Chapter 10

The Dismissal
Reflections 40 Years On

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Gough Whitlam and others have described the events of 11 November 1975 as a coup, but it was nothing of the kind. A coup is defined as a violent or illegal change of government. The events of that day were neither violent nor illegal.

With nothing more than some signatures on a few pieces of paper, a Prime Minister was removed, another was installed, and the issue was immediately referred to the Australian people in a national election for both Houses of the Commonwealth Parliament. One month later the people delivered their verdict, and it was a decisive verdict. The Fraser Caretaker Government was returned in a landslide. The Governor-General's actions were vindicated.

The late Philip Graham, former publisher of *Newsweek* and *The Washington Post*, said that good journalism should aim to be "the first rough draft of history".

So let me now go back to 1975 and look at what falsehoods and errors the future historian, searching through that first rough draft of history, might find in the contemporary accounts of those days. I begin with Malcolm Fraser's early arrival at Government House on that fateful day in November 1975, before, and not after, Gough Whitlam, as the Governor-General had instructed. That was due to a simple error by someone on Fraser's staff, and had nothing to do with Government House, but it was presented as the beginning of a Vice-Regal conspiracy.

It was alleged that Fraser was closeted in a room at Government House with the blinds drawn. This clearly was the figment of a vivid journalistic imagination on the part of someone who was not there, for Fraser waited with me in a room next to the State Entrance, a room which at that time was used as a waiting room for visitors who had arrived early, and the blinds were certainly not drawn. Why would they be? There was no one outside trying to look in.

It was alleged that Fraser's car was moved and hidden round the back, out of sight. It was not. It was in fact moved even closer to the front of the building, and was in full view.

The next pair of myths grew out of my arrival to read the Governor-General's proclamation from the steps of Old Parliament House. I came, as always, to the front entrance. I drove up to the front steps in a big, black Government House car, clearly identified as such by the traditional Crowns where number plates would normally be. I wore full morning dress, so I could hardly have been mistaken for one of the crowd that had gathered in front of the building. I was met by a Senate officer, escorted into Parliament House via Kings Hall, and taken to the office of the Clerk of the Senate, where I was to wait until the top landing could be cleared and Whitlam had vacated the microphone which I was to use.

On being asked to leave the microphone, Whitlam, who apparently had not noticed my arrival, expressed surprise that I was already in the building, questioned the officer who had met me, then he immediately returned to the microphone. He described me as an emissary from the Governor-General, and then, in what sounded very much like an incitement to riot, given the way he had already stirred them up, told the mob that I would appear shortly, and asked them to give

me the reception I deserved. Then, having just been told that I had arrived at the front of the building, he announced that the Official Secretary normally arrived at the front of the building but that on this occasion I had come through the kitchens and, as he so elegantly put it, up the back passage.

I could see and hear what was happening from my position in the Clerk's office and, although I was alone, I was so affronted by Whitlam's deliberate lie that I shouted out at the top of my voice, "You bloody liar!" No one could hear me, but it made me feel better.

Whitlam later claimed that my reading of the proclamation was an unnecessary provocation on the part of the Governor-General. This allegation was also not true, and he knew it was not true. The practice of having the Governor-General's proclamations dissolving Parliament read from the front steps commenced in 1963, on the advice of the then Attorney-General, and for good legal reasons. The 1963 public reading was followed by similar public readings in 1966, 1969, 1972, and 1974, before we came to the 1975 reading, and there have been fourteen more since then. My first reading was in 1974, when Sir Paul Hasluck dissolved both Houses of the Parliament on the advice of Prime Minister Whitlam. Whitlam had no complaints about my reading of that proclamation, yet he denounced an identical reading the next year as unnecessary and provocative.

So far I have dealt only with minor events which preceded the main game: each was not greatly significant by itself, yet together they helped establish an atmosphere designed to taint the public's perceptions of what was to follow. They suggested an aura of irregularity or impropriety emanating from Government House, which Whitlam and his supporters then sought to transfer to the major events of the day.

The original attack, of course, had been on the Senate's refusal to pass the Labor Government's budget. The Whitlam Government's view was that the Constitution and its associated conventions vested control over the supply of money to the Government in the House of Representatives, and that the actions of the Senate in threatening to block that supply of money were a gross violation of the roles of the respective Houses of the Parliament.

This view of the respective roles of the Houses of the Parliament had not always been the view of the Labor Party, nor had it been the view of Whitlam himself prior to 1975. On 12 May 1967, in the Senate Chamber, Senator Lionel Murphy, then Leader of the Opposition in the Senate, had this to say about the upper house and money bills:

> There is no tradition, as has been suggested, that the Senate will not use its constitutional powers, whenever it considers it necessary or desirable to do so, in the public interest. There are no limitations on the Senate in the use of its constitutional powers except the limits self imposed by discretion and reason. There is no tradition in the Australian Labor Party that we will not oppose in the Senate any tax or money Bill, or what might be described as a financial measure.

On 12 June 1970, the then Leader of the Opposition, Gough Whitlam, had this to say in the House of Representatives:

> The Prime Minister's assertion that the rejection of this measure does not affect the Commonwealth has no substance in logic or fact. . . . The Labor Party believes that the crisis which would be caused by such a rejection should lead to a long term solution. Any

> Government which is defeated by the Parliament on a major taxation Bill should resign . . . . This Bill will be defeated in another place. The Government should then resign.

Let me repeat that view of Whitlam's, as he expressed it in Parliament in 1970:

> Any Government which is defeated by the Parliament on a major taxation Bill should resign . . . . This Bill will be defeated in another place. The Government should then resign.

When that same Bill reached the Senate, this is what Senator Lionel Murphy, Leader of the Labor Opposition in the Senate, had to say on 18 June 1970:

> For what we conceive to be simple but adequate reasons, the Opposition will oppose these measures. In doing this the Opposition is pursuing a tradition which is well established, but in view of some doubt recently cast on it in this chamber, perhaps I should restate the position. The Senate is entitled and expected to exercise resolutely but with discretion its power to refuse its concurrence to any financial measure, including a tax Bill. There are no limitations on the Senate in the use of its constitutional powers, except the limitations imposed by discretion and reason. The Australian Labor Party has acted consistently in accordance with the tradition that we will oppose in the Senate any tax or money Bill or other financial measure whenever necessary to carry out our principles and policies. The Opposition has done this over the years, and in order to illustrate the tradition which has been established, with the concurrence of honourable senators I shall incorporate in Hansard at the end of my speech a list of the measures of an economic or financial nature, including taxation and appropriation Bills, which have been opposed by this Opposition in whole or in part by a vote in the Senate since 1950.

At the end of his speech Senator Murphy tabled a list of 169 occasions when Labor Oppositions had attempted to oppose money Bills in the Senate for the sole purpose of forcing the Government of the day to face the people at an early election.

On 25 August 1970, the Labor Opposition launched its 170th attempt since 1950. On that occasion, Whitlam had this to say in the House of Representatives:

> Let me make it clear at the outset that our opposition to this Budget is no mere formality. We intend to press our opposition by all available means on all related measures in both Houses. If the motion is defeated, we will vote against the Bills here and in the Senate. Our purpose is to destroy this Budget and to destroy the Government which has sponsored it.

As Jack Kane, one-time Federal Secretary of the Australian Democratic Labor Party and former DLP Senator for New South Wales, wrote in 1988:

> There is no difference whatsoever between what Whitlam proposed in August 1970 and what Malcolm Fraser did in November 1975, except that Whitlam failed ... Senator Murphy, for Whitlam, sought the votes of the DLP senators, unsuccessfully. That is the only reason why Whitlam did not defeat the 1970 Budget in the Senate and thus fulfil his declared aim to destroy the Gorton Government.

While all this was going on in the Parliament, the High Court of Australia was also given the opportunity to express its view on whether the Senate had the power to block supply. On 30 September 1975 the High Court handed down its judgment in *Victoria v the Commonwealth*. Four of

the learned judges expressed opinions which supported the view that, except for the constitutional limitation on the power of the Senate to initiate or amend a money Bill, the Senate was equal with the House of Representative as a part of the Parliament, and could reject any proposed law, even one which it could not amend.

The relevant parts of these judgments were incorporated in Hansard on 30 October 1975. Yet still the media, and particularly the Canberra Parliamentary Press Gallery, kept silent on this issue, and Whitlam continued to rail against the Senate. As a result, many Australians still believe that the Senate has no right to block supply.

The next two myths which Whitlam sought to propound were part of a package and they related to the question of advice to the Governor-General The first myth was that the Governor-General could act constitutionally only on the advice of his ministers or, more particularly, only on the advice of his Prime Minister, and then only in accordance with that advice. The second myth was that the reserve powers of the Crown, which allow a Governor-General to act contrary to, or even without, ministerial advice, had long since lapsed into desuetude, and that the Governor-General no longer had any discretion to act other than in accordance with ministerial advice.

But Whitlam and his acolytes in the media had forgotten, if they ever knew, that Lord Casey, as Governor-General, as recently as 19 December 1967, had exercised the reserve powers following the disappearance of Prime Minister Harold Holt. Without ministerial advice, for there was no-one who legally could give it, the Governor-General had revoked Holt's appointment as Prime Minister, in accordance with section 64 of the Constitution, exactly as Sir John Kerr did with Whitlam's appointment, and had chosen Sir John McEwen to be the next Prime Minister, exactly as Sir John Kerr did with Fraser's appointment.

Although Whitlam was constantly reminding the Governor-General, both privately and publicly, that he could act constitutionally only on the advice of his Prime Minister, the existence of the reserve powers would have been, or should have been, well-known in Labor circles. One of the most definitive and scholarly works on the subject, entitled *The King and His Dominion Governors*, published in 1936, had been written by H.V. Evatt, then a Justice of the High Court, later to become a member of the House of Representatives and Leader of the Parliamentary Labor Party.

Then there is the more-recent double dissolution which Prime Minister Menzies had recommended to Governor-General Sir William McKell in 1951. On that occasion the Governor-General did in fact accept the advice of the Prime Minister, supported by the opinions of the Attorney-General and the Solicitor-General, that the Senate's failure to pass a Bill which had twice been passed by the House of Representative satisfied the requirements of s. 57 of the Constitution and allowed the Prime Minister to recommend a double dissolution. Significantly, nowhere in the documents submitted to the Governor-General by Prime Minister Menzies was there any reference to any obligation on the Governor-General's part to accept the ministerial advice unquestioningly. On the contrary, Prime Minister Menzies advised the Governor-General that he was entitled to satisfy himself and to make up his own mind on the matters submitted to him.

Interestingly enough, and specially so in the light of the Labor Party's contrary views in 1975, the Labor view in 1951 was that the Governor-General was not obliged to accept the Prime Minister's advice and indeed should not accept it unquestioningly; that he should not simply

accept the advice of the first two Law Officers of the Crown, and should instead seek independent legal advice; and that he should seek it from the then Chief Justice of the High Court, Sir John Latham.

Labor's view in 1951, and particularly that the Governor-General should consult the Chief Justice, accords exactly with what happened in 1975, but with the boot on the other foot, Labor quickly changed its tune. Whitlam started claiming that Sir John Kerr, in consulting the Chief Justice, and Sir Garfield Barwick, in responding to that request, had acted improperly and unconstitutionally, and almost without precedent. The attacks sought to discredit both the Governor-General and the Chief Justice. As a result, as in the case of the blocking of supply by the Senate, many Australians believe, quite wrongly, that Sir John Kerr and Sir Garfield Barwick acted improperly, unconstitutionally and without precedent.

In fact, at least two other Chief Justices, in addition to Sir Garfield Barwick, have given advice to Governors-General on the exercise of their Vice-Regal powers. They were Sir Samuel Griffith and Sir Owen Dixon. These three Chief Justices gave their advice, when it was asked for, to no less than seven Governors-General. They were Lord Northcote, Lord Dudley, Lord Denman, Sir Ronald Munro Ferguson, Lord Casey, Sir Paul Hasluck and Sir John Kerr.

As the supply of money started to run out in October 1975, Whitlam sought to bypass the Constitution and the Parliament by trying to arrange with the banks for them to advance his Government the funds which it could not get from the Parliament. Such action by the banks would have been illegal, and they refused to participate, yet Whitlam has always claimed that his proposed arrangement with the banks would have solved the supply crisis, had the Governor-General given him more time. This was simply not true.

As the crisis continued, and as calls mounted in the Parliament and in the media for the Governor-General to do something, Sir John Kerr asked Whitlam for a joint legal opinion on certain matters from the two Law Officers of the Crown – the Attorney-General, Kep Enderby, and the Solicitor-General, Sir Maurice Byers. Whitlam claimed at the time, and always continued to claim, that these two men gave the Governor-General their joint legal opinion on 6 November, and that he ignored their advice. The truth is somewhat different.

Attorney-General Enderby did call on the Governor-General on 6 November 1975 with a document that had been prepared by the Solicitor-General. At the top it was headed "Joint Opinion", and at the bottom it had been signed by the Solicitor-General, and there was a place for the Attorney-General to add his signature. Enderby told the Governor-General that there were parts of the document with which he did not agree and that he could not add his signature to it. So he took out his pen, wrote the word "Draft" at the top of the document, and crossed out the signature of Sir Maurice Byers – an insult that caused Sir Maurice great offence. The Attorney-General went on to say that he proposed to prepare another joint opinion with which he could agree and which he could sign, and that he would send it to the Governor-General as soon as possible. That joint legal opinion never came: the Attorney-General was obviously busy with far more important matters.

So what Whitlam has always described as a joint legal opinion from the first two Law Officers of the Crown was in fact a draft signed by neither of them and disowned by the Attorney-General. Despite Whitlam's claim to the contrary, the Governor-General did not receive a joint legal opinion from the first two Law Officers of the Crown.

Over the past three decades we have seen the creation of the Whitlam legend by those who still believe that his was a brilliant prime ministership that was cruelly cut short. And there was no more committed proponent of this legend than Whitlam himself. The facts, however, are somewhat different.

How many times have we read that Whitlam needed more time to prevail over Fraser; that Fraser won the 1975 election because Kerr intervened when he did; that Fraser persuaded Kerr to close off the issue on 11 November; and that Kerr chose the timing that Fraser wanted.

The fact is that it was Whitlam, and no-one else, who chose the fatal day. That was the day he called on the Governor-General to advise a half-Senate election to be held on 13 December, for the election of senators who would not take their seats in the Senate for another seven months.

Such a possibility had already been canvassed in the media. However, writs for Senate elections are issued by State Governors, following a request from the Governor-General, and there had been much speculation in the media that the Premiers of Queensland, New South Wales and Victoria would be likely to advise their respective State Governors to ignore any request from the Governor-General, and to refuse to issue the necessary writs for the election of senators for their States.

In the event, the Governor-General did not give Whitlam the opportunity to present his advice on 11 November, and for very good reason. Had the Governor-General refused to accept his Prime Minister's advice, that would have precipitated another constitutional crisis, right in the middle of the one we already had. On the other hand, had the Governor-General accepted his Prime Minister's advice and gone on to ask all State Governors to issue writs for the election of senators for their respective States, a refusal by even one State Governor to do so, let alone three, would have precipitated yet another kind of constitutional crisis.

So the best advice that this so-called great Prime Minister could give to the Governor-General in the midst of the country's greatest constitutional crisis ever – a crisis which, if allowed to continue, could have led this country into economic ruin and could have resulted in the collapse of good government – was to present the Governor-General with the impossible task of choosing between two more unprecedented, and potentially equally disastrous, constitutional crises.

Had Whitlam not decided to go to Government House on that day to ask the Governor-General for a half-Senate election, the events of 11 November simply would not have occurred. If Whitlam had needed more time, he could have had it. Instead, he chose to present the wrong advice at the wrong time. Whitlam was the architect of his own misfortune; he was hoist with his own petard.

Having himself tried to use the Senate to force a Government to an early election on two occasions, and with his Party having tried to do it 170 times, did it never occur to him that his opponents might one day try to use the same tactics against him?

In a press statement he issued on 19 October 1975 Whitlam referred to the Opposition's actions in the Senate as an abuse of power, and as a violation of every constitutional and democratic principle. Yet the very same actions were legitimate and principled when he was doing them to his opponents in 1967 and 1970 when he was in opposition.

On 28 October 1975 he told the House of Representatives that the Senate was in breach of constitutional conventions relating to the passage of Appropriation Bills, Supply Bills and money

Bills. Apparently these must have been new constitutional conventions, because we saw no sign of them in 1970 or 1967, nor as far back as 1950. Or maybe they were very specialised constitutional conventions that applied only to Coalition Oppositions and not to Labor Oppositions.

When Whitlam opened his December 1975 election campaign in the Festival Hall, Melbourne, on 24 November 1975, his theme was that his removal from office was the end of parliamentary democracy as we knew it, because an elected Government in full command of a majority in the House of Representatives had been brought down by the Senate's attack on its Budget. And this was the same Leader of the Opposition who had attempted to do the very same thing to the Holt Government in 1967 and to the Gorton Government in 1970, and whose Party had tried to employ the same tactic against incumbent governments 170 times.

As I have already said, the Whitlam Opposition gloried in that record – its Senate Leader, Lionel Murphy, had proudly tabled it in the Senate in 1970. That which had been a legitimate parliamentary tactic for twenty-five years while it was used by Whitlam and his Party against their political opponents, suddenly became the end of democracy as we know it as soon as his political opponents used it on him.

As we approach yet another anniversary of the dismissal of the Whitlam Government, no doubt many a journalist will go to their files and regurgitate what they find there. I suggest that, instead of doing that, they should go to the original records and write an accurate account. They might begin by seeking answers to a few simple questions, such as:

- Why did Whitlam claim that the Governor-General acted too soon on 11 November 1975, when it was Whitlam himself who chose that date to force the Governor-General's hand, by giving defective advice?
- Why did Whitlam tell the crowd in front of Parliament House on 11 November 1975 that I had arrived at the back of the building, when he had just been told that I had arrived at the front?
- Why did Whitlam incite the mob against me, when he knew that I was a public servant simply doing my job?
- Why did Whitlam claim that Fraser's car had been hidden at the back of Government House, when it had been moved closer to the front and was in full view?
- Why did Whitlam ignore the Senate in planning his Party's parliamentary tactics following the withdrawal of his commission as Prime Minister?
- Why did Whitlam describe my reading of the proclamation from the steps of Old Parliament House as a needless provocation when he knew full well that it was a long-established practice, and that the previous year I had carried out the same duty for him and his Government?
- Why did Whitlam describe the consultation between the Governor-General and the Chief Justice as almost unprecedented, himself acknowledging only one precedent, when in fact there were many precedents?
- Why did Whitlam claim that his scheme to get money from the banks was lawful, and would have solved the supply crisis, when the banks had legal opinions that it was not lawful, and had decided not to participate?
- Why did Whitlam say that the Governor-General had received a joint legal opinion from the first two Law Officers of the Crown, when he knew full well that there was no such legal opinion?
- Why did Whitlam describe the Senate's actions in 1975 as unprecedented, when his Party had created 170 precedents and he himself had created two of them?

I said earlier that the late Philip Graham, former publisher of *Newsweek* and *The Washington Post*, once said that good journalism should aim to be "the first rough draft of history". On the other hand, Thomas Jefferson, the third President of the United States, once said that "A man who never looks into a newspaper is better informed than he who reads them; inasmuch as he who knows nothing is nearer to truth than he whose mind is filled with falsehoods and errors."

When one looks at much of the reporting of the dismissal, and the events surrounding it, one would have to conclude that Jefferson was closer to the mark than Graham.