor's justification for it. It then provides a brief critical analysis of the Governor's decision and suggests that it should not be used as a precedent for the future.

Background

The election for the Tasmanian House of Assembly was held on 20 March 2010. Twenty five seats were filled, with five Members being elected in each of five electorates according to the Hare-Clark proportional voting system. The result was that both the Labor Party and the Liberal Party won ten seats and the Greens won five seats. There was a swing against Labor of 12.39% and the Liberals won more primary votes than Labor.³

During the election campaign, there had been much speculation about a hung parliament. The Labor Premier, David Bartlett, and the Opposition Leader, Will Hodgman, had both stated during the election campaign that they would not negotiate with the Greens and they would not compromise their respective policies.⁴ Mr Bartlett had also said that if the two major parties achieved an equal number of seats, then the party with the greater number of votes should have the first right to form a government.⁵ After the result of the election became clear, the Labor caucus voted in favour of relinquishing power to the Liberal Party, authorising Mr Bartlett to advise the Governor to call upon Mr Hodgman to form a government.⁶

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The writs for the election were returned to the Governor on 7 April 2010. This is a critical date due to an idiosyncrasy in the Tasmanian Constitution that does not arise in other States. Sub-section 8B(3) of the *Constitution Act 1934* provides that if a person holds office as a Minister at the time the House of Assembly is dissolved, he or she may continue in that office 'until the expiration of the period of 7 days following the day of the return of the writs for the ensuing general election'. Sub-section 8B(4) then makes it clear that upon the expiration of those 7 days, the person ceases to hold the office of Minister unless he or she has received a new commission as Minister. This meant that the Bartlett Government would have expired on 14 April 2010 and Tasmania would have been without a government unless the Governor commissioned a new Premier and Ministry before that date. There was, therefore, an onus on the Governor to make a decision within seven days. In practice, he needed to make a decision more quickly in order to allow the person who was to be commissioned as Premier the time to organise and nominate his or her Ministry (especially if this might involve a coalition with the Greens or the inclusion of Green Party members within the Cabinet).

The Events of 7-8 April 2010

On 7 April, therefore, the Governor sent for Mr Bartlett and asked him if he was able to form a government.⁷ Mr Bartlett replied by giving the Governor written advice. Mr Bartlett noted that the general election had left the Labor Party without a majority of seats in the House of Assembly and that the Liberal Party, while winning the same number of seats as the Labor Party, also gained the most first preference votes. He continued:

Therefore I do not consider that it is appropriate for me to advise you at this time that I should retain my commission to form a Government.

As you are aware, I made a commitment that in the event that the two major parties had an equal number of seats, the party with the most votes should attempt to form government in the first instance. In the current circumstances it is my advice that you invite the Leader of the Liberal Party, the Hon Will Hodgman MP, to indicate to you whether he is willing and able to accept a commission to form a Government.

Should Mr Hodgman satisfy you that he is willing and able to form a Government, I give notice that it would be my intention to resign from my ministerial office of Premier, which would be accompanied by the resignation of the entire Ministry, and to surrender my Commission as Premier of Tasmania. Thereafter, Mr Hodgman would provide you with advice about the formation of the new ministry and other administrative arrangements.

As you are aware, the *Constitution Act 1934* requires that a new ministry must be appointed and sworn to office within 7 days after the return of the Writs. Should Mr Hodgman, or any other eligible person, not be in a position to accept a commission as Premier of Tasmania I will provide you with further advice before that time expires.⁸

The interesting aspects of this letter to note are first, that Mr Bartlett did not resign his commission, but at the same time did not advise the Governor that he wished to be re-commissioned in order to test confidence in his government on the floor of the House. Both options were open to him. Instead, he took the more contentious approach of advising the Governor to invite Mr Hodgman to indicate whether he was willing and able to accept a commission to form a Government. He would only resign if the Governor were satisfied that Mr Hodgman was 'willing and able' to form a Government.

Mr Hodgman then called on the Governor later the same day. He told the Governor that he was willing and able to form a government and handed the Governor a written advice.⁹ That advice referred to the fact that in the case of a previous hung Parliament in 1989, the Governor, Sir Phillip Bennett, sought evidence that a 'stable' government could be formed.¹⁰ In particular Sir Phillip had sought evidence that the minority government would be supported in matters of confidence and supply.¹¹ Mr Hodgman sought to address such concerns by stating:

Given that Mr Bartlett has stated that his party would not vote against legislation appropriating supply, nor would they wantonly move or support a no-confidence motion in the government, that would mean at least twenty Members of the new House of Assembly would support a government I lead on these key motions.

Therefore I believe a government I am commissioned to lead would objectively meet the test applied in 1989 by Your Excellency's predecessor, General Sir Phillip Bennett, in that it would be stable for a reasonable period of time.

....

Your Excellency may wish to make your own inquiries regarding supply and no-confidence motions. However, given that these assurances have previously been supplied, and that Mr Bartlett has formally recommended to you that you invite me to form a government, I believe that a government I am commissioned to lead will be able to obtain supply and will have the support of the House of Assembly.¹²

The Governor then advised Mr Hodgman that Mr Bartlett would have to make such a commitment directly to the Governor before he would place any weight upon it. Mr Hodgman said that he would ask Mr Bartlett to give to the Governor the commitments he had made prior to the election. Mr Bartlett then sent a letter to the Governor stating that he had made a commitment that if his party failed to win a plurality of seats or votes, he would advise the Governor that Mr Hodgman have the opportunity to form a Government in the first instance. Mr Bartlett stated that he had honoured this commitment in full and that 'I offer Mr Hodgman no more support than that and have never done so'.¹³

This statement that he had 'never done so' gave rise to some controversy, with competing transcripts of media interviews being produced. Mr Hodgman visited the Governor again on 8 April, providing a CD and transcript of a press conference held on 1 April 2010 in which the relevant statement regarding confidence and supply had been made. The Governor, however, concluded that regardless of what

commitments had previously been made, Mr Bartlett's present intention was clearly set out in his letter.¹⁴

Meanwhile, that same day, the Greens Leader, Nick McKim, announced that as neither party had so far been prepared to negotiate a deal with the Greens, his party would guarantee that it would not initiate or support a vote of no-confidence in the current Government until such time as a negotiated deal was finalised between two of the three parties.¹⁵

The Governor sent for Mr Bartlett again. He told Mr Bartlett that, in light of his letter, he had come to the conclusion that Mr Hodgman could not form a stable government. The Governor stated in his reasons:

I also told him that as he was still the holder of my commission to form a government and the Premier of the State he had a constitutional obligation to form a government so that the Parliament could be called together and the strength of that government tested on the floor of the House of Assembly. Mr Bartlett accepted that he had this obligation and said that he would advise me of the names of his Ministers as soon as he could.¹⁶

The Aftermath

Mr Bartlett then proceeded to negotiate an agreement with the Greens Party. The Governor swore in Mr Bartlett as Premier along with an interim Ministry on 13 April 2010. The full Ministry (including two Greens members) was sworn in on 19 April after further negotiations. While no coalition agreement was reached, the two Greens Cabinet Members are subject to collective ministerial responsibility and are required to vote with the Government except on matters of 'significant concern' to the Greens where they absent themselves from the cabinet discussion.¹⁷

When Parliament resumed, Mr Hodgman moved a vote of no confidence against the Government on 4 May 2010, but it was defeated the following day by the Labor and Greens Members voting together.¹⁸

The Basis for the Governor's Decision

The Governor's statement of reasons sets out some principles which underpinned his decision. The first is that it is the 'Governor's primary duty' to 'protect and maintain the Constitution and the State's representative parliamentary democracy'. The Governor also saw it as his duty to ensure that there is 'an orderly transition of government that reflects the will of the people of the State of Tasmania as expressed at the ballot box.' He continued:

The duty obliges the Governor to find the person who can form a stable government; that is, a person who is able to advise the Governor of the names of persons, elected to the Assembly or the Legislative Council, who, if appointed as Ministers, will have the confidence of the House of Assembly.

....

In the exercise of that duty to commission a person who can form a stable government the Governor will take formal advice from the current holder of that commission but is not bound to act on that advice.¹⁹

The Governor regarded as irrelevant the total number of votes received by a party. His focus was on who could form a stable government, not a government with the greatest public support.

The Governor also appeared to be put out by the idea that the party leaders were deciding amongst themselves who should be Premier. He expressed the view that:

The commissioning of a person to form a government is entirely the Governor's prerogative and it is not within the gift of any political leader to hand over, or cede to another political leader the right to form a government, whatever the result of the election.²⁰

The Governor concluded that, as Mr Bartlett was not prepared to state to the Governor that he would support Mr Hodgman in matters of confidence and supply, then 'Mr Hodgman was not in a position to form a stable government'. Mr Hodgman had previously told the Governor that he did not seek the support of the Greens Party. As noted above, the critical part of the Governor's opinion stated that in his view, as Mr Bartlett was still Premier and the holder of the Governor's commission to form a government, he had a *constitutional obligation* to form a government so that confidence in it could be tested on the floor of the House. The Governor concluded:

My failure to be satisfied that Mr Hodgman had the support of the Labor party not to block supply and not to move a vote of no confidence except in extreme circumstances gave rise to a constitutional obligation on the part of the holder of the commission to form a government. This obligation arose regardless of whether Mr Bartlett had the support of the Greens party or not, for it was the only way to move the issue into the Parliament to enable the members of the House of Assembly to make the ultimate decision of who should govern.²¹

A Critical Analysis of the Governor's Reasons

The Governor as the guardian of the Constitution

The first controversial aspect of the Governor's reasons is his statement that the Governor's primary duty is to 'protect and maintain the Constitution and the State's representative parliamentary democracy'. On its face, this seems to be relatively benign. However, if it were interpreted as meaning that the Governor has an independent discretion and power to take such action as he or she deems necessary to 'protect and maintain the Constitution' without ministerial advice, or even contrary to ministerial advice, then this is a very controversial statement indeed.

The more orthodox view is that the system of responsible government requires the Governor to act upon ministerial advice, except in those extreme circumstances that give rise to the exercise of reserve powers.²² The Governor may seek advice about

the constitutional validity of a proposed bill or government action, but if he or she is advised by the Crown Law officers that it is valid, then regardless of the Governor's personal view, he or she must act upon ministerial advice.²³ Hence, even if the Governor regards a bill as unconstitutional, the Governor must still give assent to it and leave it to the courts to determine constitutional validity.²⁴ To do otherwise would be to breach both the doctrine of responsible government and the doctrine of separation of powers. The main criticism made of Sir Philip Game when he dismissed the Lang Government in 1932 on the ground that it was acting illegally was that it was a matter for the courts to determine illegality, not the Governor.²⁵

The need to establish the 'stability' of Government

The second controversial aspect of the Governor's reasons is his emphasis on the need for 'stability' in the formation of a government. The rule that a Governor should grant a commission to the person who holds the confidence of the lower House of the legislature was set down in Regulation 57 in the *Colonial Regulations* 1892, which were used to instruct Governors on their duties. No mention was made of the need to assess the future stability of a government when it is first formed.

The issue of stability normally arises when a Governor is faced with the dilemma of whether to grant a dissolution to a Premier who has lost the confidence of the lower House or refuse the request for a dissolution and commission someone else to form a government. In such circumstances, the Governor will normally take into account whether another person has the capacity to form a stable government for the rest of the parliamentary term. If not, a dissolution should be granted. This is reflected in s 24B(6) of the *Constitution Act* 1902 (NSW) which says that where that has been a vote of no confidence in the government, the Governor 'is to consider whether a viable alternative government can be formed without a dissolution' before granting a dissolution.

Where there has just been an election, however, and a new election is therefore not advisable, the question ought simply be who is the person most likely to command the confidence of the house — not whether or not that person is likely to form a stable government. Stability is only really relevant where there is the practical alternative of holding an election. Once another election is not an element in play, then there is no real choice other than to commission the person who holds, or is most likely to hold, the confidence of the lower house.

In this case the Governor, Mr Underwood, was no doubt relying on the precedent of 1989 where the Tasmanian Governor, Sir Phillip Bennett, required written and oral assurances from each member of the Greens, to ensure that a Field labor government would be 'stable' before commissioning Mr Field. Nonetheless, Sir Phillip was the subject of some criticism for his personal involvement and 'misplaced concern to find a "stable" government'.²⁶ Written assurances as to how a Member will vote in matters of confidence and supply have no legal status and are not binding because Members of Parliament cannot contract out of their duty to act honestly and

independently in the interests of the people of the State when voting in Parliament.²⁷ Such assurances can only be indicative of present intention, not future action.

One must also wonder what Sir Phillip Bennett would have done if he had decided that a Field labor government would not be stable. He could not seriously have continued the commission of the Gray liberal government, which had already been defeated on the floor of the Parliament. His only option would have been to accept advice from Mr Gray, if it were given, to dissolve Parliament and hold a new election. This would have been contrary to convention,²⁸ especially in circumstances where the House had voted confidence in Mr Field, as the Governor would effectively have been overruling the outcome of an election and the wishes of the House of Assembly. Accordingly, he had no real choice but to commission Mr Field as Premier, regardless of whether or not his inquiries yielded satisfaction that a Field government would be suitably stable. Hence, this precedent was not the best guide for the actions of Mr Underwood.

The Governor's choice

The Governor took the view that the choice of commissioning a Premier fell solely within his prerogative and that it could not be controlled or ceded by a political leader.²⁹ This is not entirely true. If the incumbent Premier had advised the Governor that he wished to test his strength on the floor of the House, convention would have obliged the Governor to re-appoint him so that he could continue as Premier until such time as the house was recalled and determined confidence. If the incumbent Premier had resigned, then the Governor would have had no choice but to commission the Leader of the Opposition to form a government and await the verdict of the confidence of the house. In neither case would there really have been room for an exercise of the Governor's discretion. The problem arose in this case because the incumbent Premier neither resigned nor sought to be recommissioned. Either course would have been constitutionally valid. Perhaps the Governor's error lay in failing to insist upon Mr Bartlett making a choice one way or the other.³⁰

The benefit of incumbency only extends as far as a right to continue in government until Parliament is recalled and the incumbent Premier can test his or her support on the floor of the House. If this right is not exercised, then the incumbent has no greater right than the Opposition Leader or another potential Premier to be appointed Premier.

The 'constitutional obligation'

The Governor concluded that Mr Bartlett had a 'constitutional obligation' to form a government regardless of whether or not he had the support of the Greens and could form a stable government. This constitutional obligation apparently rested upon the fact that he was the one who currently held the commission.

The source of this obligation is not clear. Nor are there any obvious precedents for it. Certainly it is the case that if a government resigns (eg, after an election loss or a

vote of no confidence), it remains in office in care-taker mode until such time as a new government is commissioned. Accordingly, if Mr Bartlett had resigned, he and his government would have remained in office until Mr Hodgman had been commissioned as Premier. This is not an obligation to 'form' a government, but rather to continue administering government as a care-taker until a new government is formed.

The complicating factor in Tasmania is that there is also a statutory termination of the office of care-taker Ministers seven days after the return of the writs. The Governor is, therefore, obliged to make an active choice in appointing a Premier and ministry, rather than letting the period run on until parliament meets. In such circumstances, it is not clear: (a) why the incumbent Premier has a constitutional obligation to form a government where no party holds majority support in the lower house; or (b) that the incumbent Premier need not show that he or she can form a stable government but the Opposition Leader can only be appointed as Premier if he or she can establish future stability to the satisfaction of the Governor.³¹ The sole criterion should be who is most likely to hold the confidence of the lower house. Whoever is chosen, the issue of confidence will ultimately be determined by the House.

Conclusion

In the end, it really should not be a matter for the Governor, after an election, to be assessing the future stability of a potential government. The advantage of incumbency when an election gives rise to a hung Parliament is the right to choose whether or not to bat on as a care-taker Premier and test the strength of one's support on the floor of the house or whether to resign and leave it to the person most likely to hold the support of the house to form a government. Let us hope that this recent controversy is not regarded as establishing a precedent, or worse, a convention, that extends the benefits of incumbency and imposes upon Governors further obligations to make political judgments about the future stability of governments. ▲

End Notes

¹The reasons of the Governor of Tasmania, the Honourable Peter Underwood AC, for the commissioning of the Honourable David Bartlett to form a government following the 2010 House of Assembly election', 9 April 2010: http://www.govhouse.tas.gov.au/sites/default/files/speeches/Reasons_for_commissioning_Mr_Bartlett_to_form_a_government.pdf [viewed 23 July 2010].

²Letters by the Hon D Bartlett and the Hon W Hodgman to the Governor, 7 April 2010: http://www.govhouse.tas.gov.au/sites/default/files/Two_letters_dated_07.03.10.pdf [viewed 23 July 2010].

³The Liberal Party won 124,933 primary votes and the Labor Party won 118,168 primary votes.

- ⁴ ABC News Online, 'Minority or not, our policies will prevail: Libs, ALP', 15 March 2010.
- ⁵ M Denholm, 'Bartlett stakes future on all-out victory', *The Australian*, 23 February 2010, p 7.
- ⁶ M Denholm, 'Bartlett's Labor gives up power in Tasmania to Will Hodgman's Liberals', *The Australian*, 1 April 2010.
- ⁷ Governor's reasons, above n 1.
- ⁸ Letter by the Hon D Bartlett MP to the Governor, 7 April 2010, above n 2.
- ⁹ Governor's reasons, above n 1.
- ¹⁰ Letter by the Hon W Hodgman to the Governor, 7 April 2010, above n 2.
- ¹¹ See further: G Winterton, 'The Constitutional Position of Australian State Governors' in H P Lee and G Winterton (eds), *Australian Constitutional Perspectives* (Law Book Co, 1992) pp 304–31.
- ¹² Letter by the Hon W Hodgman to the Governor, 7 April 2010, above n 2.
- ¹³ Quotation extracted in Governor's reasons, above n 1.
- ¹⁴ Governor's reasons, above n 1.
- ¹⁵ ABC News Online, 'Labor Considers Next Move', 8 April 2010: <http://www.abc.net.au/news/stories/2010/04/08/2866921.htm?site=news> [viewed 23 July 2010]. See also: Tasmania, *Parliamentary Debates*, House of Assembly, 5 May 2010, p 37 (Mr McKim).
- ¹⁶ Governor's reasons, above n 1.
- ¹⁷ Tasmania, *Parliamentary Debates*, House of Assembly, 4 May 2010, pp 8–9.
- ¹⁸ Tasmania, *Parliamentary Debates*, House of Assembly, 5 May 2010, p 43.
- ¹⁹ Governor's reasons, above n 1.
- ²⁰ Governor's reasons, above n 1.
- ²¹ Governor's reasons, above n 1.
- ²² On the scope of the reserve powers, see: G Winterton, *Monarchy to Republic* (OUP, rev. edn, 1994) pp 31–54; and A Twomey, *The Constitution of New South Wales* (Federation Press, 2004) pp 636–60.
- ²³ See, eg, Despatches by the Secretary of State for the Dominions to Sir H Galway, Governor of South Australia, 28 February 1917 and 20 February 1918, advising that the Governor's duty was to act on ministerial advice, not as a guardian of the public against arbitrary and irregular administration. The only exception was if the circumstances justified the use of the reserve powers and an alternative government with the support of the lower House could be formed. The other alternative was for the Governor to resign if he or she was not prepared to act upon ministerial advice.
- ²⁴ There may, however, be extreme cases where there is not time to leave the matter to be determined by the courts or where the matter is not justiciable. In such cases, the Governor might consider the exercise of the reserve powers or resignation.
- ²⁵ See further: A Twomey, 'The Dismissal of the Lang Government', in *State Constitutional Landmarks* (Federation Press, 2005) p 129, at 156–60. Note that in this case Mr Lang did not provide the Governor with advice from the Crown Law Officers and would not even defend his actions as legally valid.
- ²⁶ G Winterton, 'The Constitutional Position of Australian State Governors' in H P Lee and G Winterton (eds), *Australian Constitutional Perspectives* (Law Book Co, 1992) p 328. See also: I Killey, 'Tasmania: A New Convention?' (1991) 2 *Public Law Review* 221,

226–7; and A Castles, ‘Post-election Constitutional Usage in the Shadow of Mount Wellington: Tasmania’s Constitutional Crisis, 1989’ (1990) 12 *Adelaide Law Review* 292, 296.

²⁷ *Wilkinson v Osborne* (1915) 21 CLR 89; *Horne v Barber* (1920) 27 CLR 494.

²⁸ See a discussion of the conventions in: G Winterton, ‘The Constitutional Position of Australian State Governors’ in H P Lee and G Winterton (eds), *Australian Constitutional Perspectives* (Law Book Co, 1992) pp 321–2; and I Killey, *Constitutional Conventions in Australia* (Australian Scholarly Publishing, 2009) pp 218–21.

²⁹ See also the statement by Professor Richard Herr that it is ‘not in the gift of the premier to give away government’: ‘Analyst predicts minority Labor Government — for now’, *The World Today*, ABC Radio, 1 April 2010: <http://www.abc.net.au/worldtoday/content/2010/s2862258.htm> [viewed 26 July 2010]

³⁰ It should be made clear that there is no suggestion that the Governor acted in any manner that was partisan or inappropriate. This article simply raises a difference of view as to the application of the relevant conventions.

³¹ For further criticism of this differential approach, see M Stokes, ‘Why I disagreed with the Governor’s Reasons for recommissioning a Bartlett Government’, *Tasmanian Times*, 22 April 2010: <http://tasmaniantimes.com/index.php?/article/why-i-disagreed-with-the-governors-reasons-for-recommissioning-a-bartlett-g/> [viewed 26 July 2010] [viewed 26 July 2010].