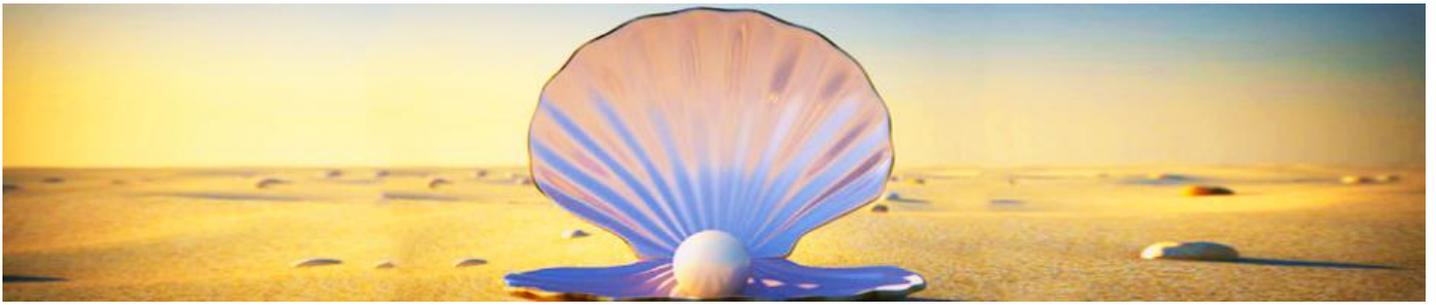


John Menadue : Pearls and Irritations



1975 and all that

By [IAN CUNLIFFE](#) | On [22 July 2020](#)

45 years have passed since the most controversial crisis in Australian political history – the dismissal of the Whitlam Government by the Governor-General on 11 November 1975. But it was not the first dismissal of an elected government by a vice-regal figure in Australia.

The Great Depression was a turbulent time in Australia. The peak of that turbulence was on 13 May 1932 when NSW Governor, Sir Philip Game dismissed NSW Labor Premier, the firebrand Jack Lang. Lang later became a political father-figure to two Australian Prime Ministers – one from either side of politics – Paul Keating and Malcolm Turnbull.

I gained a fascinating insight into the Lang dismissal in the aftermath of another major upheaval in Australian political and public life – the bombing of Sydney’s Hilton Hotel on 13 February 1978. I worked on the Protective Security Review (PSR) which inquired into issues that emerged from the bombing. Justice Robert Hope conducted the PSR.

A bomb had exploded outside the hotel, where the Commonwealth Heads of Governments were meeting – involving Prime Ministers and Presidents from many of the countries of the British Commonwealth. Three people were killed by the blast. The most popular speculation was that the bomb was planted by a religious sect and targeted at the Indian Prime Minister.

After the Hilton Bombing, the Army was called in to evacuate the Conference to Bowral in rural NSW. There were no Australian precedents for that action and serious questions were asked about, for example, what the legalities would have been if a soldier had shot someone: the law regarding police shootings is tolerably clear, but not for soldiers in such situations. Similar issues arise in relation to the power to make arrests.

Accordingly, various issues about military law were important in the PSR. Australia’s leading authority on such issues was Sir Victor Windeyer. Sir Victor was probably the most distinguished member of one of Australian history’s most distinguished judicial families. He had been a High Court justice. Earlier, Sir Victor was Counsel Assisting the Petrov Royal Commission, established by Prime Minister Robert Menzies to his great political advantage. Earlier still, Sir Victor rose to the rank of Major General, and saw action during the Second World War, including in the siege of Tobruk and in New Guinea.

Hope sought out Sir Victor for his insights. I remember Hope’s excitement after the meeting. I was reasonably aware of the fracturing of Australian politics around the time of the Great

Depression. Probably the best known incident of the time was when New Guard member Francis de Groot pre-empted Premier Lang to ride in on horseback with his sword and cut the ribbon for the opening of the Sydney Harbour Bridge on 19 March 1932. The New Guard was a proto-fascist group on the extreme right.

The picture of extremism in Australia on both the right and the left was also seen in the UK, the US and France. It was a time of extreme polarisation: fascist parties and their fellow travellers against Communists and their ilk. Of course, in Germany, Italy and Spain the fascists won out by taking government.

According to Hope, Windeyer told Hope that he, Windeyer, had been a member of the Old Guard during the Great Depression – a much more establishment group than the New Guard. According to the entry on Sir Victor in the Australian Dictionary of Biography, “Windeyer took command in 1930 of a platoon in the Old Guard, an organisation not to be confused with the more public and more extreme New Guard. Its objects—to assist in ‘the maintenance of law and order’ and to uphold ‘the Constitution under which we work and live’—were focused on the politics of J. T. Lang and the activities of the New Guard.”

Windeyer told Hope that on 13 May 1932, he and other members of the Old Guard had been called to “drill” inside Customs House in Sydney. At that time, Windeyer was also a Major in the Sydney University Regiment, which may best be described as an [officer-training regiment of the Australian Army Reserve](#). After waiting in Customs House for some hours until late in the day, the commander of the Old Guard contingent had told them that Lang had been dismissed by the Governor, and that Lang had accepted his dismissal. The Old Guard members were no longer required to remain.

According to the same entry in the Australian Dictionary of Biography, the Old Guard dissolved after Game dismissed Lang.

Lang’s dismissal followed a bitter dispute between the Commonwealth and NSW Governments. The federal Government was totally opposed to Lang’s plan to as to how best to fight the Great Depression – by taking a repayment holiday to overseas bond holders.

Customs House was a Commonwealth Government facility. Presumably, the Old Guard had permission to drill there. Presumably there was a plan of action for the contingency that Lang refused to go.

I gained another fascinating insight – into the events of 1975 – from former great High Court advocate, Sir Maurice Byers. Sir Maurice was Commonwealth Solicitor General at the time of Whitlam’s dismissal.

Sir Maurice told me that he was confident that he could successfully have challenged the dismissal of the Whitlam Government by the Governor General if, instead of Whitlam going directly home from Government House to the Lodge to enjoy a steak for lunch, he had instructed Byers to appear immediately in the High Court. Those proceedings would have been by way of judicial review.

I doubted that Sir Maurice would have succeeded – despite his renowned enormous ability to win over the High Court. (As a fairly junior official, I was not so bold as to express my doubt to one of the High Court’s

greatest ever advocates). My view was that the High Court would regard interfering in dealings between the Queen's representative and the Prime Minister and Leader of the Opposition as many bridges too far: the issues were what lawyers call "non-justiciable".

Byers would not have known at the time of the Dismissal that two of the seven judges of the High Court had had been advising the Governor-General in the lead up to the Whitlam sacking and Kerr commissioning Opposition Leader Malcolm Fraser to become Prime Minister. Chief Justice Sir Garfield Barwick was ousted soon after 1975. Sir Anthony Mason, then a puisne justice of the High Court was revealed much later

The two justices should certainly have disqualified themselves if the case had been litigated. Would they have?

I reflected back on the possible role for the Court in 1975 by what Britain's top court, the Supreme Court did in 2018. In the fight over Brexit, the Queen had acted on the advice of Prime Minister Boris Johnston to prorogue (suspend) the British Parliament at a critical time. The UK Supreme Court overturned the Queen's prorogation. The Court was unanimous – 11 judges to nil. The Leader of the Commons, Jacob Rees-Mogg reportedly told a meeting of cabinet that the action by the court had amounted to a "constitutional coup".

Many describe 1975 as a coup. Was there a contingency plan on 11 November 1975 as there was in 1932? What was it?

While, together with so many others, I was shattered by Whitlam's dismissal, even then I was relieved that he did not refuse to go. Ever the stickler for legality and convention, Whitlam went – albeit far from quietly. But nor did he challenge his dismissal in the courts.

It would be better for the courts to determine the legal issues which arose in 1932 and 1975 than to risk the outcome being determined through the barrel of a gun.



[Ian Cunliffe](#)

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