Uncertainty and the Exercise of Reserve Powers: Revisiting a Governor-General's Code of Practice*

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Abstract: This article examines the concept of uncertainty as it accompanies the exercise of the Governor-General's reserve powers according to unwritten constitutional conventions. While such conventions offer flexibility in constitutional umpiring, their vagueness contributes to controversy, speculation and even crisis. During episodes of acute parliamentary dispute, uncertainty has the potential to undermine the Governor-General's reputation and authority. In response, Canadian scholar Bruce Hicks has advocated for an apolitical decision-making rule for Canada's Governor-General. The rule aims to foster greater predictability by enhancing expectation that Parliament will strive to resolve its own constitutional disputes. Building on Hicks's proposal, this article suggests Australia should go further and introduce a Governor-General's Code of Practice, an idea Australia's Constitutional Commission considered in the 1980s. The proposed code would outline guiding principles for use of reserve powers, including Hicks's rule, to buttress trust in Australia's federal parliamentary democracy.

INTRODUCTION

Should the Commonwealth alter the form of its constitutional reserve powers? Provoking this question is the uncertainty inherent in vague unwritten conventions that attach to the Governor-General's discretionary use of the reserve powers. Further uncertainty arises for want of precedents in the use of those powers. By definition, conventions guide actions by dint of being usually followed or at least considered acceptable. In contrast, occasions marked by the use of reserve powers, ostensibly guided by convention, are rare and distinguishable by their distinctive circumstances. Nevertheless, Australia's federal parliamentary democracy has enjoyed notable stability in the presence of unwritten reserve powers.

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However, reconsidering the form of the reserve powers is important for three reasons. One, whether to leave the reserve powers in an unwritten form is a controversy that has persisted since Federation.[2] Two, controversy inevitably marks the use of reserve powers because the conventions are unenforceable,[3] 'disputed and uncertain'.[4] Three, uncertainty in their use invites speculation by constitutional commentators, which can heighten the accompanying sense of crisis.[5]

In this article I argue that the Commonwealth of Australia should adopt a Code of Practice that contains principles federal Parliament expects the Governor-General to follow when using reserve powers. In reaching this conclusion, I rely on the argument propounded by Bruce Hicks, a Canadian political scientist, that making the Governor-General's decisions more predictable during constitutional episodes lessens the sense of crisis, thereby supporting public trust in the constitutional fabric of a democratic society.[6]

I have chosen this approach for two reasons. First, as countries of the British Commonwealth, Australia and Canada share the unwritten constitutional norms called reserve powers. Second, there is much to learn from analysing Australia's Constitution through the analytical lens of uncertainty. Uncertainty is an important and ubiquitous dimension of human decision making.[7] As this article discusses, decision making under uncertainty shaped the formation of Australia's reserve powers, clouds their use by Governors-General and affects a range of stakeholders when they are used.

The remainder of this article is structured as follows. First, I provide a 'biography' of the Commonwealth's reserve powers in which I discuss their nature, their history and why uncertainty about their use persists. Next, I introduce Hicks's predictability benefit argument as a way of mitigating some uncertainty that accompanies their use. This section discusses how uncertainty in constitutional umpiring causes harm, how speculation fuels that uncertainty and how predictability dampens that speculation. Finally, I present the case for a modest constitutional reform. I examine the validity of Hicks's argument in Australia's federal context,

[2] *Official Report of the National Australasian Convention Debates*, Adelaide. 1897, p. 910.

[3] B. J. Galligan, 'The Kerr-Whitlam Debate and the Principles of the Australian Constitution'. *Journal of Commonwealth and Comparative Politics* 18(3) 1980, p. 266.

[4] Galligan, 'The Kerr-Whitlam Debate and the Principles of the Australian Constitution', p. 249.

[5] Bruce Hicks, 'Guiding the Governor General's Prerogatives: Constitutional Convention Versus an Apolitical Decision Rule'. *Constitutional Forum Constitutionnel* 18(2) 2009, p. 65.

[6] Hicks, 'Guiding the Governor General's Prerogatives', p. 65.

[7] Amy R Bland and Alexandre Schaefer, 'Different Varieties of Uncertainty in Human Decision-Making'. *Frontiers in Neuroscience* 6(Article 85) 2012, p. 1.

consider the merits of more predictable decision making through adoption of Hicks's apolitical decision rule, and revive the idea of a Governor-General's Code of Practice as a way of implementing Hicks's rule.

THE COMMONWEALTH'S RESERVE POWERS

Some might say that uncertainty about the Commonwealth's reserve powers traces back to disagreements in the lead up to Federation. Others, looking back many hundreds of years, might say reserve powers inherently express uncertainty. After all, they are discretionary and subject to unwritten conventions that have been shaped by disparate events that rarely occur. Yet, despite this, complementing their greatest weakness of uncertainty is their greatest strength of flexibility.

This section provides a 'biography' of the reserve powers to support their analysis through the lens of uncertainty. First it discusses their definition, purpose and types. Next it considers their historical roots. Finally, it examines the reasons why reserve powers persist as unwritten constitutional norms.

Definition, purpose, types

A reserve monarchical power is a residual power,[8] an artefact of the Westminster-style system of responsible government.[9] Heads of state may exercise the power at their discretion,[10] without or against ministerial advice,[11] but subject to convention.[12] A 'head of state' includes the Sovereign, a vice-regal representative, and heads of state in countries that have inherited features from Westminster.[13]

The purpose of reserve powers is to enable the head of state 'to uphold and maintain the fundamental constitutional principles of the system of government that the head of state

[8] Advisory Committee on Executive Government, Parliament of Australia, *Report of the Advisory Committee to the Constitutional Commission*, Parliamentary Paper (no. 303) 1987, p. 3.

[9] Anne Twomey, *The Veiled Sceptre: Reserve Powers of Heads of State in Westminster Systems* (digital). Cambridge University Press, 2018, p. 1.

[10] Twomey, *The Veiled Sceptre*, p. 6.

[11] Twomey, *The Veiled Sceptre*, p. 6.

[12] Twomey, *The Veiled Sceptre*, p. 7.

[13] Twomey, *The Veiled Sceptre*, pp. 1–2.

represents'.[14] In fulfilling this purpose, reserve powers enable change of government,[15] and serve as 'the last line of defence against governmental actions in breach of fundamental constitutional principles'.[16]

In Australia, reserve powers are rarely exercised.[17] At the Commonwealth level, the last occasion was in 1975 when the Governor-General Sir John Kerr dismissed the Prime Minister Gough Whitlam in the circumstances of a supply deadlock (commonly known as 'the Dismissal'). Prior to that occasion, in 1909, Lord Dudley (William Humble Ward) refused the application from Prime Minister Alfred Deakin requesting a dissolution.[18]

Despite being rarely exercised, it does not necessarily follow that reserve powers play no ongoing role in maintaining fundamental constitutional principles. To an unknown extent, reserve powers may achieve that purpose without being exercised. For example, their mere existence may suffice to cause a chief minister to moderate behaviour,[19] rather than to 'push the boundaries of appropriate behaviour'.[20]

There are several types of reserve powers. Anne Twomey categorises them into three groups. One group comprises the 'classic'[21] powers: to dismiss a chief minister, to appoint a chief minister, and to refuse a dissolution.[22] Another group comprises the disputed reserve powers: to refuse royal assent, to force a dissolution, and to summon and prorogue Parliament.[23] A further group contains several discrete powers, including to refuse to act in breach of caretaker conventions, the *Australian Constitution* (the Constitution) or the law, and to pursue the doctrine of necessity to restore constitutional governance.[24]

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[14] Twomey, *The Veiled Sceptre*, p. 1.

[15] Twomey, *The Veiled Sceptre*, p. 1.

[16] Twomey, *The Veiled Sceptre*, p. 1.

[17] Australia. Constitutional Commission, *Final Report of the Constitutional Commission*, Parliamentary Paper (no. 229) 1988, p. 76 [2.135].

[18] Herbert Vere Evatt, *The King and His Dominion Governors: A Study of the Reserve Powers of the Crown in Great Britain and the Dominions* (2nd ed). London: Routledge, 2013, p. 53.

[19] Twomey, *The Veiled Sceptre*, p. 43.

[20] Twomey, *The Veiled Sceptre*, p. 42.

[21] Anne Twomey, *Unrecognised Reserve Powers*, Speech, High Court of Australia, 14 November 2012, p. 1. Accessed at: https://www.hcourt.gov.au/publications/speeches/high-court-lecture-series.

[22] See also George Winterton, 'Reserve Powers in an Australian Republic'. *University of Tasmania Law Review* 12(2) 1993, p. 253.

[23] Twomey, *The Veiled Sceptre*, p. 10.

[24] Twomey, *The Veiled Sceptre*, p. 10.

Historical Roots

Reserve powers are the remnants of the British Crown's discretionary powers.[25] The Commonwealth of Australia inherited these by inheriting the British system of responsible government.[26] Their origin traces to the transfer of the Crown's power to the state that occurred during the age of enlightenment of the 17th and 18th centuries.[27] Although decision makers at the time found agreement on who should control most of the Crown's discretionary powers, they could not agree on a suitable alternative for a few powers.[28] Over time, the Crown came to retain these remnants, which are now referred to as reserve powers.[29]

Philosophical developments during the enlightenment explain why conventions 'temper'[30] the exercise of these 'sweeping'[31] reserve powers. During this age, legal philosophers reconceived the rationale for the Crown as the source of all public authority as 'the people's choice' rather than God's choice.[32] Hicks describes this new way of thinking as a 'clever sleight of hand' to align the justification for power allocations with evolving societal mores.[33] In effect, it changed the rationale that supported the constitutional authority of institutions without markedly altering the institutions themselves.[34] The resulting equilibrium between the forces for change (democracy) and for permanence (convention) became part of British common law.[35]

Australia inherited this common law to the extent it was applicable.[36] Further, the framers of Australia's Constitution were familiar with British constitutional traditions as a reason for not codifying conventions.

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[25] Bruce M. Hicks, 'The Crown's "Democratic" Reserve Powers'. *Journal of Canadian Studies* 44(2) 2010, p. 8.

[26] Winterton, 'Reserve Powers in an Australian Republic', p. 252.

[27] Hicks, 'The Crown's "Democratic" Reserve Powers', p. 9.

[28] Hicks, 'The Crown's "Democratic" Reserve Powers', p. 8.

[29] Hicks, 'The Crown's "Democratic" Reserve Powers', p. 8.

[30] Richard A Edwards, 'Republican Britain: The Constitutional Implications'. *Cambrian Law Review* 31 2000, p. 7.

[31] Edwards, 'Republican Britain: The Constitutional Implications', p. 7.

[32] Hicks, 'The Crown's "Democratic" Reserve Powers', p. 9.

[33] Hicks, 'The Crown's "Democratic" Reserve Powers', p. 10.

[34] Hicks, 'The Crown's "Democratic" Reserve Powers', p. 10.

[35] Hicks, 'The Crown's "Democratic" Reserve Powers', p. 10.

[36] William Blackstone, *Commentaries on the Laws of England in Four Books* (16th ed) ed. John Taylor Coleridge. London: J Butterworth and Son, 1825, p. 107 [108].

Power Persisting in Unwritten Words

Reserve powers exist in the form of unwritten constitutional norms. This, of itself, may introduce uncertainty into political and constitutional decision making where there is doubt about a power's precise definition. Additional uncertainty attaches to reserve powers through unwritten conventions intended to govern their use. Most of the Commonwealth of Australia's constitutional conventions are the product of 'about 250 years of evolution of British parliamentary government'.[37] Despite this historical development, significant uncertainty attaches to the conventions,[38] or their application in novel circumstances, including where they might clash.[39] Further uncertainty may confront decision making by political actors where a Governor-General errs in applying the relevant power to the prevailing circumstances.[40] More uncertainty emerges to the extent that conventions need to change. While constitutional conventions are 'customs, or understandings',[41] they reside in the sphere of 'constitutional or political ethics'.[42] As such, conventions coexist with the written law as 'an unwritten or conventional Constitution'.[43] For example, a large proportion of changes in the British Constitution since Edward I (1239–1307) have been 'silent changes' to conventions.[44] Conventions have also changed during the 20th century.[45] And, on occasions, conventions may need to be adapted or created.[46] It is always open to Parliament to change a convention.[47]

During the 1897 National Australasian Convention debate on the draft Constitution Bill, the applicability of unwritten conventions under an unwritten British constitution for an Australian

[37] Australia. Constitutional Commission, *Final Report*, p. 88 [2.193].

[38] Twomey, *The Veiled Sceptre*, p. 38.

[39] Anne Twomey, 'The Reserve Powers in Times of Political Crisis: The Dutton/Turnbull Leadership Challenge and Royal Assent to the Medevac Bill and Brexit Bills'. *Federal Law Review* 49(1) 2021, p. 101.

[40] LJ Mark Cooray, 'Australian Constitutional Convulsions of 1975 - The Reserve Powers of the Governor-General and Implications for the Future'. *Malaya Law Review* 22(1) 1980, p. 114.

[41] A V Dicey, *Introduction to the Study of the Law of the Constitution* (3rd ed). London: MacMillan and Co, 1889, p. 352.

[42] Dicey, *Introduction to the Study of the Law of the Constitution*, p. 341.

[43] Edward A Freeman, *The Growth of the English Constitution from the Earliest Times* (2nd ed). London: MacMillan and Co, 1873, p. 278.

[44] Freeman, *The Growth of the English Constitution from the Earliest Times*, p. 90.

[45] Australia. Constitutional Commission, *Final Report*, p. 82 [2.168].

[46] Twomey, 'The Reserve Powers in Times of Political Crisis', p. 101.

[47] Geoffrey Marshall, *Constitutional Conventions: The Rules and Forms of Political Accountability* (online). Oxford University Press, 1987, p. 217.

constitution in written form was contested.[48] Several reasons explain why the founders of federation decided to retain the reserve powers in an unwritten form. First, Sir Edmund Barton insisted on treating the reserve powers for the Commonwealth's written Constitution in the same way that England's Constitution treated them — as unwritten.[49] Further, as lead drafter, Barton 'feared ridicule in London' if the Bill embraced constitutional conventions rather than 'confin[ing] itself to the "law"'.[50] Moreover, within Barton's understanding of English constitutional practice, '[c]onventions offered the enticing prospect of flexibility'.[51] A key advantage of flexibility is the adaptability of reserve powers to address novel crises.[52]

Faced with a trade-off between uncertainty and flexibility, commentators appear polarised as to what form of reserve powers best serves the Commonwealth's long-term interests. Some commentators argue against codification on the grounds that conventions need to 'develop organically'.[53] In this vein, Robert Hawkins points to the 'impossibility of anticipating all eventualities', the risk of embroiling the Governor-General and the spectre of judicial review.[54] Others, notably Herbert Evatt, posited two reasons to codify reserve powers. First, it avoids 'an over-careful Governor-General' failing to act for want of a clear definition of their scope.[55] Second, it avoids 'an imprudent or over-zealous Governor-General' acting without reasonable grounds.[56]

Since federation, two notable efforts have sought to put aside conventions and instead codify reserve powers. In 1936, Evatt published his book The King and His Dominion Governors 'to demonstrate how uncertain and vague the reserve powers were and to advocate for their

[48] *Official Report of the National Australasian Convention Debates*, Adelaide. 1897, p. 910 (Edmund Barton, George Reid, John Cockburn).

[49] *Official Report of the National Australasian Convention Debates*, Adelaide, 19 April 1897, p. 910 (Edmund Barton).

[50] Winterton, 'Reserve Powers in an Australian Republic', p. 253.

[51] Michael Crommelin, 'Powers of the Head of State'. *Melbourne University Law Review* 38(3) 2015, pp. 1122–3.

[52] Winterton, 'Reserve Powers in an Australian Republic', p. 252.

[53] James W J Bowden and Nicholas A MacDonald, 'Cabinet Manuals and the Crown', in D Michael Jackson and Philippe Lagassé (eds), *Canada and the Crown: Essays in Constitutional Monarchy*. Queen's University: McGill-Queen's University Press, 2013, p. 182.

[54] Robert E Hawkins, '"Inefficient Efficiency": The Use of Vice-Regal Reserve Powers', in D Michael Jackson and Philippe Lagassé (eds), *Canada and the Crown: Essays in Constitutional Monarchy*. Queen's University: McGill-Queen's University Press, 2013, p. 103.

[55] Evatt, *The King and His Dominion Governors*, p. 306.

[56] Evatt, *The King and His Dominion Governors*, p. 306.

codification'.[57] Then in 1985, the Brisbane session of the Australian Constitutional Convention resolved '[t]hat this Convention recognises and declares that the following principles and practices should be observed as Conventions in Australia'.[58] Although this effort resulted in the compiling of 18 constitutional conventions in written form, the outcome was not authoritative or binding in any formal sense.

Further support for the codification of reserve powers is often linked to republican reform. In this regard, the Australian Republican Movement has proposed amendments to the Constitution, which it has detailed in its Australian Choice Model.[59] The proposal's intention is to extinguish reserve powers currently exercisable by the Governor-General unless codified within the Constitution.[60]

In conclusion, the persistence of the Commonwealth's reserve powers in their vague unwritten form is no historical accident. The evidence presented does not suggest their persistence stems from a chance happening or a cause that was other than deliberate. Rather, it appears to be the reasoned outcome of conscientious political actors concerned about power sharing for the good of a nation. Notwithstanding, the vague form of unwritten reserve powers is a legal tension. While the next section finds that uncertainty clouds their application and scope,[61] the law generally favours certainty in these areas.[62] Yet efforts to codify reserve powers have not succeeded. Viewed through the analytical lens of uncertainty, the existing form of the reserve powers becomes questionable. Should the Commonwealth leave its reserve powers in their current form, or should it alter their form to alleviate the uncertainty that clouds their application and scope during a constitutional episode? Thus far, identification of a middle approach that balances flexibility and predictability has proved elusive.

[57] Twomey, *The Veiled Sceptre*, p. 38.

[58] *Minutes of Proceedings, Official Record of Debates and Biographical Notes on Delegates and Representatives Attending the Australian Constitutional Convention,* Brisbane. 1985, p. 415.

[59] Australian Republican Movement, *The Australian Choice Model: A Genuine Choice for Australians*. Accessed at: https://republic.org.au/letsdiscuss.

[60] Dane Luo, 'The Devil Is in the Detail: The Reserve Powers under the Australian Choice Model', Blog Post, *AUSPUBLAW*, 18 February 2022. Accessed at: https://www.auspublaw.org/blog/2022/02/the-devil-is-in-the-detail-the-reserve-powers-under-the-australian-choice-model.

[61] Twomey, *The Veiled Sceptre*, p. 42.

[62] See eg *Pyrmont Point v Westacott*, 91 NSWLR 170 (2016), at 178 [47] (Ward JA).

HICKS'S PREDICTABILITY BENEFIT ARGUMENT

To address the legal tension inhering in the Commonwealth's reserve powers — law generally favouring certainty and reserve powers favouring uncertainty — I rely on an argument by Bruce Hicks, a Canadian political scientist. Hicks expounded his argument during the Canadian 2008–2009 parliamentary dispute. In this dispute, the Governor-General granted the Prime Minister's request to prorogue Parliament just 'six weeks after a federal election, three weeks into the new session, and two sitting days before an opposition motion of non-confidence was likely to defeat the government'.[63] The uncertainty that enveloped the Governor-General's decision making engendered a sense of crisis.[64] Hicks argues that enabling more predictable decision making during a prorogation episode will reduce the sense of crisis, among other benefits.[65]

In this section, I discuss Hicks's predictability benefit argument through the analytical lens of uncertainty. I step through how uncertainty in constitutional umpiring causes harm, how speculation fuels that uncertainty and how predictability dampens speculation which, in turn, mitigates the sense of crisis.

Uncertain Umpiring Causes Harm

Resolving a constitutional episode such as Canada's 2008 prorogation episode requires constitutional umpiring. I use the term 'constitutional episode' to mean a dispute between constitutional actors that invites intervention by the independent umpire. This is to distinguish most uses of the term 'constitutional crisis', which are hyperbole,[66] from a real constitutional crisis, which is 'a very serious thing'.[67]

A constitutional crisis occurs when the Constitution risks 'failing at its central task'.[68] According to Jack Balkin, that task is ensuring disputes remain 'within the boundaries of ordinary politics rather than breaking down into anarchy, violence, or civil war'.[69] Such occasions could arise from politicians announcing they will defy the Constitution, many people refusing to obey the

[63] Hicks, 'Guiding the Governor General's Prerogatives', p. 55.

[64] Hicks, 'Guiding the Governor General's Prerogatives', p. 65.

[65] Hicks, 'Guiding the Governor General's Prerogatives', p. 65.

[66] Jack M Balkin, 'Constitutional Crisis and Constitutional Rot'. *Maryland Law Review* 77(1) 2017, p. 148.

[67] Balkin, 'Constitutional Crisis and Constitutional Rot', p. 150.

[68] Balkin, 'Constitutional Crisis and Constitutional Rot', p. 147.

[69] Balkin, 'Constitutional Crisis and Constitutional Rot', pp. 147–8.

Constitution or the Constitution keeping political actors from preventing a disaster.[70] Notwithstanding, the scope of this article does not consider the use of reserve powers under the extreme uncertainty of a real constitutional crisis.

Within the context of a constitutional episode, constitutional umpiring means 'resolv[ing] disputes among contending parties'.[71] Within the realm of the British Commonwealth, the Governor-General fills this role. Insofar as the Constitution delimits and allocates governmental powers,[72] constitutional umpiring involves decision making to maintain the predetermined power allocations.

Constitutional umpiring characterised by uncertain decision making can harm public trust in the constitutional fabric of a democracy. For example, during the 2008 Canadian parliamentary dispute, uncertain decision making '[shook] public faith in Canada's constitutional conventions and its system of responsible parliamentary government'.[73] Further, it highlighted a potential risk to the office of the Governor-General as part of that system.[74] Moreover, Hicks identified a 'very real danger' if the public were to expect the Governor-General to use reserve powers contrary to constitutional conventions which constraint their use. Such an expectation could emerge if, for example, many citizens came to accept the inaccurate notion that the Governor-General's umpiring role is to 'thwart the will of a ruthless prime minister'.[75]

At the root of uncertain umpiring are ambiguous conventions attached to reserve powers. Use of reserve powers must follow convention, but control over their use 'suffers from inevitable ambiguity' attached to conventions.[76] Without clearly expressed conventions to guide the use of reserve powers, decision making becomes uncertain. Amplifying this uncertainty are the circumstances that characterise a constitutional episode — controversy and disagreement among constitutional actors.[77]

Speculation Fuels Uncertainty

During the Canadian 2008 parliamentary dispute, the influence of the media and expert

[70] Balkin, 'Constitutional Crisis and Constitutional Rot', p. 148.

[71] David Chang, 'Conflict, Coherence, and Constitutional Intent'. *Iowa Law Review* 72(4) 1987, p. 774 n 64.

[72] Australia. Constitutional Commission, *Final Report*, p. 466 [9.94].

[73] Hicks, 'Guiding the Governor General's Prerogatives', p. 55.

[74] Hicks, 'Guiding the Governor General's Prerogatives', p. 59.

[75] Hicks, 'Guiding the Governor General's Prerogatives', p. 59.

[76] Hicks, 'Guiding the Governor General's Prerogatives', p. 64.

[77] Hicks, 'Guiding the Governor General's Prerogatives', p. 64.

commentators fuelled the sense of uncertainty.[78] The media took an intense interest as the dispute offered 'daily drama' and raised constitutional questions.[79] For answers to emerging constitutional questions, the media approached various academics to help the public 'understand the relevant constitutional rules and possible decision outcomes'.[80] However, for their part, the academic experts 'did nothing to alleviate the sense of uncertainty'.[81] We can infer from Hicks that because of the uncertainty attached to the prorogation conventions, experts offered different interpretations of those conventions and their application in the circumstances. Supporting this inference is Johannes Wheeldon's ex-post analysis of the views of 25 constitutional scholars about the 2008 prorogation.[82] Although most scholars agreed the Governor-General had discretion to refuse the request, Wheeldon's results confirm no consensus. In fact, and underscoring the pervading uncertainty, Wheeldon proposes 'four unique schools of thought' about that constitutional episode.[83]

Ample anecdotal evidence buttresses the proposition that ambiguity invites speculation. As a media invitee himself during the 2008 prorogation,[84] Hicks witnessed the speculation among academics firsthand.[85] Further, Hicks observed that 'even the reasons underlying convention are largely speculative'.[86] With the Governor-General's decision hanging on convention subject to multiple interpretations, it is natural for academics to theorise or conjecture about the possible outcomes of the dispute. After all, Canada needed answers.

However, in that constitutional episode, speculation by the media and constitutional experts fuelled the 'sense of "crisis"'.[87] Further, Hicks views the variety of political events that ensued in the weeks following prorogation as unnecessary. They were avoidable but for 'continued

[78] Hicks, 'Guiding the Governor General's Prerogatives', p. 55.

[79] Hicks, 'Guiding the Governor General's Prerogatives', p. 55.

[80] Hicks, 'Guiding the Governor General's Prerogatives', p. 55.

[81] Hicks, 'Guiding the Governor General's Prerogatives', p. 55.

[82] Johannes Wheeldon, 'Constitutional Peace, Political Order, or Good Government? Organizing Scholarly Views on the 2008 Prorogation'. *Canadian Political Science Review* 8(8) 2014, p. 102.

[83] Wheeldon, 'Constitutional Peace, Political Order, or Good Government?', p. 102.

[84] Hicks, 'Guiding the Governor General's Prerogatives', p. 55.

[85] Hicks, 'Guiding the Governor General's Prerogatives', p. 65.

[86] Hicks, 'Guiding the Governor General's Prerogatives', p. 64.

[87] Hicks, 'Guiding the Governor General's Prerogatives', p. 65.

lack of clarity'.[88] Moreover, avoiding them would have 'eliminated the sense of crisis',[89] and its attendant uncertainty surrounding the Governor-General's decision making.

Hicks's Predictability Benefit Argument

However, Hicks argues that simply making conventions less ambiguous is not sufficient to alleviate uncertainty during a constitutional episode,[90] were this feasible. Instead, he argues for predictable decision making by the Governor-General. In his view, this approach will deliver greater benefits than relying only on making conventions less ambiguous.[91] Hicks reasons that predictability reduces uncertainty during a constitutional episode particularly to the extent that it reduces academic and media speculation.[92]

Empirical scholarship adds weight to Hicks's argument that constitutional reforms aimed at making umpiring decisions more predictable are preferable to reforms simply aimed at making conventions less ambiguous. Catrin Rode and others have found that when choosing between options in situations lacking probability information (ie under uncertainty),[93] people take account of three determinants: their need; an option's expected outcome; and the outcome's variance.[94] Crucially, they do not generally avoid ambiguous options as such,[95] that is, options with unknown outcome probabilities.[96] Rather, empirical evidence suggests that people generally seek to avoid high variance outcomes, which may or may not be associated with ambiguous options.[97]

Likewise, presumably political actors would prefer reforms that best serve to reduce uncertainty surrounding decision making by the Governor-General during a political dispute, all other things equal. To that end, reforms that make umpiring decisions more predictable are likely to lower the variance of political choice outcomes predicated on those decisions more than reforms that make conventions less ambiguous. Two reasons stand out. One, reforms

[88] Hicks, 'Guiding the Governor General's Prerogatives', p. 56.

[89] Hicks, 'Guiding the Governor General's Prerogatives', pp. 56–7.

[90] Hicks, 'Guiding the Governor General's Prerogatives', p. 57.

[91] Hicks, 'Guiding the Governor General's Prerogatives', p. 65.

[92] Hicks, 'Guiding the Governor General's Prerogatives', p. 65.

[93] Catrin Rode et al., 'When and Why Do People Avoid Unknown Probabilities in Decisions under Uncertainty? Testing Some Predictions from Optimal Foraging Theory'. *Cognition* 72(3) 1999, p. 273.

[94] Rode et al., 'When and Why Do People Avoid Unknown Probabilities in Decisions under Uncertainty?', p. 269.

[95] Rode et al., 'When and Why Do People Avoid Unknown Probabilities in Decisions under Uncertainty?', p. 269.

[96] Rode et al., 'When and Why Do People Avoid Unknown Probabilities in Decisions under Uncertainty?', p. 271.

[97] Rode et al., 'When and Why Do People Avoid Unknown Probabilities in Decisions under Uncertainty?', p. 296.

aimed directly at decision outcomes would likely be more effective in reducing uncertainty than reforms aimed at conventions intended to guide those same decision outcomes. Two, the extent to which conventions could be made less ambiguous yet retain sufficient flexibility to guide the umpiring of novel political disputes is far from clear.

As a way to enhance predictability, Hicks proposes '[h]aving the governor general acknowledge and formalize the use of an apolitical decision rule'.[98] The gist of the rule is that a Governor-General should 'try to exercise [their] reserve powers such that as many options as possible will remain available to elected members of Parliament'.[99] In other words, the Governor-General should give Parliament every opportunity to resolve its own political disputes. We can infer the fundamental premise of the rule from Hicks's article, which is that although the Governor-General does have 'an autonomous decision-making role',[100] a minimalist approach is nevertheless appropriate.[101] Hicks gives other reasons to support adopting the apolitical decision rule to operationalise his predictability benefit argument. These include an analogous precedent in the Canadian Speaker's conventions,[102] and the imperative to safeguard the Governor-General's impartiality.[103]

Elsewhere Hicks argues that a Governor-General may avoid adding to uncertainty during a constitutional episode by issuing a written decision that explains their reasoning.[104] In his view, having the Governor-General adopt this approach would have removed much of the uncertainty surrounding the Canadian 2008 prorogation episode.[105] While the merits of this idea are largely self-evident, this article focuses on the Governor-General's use of reserve powers rather than their communication as such.

While Hicks leaves the precise text and instrumental form of his apolitical decision rule open for further discussion, he recommends three broad guidelines to ensure its effectiveness. One,

[98] Hicks, 'Guiding the Governor General's Prerogatives', p. 64.

[99] Hicks, 'Guiding the Governor General's Prerogatives', p. 64.

[100] Hicks, 'Guiding the Governor General's Prerogatives', p. 59.

[101] Hicks, 'Guiding the Governor General's Prerogatives', p. 61.

[102] Hicks, 'Guiding the Governor General's Prerogatives', p. 62.

[103] Hicks, 'Guiding the Governor General's Prerogatives', p. 64.

[104] Bruce Hicks, 'Lies My Fathers of Confederation Told Me: Are the Governor General's Reserve Powers a Safeguard of Democracy?'. *Inroads: The Canadian Journal of Opinion* (25) 2009.

[105] Hicks, 'Guiding the Governor General's Prerogatives', p. 64.

unlike ambiguous conventions, the rule should be 'formally enunciat[ed]',[106] — a 'formal rule'[107] expressed in 'clearly defined' terms.[108] Two, Hicks impliedly invites constitutional scholars to contribute to the rule's development by examining the acceptability of his idea from several scholarly standpoints.[109] In addition, he appears to leave open its precise wording insofar as he simply states the gist of the rule,[110] and always refers to the rule using the indefinite article. Three, Hicks recommends that the Governor-General should acknowledge the merits of the rule,[111] and formalise its use.[112]

In conclusion, we see that uncertain decision umpiring during Canada's 2008 prorogation episode harmed public trust in Canada's constitutional fabric. This harm stemmed from the vague nature of conventions intended to guide use of reserve powers. However, it was exacerbated by commentators who, understandably, speculated on the possible alternative outcomes in the uncertain circumstances. Hicks argues that enabling political actors to better predict outcomes in a prorogation episode offers the benefit of reducing speculation and, in turn, reducing the sense of crisis. Further, as a way to enhance predictability, Hicks recommends the Governor-General acknowledge and formalise the use of an apolitical decision rule. In effect, such a rule would serve to enhance predictability by explicitly placing the burden of resolving political disputes on Parliament, unless a higher threshold is reached that warrants the Governor-General's intervention.

THE CASE FOR CONSTITUTIONAL REFORM

As discussed previously, various sources of uncertainty cloud the reserve powers, and their use during a constitutional episode would likely add to that uncertainty. On the basis of Hicks's predictability argument, I will argue that the Australian Parliament should develop a code of practice specifying principles for the Governor-General to adhere to when using reserve powers. The inference I draw from Hicks's argument is that reforms to support more predictable decision making during a prorogation episode in Canada would, likewise, be beneficial in managing constitutional episodes in Australia. Further, while Hicks does not address in detail the rule's formalisation, it is nevertheless important to consider how federal

[106] Hicks, 'Guiding the Governor General's Prerogatives', p. 57.

[107] Hicks, 'Guiding the Governor General's Prerogatives', p. 65.

[108] Hicks, 'Guiding the Governor General's Prerogatives', p. 61.

[109] See eg Hicks, 'Guiding the Governor General's Prerogatives', pp. 58, 60–1.

[110] Hicks, 'Guiding the Governor General's Prerogatives', p. 64.

[111] Hicks, 'Guiding the Governor General's Prerogatives', p. 65.

[112] Hicks, 'Guiding the Governor General's Prerogatives', p. 64.

Parliament should formalise the rule to clarify how it relates to other elements of the constitutional system.

I develop this argument for constitutional reform in three steps. First, I explain the validity of applying Hicks's argument to Australia's Commonwealth. Next, I argue that adopting Hicks's apolitical decision rule would benefit Australia's federal parliamentary democracy by improving the predictability of decision making by the Governor-General during constitutional episodes. Finally, I revive the idea of a Governor-General's code of practice as an instrument for introducing Hicks's apolitical decision rule.

The Validity of Applying Hicks's Predictability Benefit Argument to the Commonwealth of Australia

Three grounds validate applying Hicks's predictability benefit argument to the Commonwealth of Australia. One, the constitutional heritage of reserve powers in Australia and Canada is identical. Both countries share 'a sufficiently close connection to the Westminster system of government'.[113] And although their constitutional conventions attract 'legitimate and healthy differences of interpretation',[114] they are nevertheless broadly comparable.[115]

Two, the essence of Hicks's apolitical decision rule, which gives practical expression to his predictability benefit argument, does not purport to alter power balances within a constitutional system. It does not codify nor materially change existing conventions. The rule is essentially a meta-convention — a convention about the use of conventions themselves.

Three, Hicks's reasons for enhancing predictability in a prorogation episode apply appropriately to occasions inviting use of other reserve powers. Hicks's chief argument for predictability is to mitigate harmful speculation. The fact that use of the dissolution power can, in certain circumstances, lead to highly predictable outcomes does not weigh against enhancing predictability more generally.

Although the validity of applying Hicks's argument depends on constitutional actors respecting conventions,[116] this condition is not unique to Canada. Precedents already show that Australian

[113] Twomey, *The Veiled Sceptre*, p. 2.

[114] James W J Bowden and Nicholas A MacDonald, 'Writing the Unwritten: The Officialization of Constitutional Convention in Canada, the United Kingdom, New Zealand and Australia'. *Journal of Parliamentary and Political Law* 6 2012, p. 366.

[115] Bowden and MacDonald, 'Writing the Unwritten', p. 367.

[116] Hicks, 'Guiding the Governor General's Prerogatives', p. 61.

Prime Ministers have acted contrary to convention.[117] And, as Evatt points out, there is 'no effective remedy against non-observance of conventions'.[118]

Adopting Hicks's Apolitical Decision Rule Would Benefit the Commonwealth

Hicks's predictability benefit argument invites constitutional reform. Reform could imply codifying conventions into black letter law as a way to lessen their ambiguity, were this at all practicable and utile. However, in Hicks's view, this approach would not sufficiently reduce uncertainty fuelled by commentator speculation. Instead, his call is for predictability in Governor-General decision making. This implies a reform involving something additional. To this end, implementation of Hicks's apolitical decision rule could serve as a beneficial constitutional reform initiative.

However, whether the Commonwealth should adopt Hicks's rule turns on a careful weighing of the pros and cons. Weighing in favour is the fact that the Commonwealth does not have a constitutional convention or instrument to promote more predictable decision making by the Governor-General. To argue the converse — that unpredictable decision-making is in the national interest — is not defensible.

In addition, we may expect that Australian media and academic commentators would, like their Canadian counterparts, contribute to the sense of crisis during a constitutional episode. This expectation is not intended to denigrate the media and its reportage of governmental and political matters, which 'must be regarded as indispensable to freedom of communication',[119] nor academics trying to help citizens understand how parliamentary democracy works under constitutional uncertainty. Rather, it is a reason to consider adopting Hicks's rule to address a source of uncertainty that is amenable to mitigation.

Some might argue 'if it ain't broke, don't fix it'. Australia's sparse history of constitutional episodes suggests a stable parliamentary democracy. In contrast, Canada has experienced episodes as recently as 2008,[120] 2020[121] and 2025.[122] However, history cannot guarantee future

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[117] Cooray, 'Australian Constitutional Convulsions of 1975', p. 108.

[118] Evatt, *The King and His Dominion Governors*, p. 306.

[119] *Levy v Victoria* (1997) 189 CLR 579, at 623 (McHugh J).

[120] Hicks, 'Guiding the Governor General's Prerogatives', p. 55.

[121] Historica Canada, 'Prorogation in Canada', in *The Canadian Encyclopedia*, 15 May 2025. Accessed at: https://thecanadianencyclopedia.ca/en/article/prorogation-in-canada.

[122] Leah Trueblood, 'Judicial Review of Prorogation in Canada: The Applicability of *Miller/Cherry v Prime Minister* to *MacKinnon v Canada*', Blog Post, *UK Constitutional Law Association*, 29 April 2025. Accessed at: https://ukconstitutionallaw.org.

stability. It behoves Australia to avoid presuming that its Federation decision on the form of constitutional conventions necessarily remains fit for purpose.

On balance, the normative arguments in favour of improving decision-making predictability through Hicks's apolitical decision rule appear to outweigh the offsetting considerations of maintaining the status quo.

Application to the Dismissal

Having made the argument for adoption of Hicks's apolitical decision rule, an interesting thought experiment presents itself. How might the rule have applied in the circumstances of the Dismissal? Although Hicks did not address this application, some inferences may be drawn from the rule's definition and an earlier Canadian episode.

In order to consider how the rule might have applied, it is first necessary to assume that the circumstances would still warrant exercise of a reserve power. In this hypothetical scenario, decision making by various actors may deviate from that in 1975 against the backdrop of the apolitical decision rule that the Governor-General and Parliament have accepted. For example, the rule's presence might slow decision making by the Governor-General insofar as it promotes wider consideration of the powers available in the circumstances. Alternatively, to the extent the resolution burden shifts more squarely onto Parliament, the rule might induce greater public pressure on parliamentarians to resolve the dispute in a timelier manner. Assuming vice-regal intervention is warranted, application of the rule means choosing the reserve power which, if exercised, leaves open as many options as possible.

Hicks's consideration of decision making by Governor-General Lord Byng during Canada's so-called King-Byng affair of 1926 illustrates how application of the rule might proceed in practice. In that case, by initially refusing the dissolution request, Lord Byng left the matter before Parliament for as long as possible — until it was 'truly dysfunctional' — before granting the request.[123]

The King-Byng example usefully draws attention to the time dimension of decision making under the rule. Presumably, in the first instance, exercise of the reserve power that leaves open the largest number of options for Parliament also offers Parliament an equal or more generous time constraint for decision making. As such, there may be a time trade-off between giving Parliament every opportunity to resolve its own disputes and the duration of those disputes.

[123] Hicks, 'Guiding the Governor General's Prerogatives', p. 63.

In the case of the Dismissal, time was a more acute decision factor than in the King-Byng dissolution example. Supply deadlocks are inherently urgent.[124] However, where time permits, a Governor-General choosing to make decisions according to the apolitical decision rule might enable Parliament to experience public pressure for longer than otherwise. Noting that the rule is non-binding, the Governor-General makes their decision making more predictable by publicly committing to the rule at the first opportunity during their term.

A Code of Practice for the Governor-General

The question arises as to what form the apolitical decision rule should take. One idea from Australia's Constitutional Commission in the late 1980s is for a 'judicially unenforceable'[125] 'code of practice' to govern reserve powers.[126] A majority of the Advisory Committee on Executive Government made this recommendation. However, the idea did not progress. The Commission itself instead proposed amending the Constitution so that most reserve powers would 'be exercisable only on Ministerial advice'.[127] Notably, the Commission also proposed amending section 64 of the Constitution[128] to preclude dismissal of a Prime Minister without the House first resolving its lack of confidence in the Government.[129] In the end, the ensuing 1988 referendum excluded both proposals.[130]

There are several reasons to revive the code of practice idea as an instrument to introduce Hicks's apolitical decision rule. One, it would ensure the general public, constitutional commentators and all constitutional actors know of the Governor-General's broad approach to making decisions. This approach avoids leaving the Governor-General 'refereeing a game in which the players do not agree on the rules'.[131] Two, developing a code is more likely to succeed than a referendum to change the Constitution. Electors have approved only 8 out of 45 proposals for constitutional change.[132] Three, the code would remain subordinate to the

[124] Brendan Lim, *Australia's Constitution after Whitlam*. Cambridge: Cambridge University Press, 2017, p. 43.

[125] Advisory Committee on Executive Government, *Report to the Constitutional Commission*, p. 38.

[126] Advisory Committee on Executive Government, *Report to the Constitutional Commission*, p. 65.

[127] Australia. Constitutional Commission, *Final Report*, p. 344 [5.164].

[128] *Commonwealth of Australia Constitution Act* (The Constitution), s 64.

[129] Australia. Constitutional Commission, *Final Report*, p. 325 [5.63(b)].

[130] Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Constitutional Change: Select Sources on Constitutional Change in Australia 1901–1997*, Miscellaneous Paper (no. 8442) 1997, p. 110.

[131] Peter H Russell, 'Prorogation: Prime Ministers Must Not Become Kings'. *Canada Watch* (Spring) 2011, p. 17.

[132] Australian Electoral Commission, 'Referendum Dates and Results', Web Page, 7 November 2023. Accessed at: https://www.aec.gov.au/elections/referendums/referendum_dates_and_results.htm.

Constitution. This appropriately recognises the code's role in guiding, not binding. Four, it may assist Governors-General, most of whom are not legally trained. Five, it could serve as a receptacle for related guidance. For example, to reduce uncertainty, Hicks also suggests requiring a Governor-General to issue written decisions explaining their exercise of a reserve power.[133]

One potential disadvantage is that a code is likely to be readily amendable. However, it is non-binding in any case. Moreover, a code containing the apolitical decision rule could potentially increase the Governor-General's power. For example, by subjecting any egregious manoeuvres by a Prime Minister to Parliamentary debate for longer, the Governor-General applies political and public pressure for longer.

A further question is who should take carriage of this reform initiative. As previously mentioned, Hicks recommended that the Governor-General should 'acknowledge and formalize the use of an apolitical decision rule'.[134] However, it is far from clear that the Governor-General would unilaterally take the initiative. Given the likely political and public sensitivities involved, it may be prudent for federal Parliament to take carriage of this constitutional reform initiative. It is critical to ensure clarity about how the Code of Practice containing the apolitical decision rule (and possibly other matters) relates to other elements of the Commonwealth constitutional system and to avoid any unintended consequences during a constitutional episode. It may be prudent, for example, to require a two-thirds majority or similar supermajority to ensure maximal buy-in from parliamentarians.

In sum, applying Hicks's predictability benefit argument to the Commonwealth's reserve powers is a reform opportunity that maintains the flexibility of uncertain conventions but overcomes the significant uncertainty in decision making. Further, Hicks's suggestion of an apolitical decision rule is a practicable means for enhancing predictable decision making by the Governor-General during a constitutional episode. Moreover, the idea of a Code of Practice for the Governor General is a convenient and practicable instrument for introducing Hicks's rule.

CONCLUSION

The vague form of the Governor-General's reserve powers presents a legal tension. While uncertainty clouds the exercise of the reserve powers according to unwritten conventions, the law and decision makers generally favour certainty. Viewed through the analytical lens of

[133] Hicks, 'Guiding the Governor General's Prerogatives', p. 64.

[134] Hicks, 'Guiding the Governor General's Prerogatives', p. 64.

uncertainty, the current form of the reserve powers appears suboptimal. There is scope to reduce some uncertainty surrounding their use without fundamentally compromising their flexibility or constitutional power balances.

In this article I have argued that Australia's Federal Parliament should approve a Code of Practice for adoption by the Governor-General. In reaching this conclusion, I have relied on Bruce Hicks's argument that making the Governor-General's decisions more predictable during constitutional episodes would lessen the sense of crisis. The Code would contain principles that Parliament expects the Governor-General to follow when using reserve powers. In this form, the principles should be non-binding and judicially unenforceable. The principles are essentially meta-conventions — conventions about the conventions themselves. Rather than replacing constitutional conventions, these broad principles would serve to guide the Governor-General in using their reserve powers according to the conventions as understood at the time.

One principle for inclusion in the proposed Code should be Hicks's apolitical decision rule. Put simply, the rule states that the 'Governor-General should try to exercise [their] reserve powers such that as many options as possible will remain available to elected members of Parliament'.[135] The rule's purpose is to subdue the sense of crisis during a constitutional episode that media and academic commentators can cause by speculating about uncertain outcomes. Until Parliament is truly dysfunctional, public expectation should weigh on Parliament to persevere in resolving constitutional disputes. The rule offers the advantage of retaining the flexibility inherent in ambiguous conventions.

Australia enjoys a stable parliamentary democracy. To presume this will always be the case is to take it for granted. It is not a question of whether a constitutional episode will occur, but when. Canada's 2008–2009 parliamentary dispute and the Dismissal are salutary reminders that uncertain and unpredictable decision making by the Governor-General can harm public trust in the constitutional fabric of a democracy. The proposed Governor-General's Code of Practice, which includes Hicks's apolitical decision rule, offers a solution.

[135] Hicks, 'Guiding the Governor General's Prerogatives', p. 64.