



Précis Paper

The Whitlam Dismissal

A discussion of the circumstances leading up to and following the Whitlam dismissal on 11 November, 1975.

Discussion Includes

- Key players in the Dismissal
- The Senate's power to block or delay the budget bills.
- Why hasn't a similar crisis occurred since 1975?
- Key events leading up to 11 November, 1975.
- What if the budget bills had not gone through the Senate unopposed after the Dismissal?
- London and its involvement in the events of 11 November, 1975.
- Do reserve powers include a power to dismiss the Prime Minister?

Précis Paper

The Whitlam Dismissal

1. In this edition of BenchTV, Professor Tony Blackshield (Emeritus Professor of Law – Macquarie University, Sydney) and Michael Sexton SC (Solicitor General of NSW – Solicitor General's Chambers, Sydney) discuss the circumstances leading up to and following the Whitlam dismissal on 11 November, 1975.

Key players in dismissal

2. Malcolm Fraser, who subsequently became Prime Minister, initiated the blocking of the budget in the Senate.
3. The Governor General at the time, Sir John Kerr had a duty to warn Whitlam of what was about to happen in regard to his being dismissed.
4. Sir Garfield Barwick was the Chief Justice of the High Court and interfered in the political process.
5. Sir Anthony Mason was a member of the High Court who participated in giving advice to Sir John Kerr as part of the political process.
6. In regard to Sir Garfield Barwick and Sir Anthony Mason, it is often argued that their involvement in the dismissal was because they "were caught on the ebb tide of a previously acceptable practice."
7. In providing advice to Kerr, Barwick may have been wrong in giving such advice at all, but it is arguable that he honestly believed that he was doing the right thing.
8. Barwick was used to provide public advice but the private advice and the advice upon which Kerr relied was supplied by Sir Anthony Mason.
9. Sir Anthony Mason's role was not uncovered until recently and it was intended to have been kept a secret indefinitely.
10. John Kerr did not really need Barwick's advice but wanted it on record that the Chief Justice had approved it and it also ensured that the matter could not go before the High Court.
11. This was not quite accurate however, as there was a case prepared to be registered in the High Court on the afternoon of 11 November arguing that the Senate had no power to reject supply.
12. Whilst the case may have been thrown out by the High Court they would have had to at least consider the case.

Senate's power to block or delay the budget bills

13. Under the Constitution the Senate does have the legal power to reject Supply.
14. However, in NSW the Legislative Council does not have the power to block financial bills.

15. The reason why the Senate has legal power to reject supply is because the Constitution makers in the 1890s modelled the powers of the Senate on the powers of the House of Lords in England.
16. At the time, the House of Lords clearly had the power but there was a Convention in place to the effect that it would never be exercised.
17. In 1909 the House of Lords broke the Convention and did block the budget and the law was amended so that the House of Lords no longer had the power.
18. What the Constitution makers did not take into account is that the Senate and House of Lords are different in that the Senate is an elected body.
19. It is arguable that the Senate should not be able to reject Supply.

Why hasn't a similar crisis occurred since 1975?

20. It is unlikely that the events of November 1975 will be repeated.
21. This is partly because it is near impossible for either of the major parties to get a majority in the Senate.
22. Further, the unpopularity of what happened in November 1975 makes Senators very wary of repeating that kind of exercise.
23. The Governor General would also be very wary of following Sir John Kerr's footsteps as his public image was destroyed.
24. Sir John Kerr was a very good judge, some people argue that one of his greatest mistakes was continuing on as a judge once he became Governor General. One of his most important judgments was that of *Ball v McIntyre* (1966) 9 FLR 237.
25. The two competing arguments in regard to Kerr carrying on as a judge once he became Governor General are summed up as "in a political crisis the Crown must be an Umpire" vs "in a political crisis, the Crown must not be a football."

Key events leading up to 11th November, 1975

26. One such event was the initiation of a scheme of alternative arrangements which was put in place when it seemed that money might run out for public service salaries, which allowed public servants to borrow money from banks until salaries were paid.
27. This took the pressure off of the Liberals in the Senate as it tided the Government through the crisis.
28. It is arguable that it was not the Governor General's role to give assistance to one party over the other, that is the Crown must remain above the battle and must not become a political football.
29. Another event which led up to the 11th November, 1975 was the fact that the Government wanted to call a half-Senate election. This did not happen, however as the Government was dismissed by Sir John Kerr when Whitlam came to make the application.

30. Nevertheless, the half-Senate election couldn't have solved the issue of the numbers in the Senate so it was not going to advance the Government's position and there was a real likelihood that the money was going to run out during the half-Senate election.
31. This gave Sir John Kerr the excuse to dismiss the Government as soon as the proposition of the half-Senate election was put to him.

What if the budget bills not gone through the Senate unopposed on 11 November, 1975 after Whitlam's dismissal?

32. Another way of posing this question is what would have happened if Malcolm Fraser was left without supply in the same way that the Government was running out of supply?
33. Many of these technical questions are asked by Geoffrey Sawer in his book *Federation under strain: Australia 1972-1975*.
34. It is likely that even if the Government had refused to pass the budget bills, the election would have proceeded.
35. However, if the members of the House of Representatives had refused to acknowledge the dismissal and continued to maintain that they were the elected Government, then we would have had a Constitutional crisis.

London and its involvement in the events of 11 November, 1975.

36. Sir John Kerr should have given Whitlam the choice to call an election as Prime Minister or to be dismissed which would have resulted in Malcolm Fraser going to election as Prime Minister.
37. This would have cast Sir John Kerr in a different light as it has always looked bad that he did not warn Whitlam of the impending dismissal.
38. It can be argued that Kerr acted the way he did so that Whitlam would not contact the Queen requesting his dismissal before Whitlam was dismissed.
39. However, if Whitlam had contacted the Queen before he was dismissed, it is likely that London would probably have not moved quickly enough.
40. If Whitlam had sought to remove Kerr it would have resulted in bad publicity for Whitlam, which would have had electoral consequences.
41. It came to light after the dismissal that there had been correspondence between Kerr and the Palace, however we do not know what was in the correspondence.
42. In the case of *Hocking v Director-General of National Archives of Australia* [2018] FCA 340, where Jenny Hocking attempted to access the correspondence, Justice Griffiths confirmed the decision of National Archives that she cannot have access to the correspondence.
43. The Court has found that in providing periodic briefings to the Queen, Sir John Kerr was not exercising the executive power of the Commonwealth under S61 of the Constitution and therefore the correspondence was private communications.

44. However, since the executive power of the Commonwealth is vested in the Queen and exercisable by the Governor General as the Queen's Representative, it is arguable that any communication between them effecting the Government must be an exercise of the executive power.
45. Nevertheless, the Judgment seems to indicate that the letters between Kerr and the Queen was not executive power because he was not acting on advice of the Executive Council.
46. It is private correspondence and therefore outside of the purview of the Commonwealth Government and the Commonwealth Freedom of Information Archives legislation because the correspondence has always been considered to be private.
47. The subsequent question which arises therefore, is if London was aware of Whitlam's impending dismissal, should London have informed Whitlam?
48. It is arguable that it didn't have to as Australia is a self-governing country and the Governor General is the Head of State and if he had proposed his decision to take action, then it was not for London to interfere.

Do reserve powers include a power to dismiss the Prime Minister?

49. It has only been in the past 10 years that the High Court has started to explore the boundaries of executive power.
50. It is difficult to say that in reporting to the Queen about a political dispute in Australia that it should be considered private and personal correspondence.
51. When Kerr dismissed the Government, he was acting under Section 61 of the Constitution.
52. He is only exercising executive power when he is acting on the advice of his Ministers and not when he is exercising the reserve powers.
53. It is difficult to say that Governor General is not exercising their executive power when they exercise reserve power.
54. Unlike the Federal reserve powers, in NSW the reserve powers are largely codified and significantly reduced by the *Constitution Act 1902* (NSW).

BIOGRAPHY

Professor Tony Blackshield

Emeritus Professor of Law – Macquarie University, Sydney

Tony Blackshield taught in the 1960s in the Department of Jurisprudence and International Law at the University of Sydney. In the 1970s he was a founding member of the Faculty of Law at the University of New South Wales. Thereafter he was Professor of Legal Studies at La Trobe University (1979-1988) and Professor of Law at Macquarie University (1988-1999). He was also a frequent public commentator, notably on 'the Dismissal' of 11 November 1975 and 'the Murphy affair' of 1984-1986. He is a Fellow of the Academy of Social Sciences in Australia, an Honorary Professor of the Indian Law Institute, New Delhi and an Officer of the Order of Australia.

Michael Sexton SC

Solicitor General of NSW – Solicitor General's Chambers, Sydney

A graduate of the law schools of Universities of Melbourne and Virginia, Michael Sexton SC spent some years as an academic lawyer before taking up practice at the NSW Bar. Since 1998 he has been Solicitor General for New South Wales. Michael has written several books on Australian history and politics including 'The Great Crash: The Short life and Sudden Death of the Whitlam Government.'

BIBLIOGRAPHY

Cases

Hocking v Director-General of National Archives of Australia [2018] FCA 340.
Ball v McIntyre [1966] 9 FLR 237

Legislation

Constitution Act 1902 (NSW)
Australian Constitution s61.

Books

Geoffrey Sawer, *Federation under strain: Australia 1972-1975* (Melbourne University Press, 3rd ed, 1977).