Royal Assent in Victoria[#]

Kate Murray[*]

In October 2005 the Governor of Victoria withheld the royal assent from a bill on advice from the Premier. This caused private concern for parliamentary staff, outspoken complaints from some members of Parliament and even somewhat of a media frenzy — well a frenzy relative to the usual media attention paid to parliamentary procedure. The withholding of assent led to a range of questions. What exactly is the legal and constitutional basis for royal assent in Victoria? How has the procedure for giving assent changed over the 150 year history of the Parliament of Victoria? What are the roles of the clerk of the parliaments, the governor and the executive in the process and, in particular, who can and should advise the governor? This paper will attempt to answer some of those questions and examine a range of situations in which there have been difficulties with the royal assent process in Victoria.

New comers to the Victorian Constitution might be surprised to find that it is not a 'how to' on democracy in Victoria. Much of what happens in the three branches of government and the relationships between them is left unsaid.[1] Instead the traditions of the Westminster system, together with various adaptations developed during the 150 years of responsible government in Victoria, are followed. And so it is with the process for royal assent.

Royal assent is one of the stages of making a law in Victoria. It occurs when the governor, on behalf of the Queen, approves a bill that has been passed by both Houses of Parliament.[2] The constitutional basis for this is section 15 of the *Constitution Act 1975 (Vic)* which vests the legislative power of the State in the Parliament and defines the Parliament as consisting of Her Majesty, the Council and the Assembly. The implication being that all three must agree to a bill for it to become a law. What the Constitution does not say is 'to show that Her Majesty has

[#] ANZACATT paper written 2007, fully refereed.

[*] Legislative Assembly, Victoria

[1] The cabinet, for example, is not even mentioned.

[2] Legislative Assembly (Vic) Fact Sheet 2: Stage of a Bill. www.parliament.vic.gov.au/assembly/facts2.html viewed 08/01/2007.

agreed to a bill, the governor gives the royal assent to the bill', but it does refer to royal assent in sections 14 and 18, for example, and section 43 gives both Houses the power to make standing orders in relation to 'the proper presentation of…Bills to the Governor for Her Majesty's assent'.

Consequently the Houses have adopted Joint Standing Order 10, which covers the presentation of bills for royal assent. It states:

> (1) Two copies of all bills, except the Annual Appropriation Bill, will be presented to the Governor for royal assent by the Clerk of the Parliaments.
>
> (2) Annual Appropriation Bills will be presented to the Governor for royal assent by the Speaker of the Legislative Assembly.[3]

This standing order makes the whole process seem very simple, but there is quite an involved process that takes place in order for this to occur. The present practice involves a special print of the bill being ordered, checked and signed by the Clerk of the Parliaments. The Governor is then informed that there is a bill requiring the royal assent. The Clerk of the Parliaments then waits on the Governor and the Governor gives the royal assent by signing the bill. A variety of people is then informed that the bill has been assented to and is now an Act.

Under Joint Standing Order 9[4] two copies of the Act copy are printed on archive paper and included, at the end of the Act, are the authenticity certificate of the Clerk of the Parliaments and the assenting words of the Governor:

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[3] Joint Standing Orders (Vic) adopted by the Legislative Assembly on 9 August 2006 and by the Legislative Council on 22 August 2006 and operational from the first sitting day of the 56th Parliament (that is, 19 December 2006). This joint standing order (JSO) has remained almost unchanged for 150 years. In 1857, JSO 15 was: 'The three fair prints of each Bill, except the Appropriation Bill, when passed, shall be presented to the Governor for Her Majesty's assent, by the Clerk of the Parliaments.' See pp xxxiii–xxxiv Votes and Proceedings of the Legislative Council (Vic), Session 1856–7, as approved by the Governor on 3 August 1857 (announced in the Council on 4 August 1857).

[4] Joint Standing Orders (Vic) adopted by the Legislative Assembly on 9 August 2006 and by the Legislative Council on 22 August 2006 and operational from the first sitting day of the 56th Parliament (that is, 19 December 2006). This joint standing order (JSO) has also remained relatively unchanged for 150 years. In the JSOs adopted in 1857 threes copies of the bill were required and they were to be printed on vellum. See pp xxxiii–xxxiv Votes and Proceedings of the Legislative Council (Vic), Session 1856–7, as approved by the Governor on 3 August 1857 (announced in the Council on 4 August 1857). In 1915 a change was made and the bills were printed on special paper rather than vellum as this would save the Parliament around £200 a year and, in addition, vellum came from Germany and special paper was manufactured in the British Empire. See Hansard (Assembly, Vic), 26 May 1915 p 435. The change from three copies to two copies occurred only in 2006 but reflects the fact that since the commencement of the Australia Act 1986 (Cth) it is no longer necessary to send a copy to Her Majesty's Principal Secretary of State.

I HEREBY CERTIFY that this is the bill to which the Legislative Council and the Legislative Assembly of the State of Victoria have agreed.	In the name and on behalf of Her Majesty I assent to this Act.
Clerk of the Parliaments	Governor

This copy is proof-read against the certified copy of the bill, that is, the copy that the Clerk of the Assembly and Clerk of the Council have signed to certify that the bill has been passed in each of their Houses. This is done on behalf of the Clerk of the Parliaments so that he or she may be confident in signing the authenticity certificate.

Next the Clerk of the Parliaments advises the Clerk of the Executive Council that they bill is awaiting royal assent and sends two copies of the bill and a copy of the second reading speech for the Governor's information.

Parliament House,
Melbourne.
3 November 2000

Madam,

I have the honour to transmit, for the consideration of His Excellency the Governor, duplicate copies of the Bills specified hereunder which have passed the Legislative Council and the Legislative Assembly.

Will you please inform me when and where it will be His Excellency's pleasure to have these Bills presented to him for Her Majesty's assent.

Yours faithfully,

Clerk of the Parliaments

[Bills listed here]

CLERK OF THE EXECUTIVE COUNCIL
1 TREASURY PLACE,
MELBOURNE 3002

The Clerk of the Executive Council formally requests the Attorney-General, as the Governor's Law Officer, to certify as to whether there is any legal objection to the bill passing into law (the attorney-general's certificate). This certificate is prepared and recommended by the Chief Parliamentary Counsel. In practice, it assures the

Governor that the bill has satisfied the requirements of the *Constitution Act 1975 (Vic)* and that there are no amendments to be recommended by the Governor under section 14 of the Constitution.

At the appointed time and place, the Clerk of the Parliaments presents the bills for royal assent. In advance these copies are ribboned and waxed (this still happens in Victoria!) and the Clerk of the Parliaments signs the authenticity certificate. Under Joint Standing Order 11, if the Clerk of the Parliaments is unavoidably absent, his or her duties are undertaken by the Clerk of the other House, or, in the absence of both Clerks, by either or their deputies.[5] In lieu of the Governor, the Lieutenant-Governor or the Administrator may sign on behalf of the Governor.[6] Bills presented for assent are given the royal assent in alphabetical order.[7] A bill becomes an Act immediately upon it receiving the royal assent.[8]

The courts, the two Houses and the public are then informed. Joint Standing Order 13 states:

> After the Governor has given the royal assent to a bill, the Clerk of the Parliaments will retain one signed copy in safekeeping and the other signed copy will be delivered to the Supreme Court.[9]

In practice Acts are delivered to the Master of the Supreme Court in one batch at the end of each year. The Governor reports to each House by message the fact that the bill has been assented to. Depending upon when the Houses are next sitting, such a message might not be read in the House for several weeks.

The Clerk of the Executive Council publishes the Governor's declaration of assent in the Government Gazette. The Clerk of the Parliaments sends a publication copy of the Act to the Government Printer who then arranges for the Act to be published both online and in hard copy.

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[5] Joint Standing Orders (JSOs) adopted by the Legislative Assembly on 9 August 2006 and by the Legislative Council on 22 August 2006 and operational from the first sitting day of the 56th Parliament (that is, 19 December 2006). This JSO was updated in the 2006 review of the JSOs. Previously the Clerk-Assistant of the Legislative Council stood in for the Clerk of the Parliaments under JSO 20, approved 3 August 1857 (announced in the Council on 4 August 1857) and then under JSO 22 approved 2 March 1893. In recent years this has resulted in the odd situation of the Deputy Clerk of the Council standing in for the Clerk of the Assembly, even though the Clerk of the Council and Deputy Clerk of the Assembly were both available. A similar change was attempted in 1915 when the Clerk of the Assembly was the Clerk of the Parliaments but was rejected by the Council in protest of the Assembly Clerk holding the Clerk of the Parliaments position; apparently a break in tradition and a snubbing of the Council. See Hansard (Council, Vic), 8 June 1915, p 652.

[6] *Constitution Act 1975 (Vic)* section 6B.

[7] As far as can be ascertained listing the bills in alphabetical order is a tradition of the Parliament of Victoria. In the UK bills are grouped according to type. See May, 23rd edition, p 652.

[8] Interestingly in the UK Royal Assent is not effective until both House have been notified of such. See May, 23rd edition, p 654.

[9] Joint Standing Orders adopted by the Legislative Assembly on 9 August 2006 and by the Legislative Council on 22 August 2006 and operational from the first sitting day of the 56th Parliament (that is, 19 December 2006).

From: Professor David de Krester, A.C.,
Governor of Victoria

Message

The Governor informs the Legislative Assembly that he has, on this day, given the Royal Assent to the under~mentioned Acts of the present Session presented to him by the Clerk of the Parliaments, viz.:–

[Acts listed]

THE GOVERNORS OFFICE

MELBOURNE, VIC. 3002

10 October 2006

The usual timing for assent involves submitting a list of bills passed that week to the Clerk of Executive Council by midday on Friday. The bills are then assented to by the Governor on the following Tuesday morning at 9.30 am, before Executive Council meets. Variations to this process occur if (a) one of the Houses meets on Friday and a bill is not passed in time to be included on the list sent to the Clerk of Executive Council; (b) a bill is large or passed late in the week and therefore cannot be printed or proof-read in time for it time to be included on the list sent to the Clerk of Executive Council; (c) Executive Council does not meet or meets on a different day; or (d) there is some urgency requiring a bill to be assented to immediately. The Governor usually giving the royal assent just prior to a meeting of Executive Council, allows the Governor in Council to, in the following meeting of Executive Council, immediately (a) set the commencement dates of any of the Acts, or part of any of the Acts, just assented to; and (b) make any regulations or Orders in Council required for any of the Acts just assented to. Both these actions can only be taken after an Act has been assented to. The Clerk usually attends the Governor's office at the Old Treasury Building in Melbourne for the royal assent, but on other occasions has attended Government House.

The process varies for the assent to the Annual Appropriation Bill. Under Joint Standing Order 10 the Annual Appropriation Bill must be presented by the Speaker for royal assent.[10] This is in line with the practice of the UK Parliament.[11] The Parliament has not yet tested the process for obtaining royal assent after a referendum.

[10] Joint Standing Orders (Vic) adopted by the Legislative Assembly on 9 August 2006 and by the Legislative Council on 22 August 2006 and operational from the first sitting day of the 56th Parliament (that is, 19 December 2006).

[11] May, 23rd edition, p 654.

A short glimpse at the history of the royal assent process in Victoria shows that the process set out above has not always been in place. In the early history of the Parliament of Victoria, the governor came into the Legislative Council chamber to give the royal assent. This extract from the Minutes of the Proceedings of the Legislative Council shows the very first bills assented to in Victoria:

> ROYAL ASSENT TO BILL — The approach of His Excellency the Governor was announced by the Usher.
>
> His Excellency the Governor came into the Council Chamber, and commanded the Usher to desire the immediate attendance of the Legislative Assembly in the Council Chamber.
>
> Mr Speaker and the Legislative Assembly attending, His Excellency was pleased to assent, in the name of Her Majesty the Queen, to the following Bills:—
>
> > An Act for defining the Privileges, Immunities, and Powers of the Legislative Council and Legislative assembly of Victoria respectively.
> >
> > An Act for taking an Account of the Population.
>
> The Royal Assent being read severally by the Clerk of the Parliaments in the following words :—
>
> > In the name and on behalf of Her Majesty, I assent to this Act.
> >
> > HENRY BARKLY.
> > Governor.
>
> Parliament Houses,
> Melbourne, 25th February, 1857.
>
> The Clerk of the Parliaments delivered to Mr Speaker Schedules of the Acts assented to.
> Mr Speaker and the Legislative Assembly withdrew.
> His Excellency the Governor left the Council Chamber.[12]

When an appropriation bill required assent the Speaker brought that into the Council chamber when the governor was to give assent to other bills, and the governor then assented to the appropriation bill together with the other bills awaiting assent.[13]

This practice continued until 1878 when the Governor sent a message to the Council informing them that, following the advice of the Attorney-General, he had given assent to several bills at the Government Offices. The advice said:

> It is well known that in New South Wales, New Zealand, Queensland, and other colonies, Bills are assented to by the Governor as a general rule at the Government

[12] Minutes of the Proceedings of the Legislative Council (Vic), No 25, Wednesday 25 February 1857, p 92.
[13] See Minutes of Proceeding of the Legislative Council, No 36, 15 July 1870, p 85.

> House or at the Government Offices, and in the presence of the Clerk of the Parliaments; but not in the presence of the Parliament itself. In fact, the latter practice appears to be confined to Victoria; and there is precedent for such a course in Victoria also.
>
> I advise that His Excellency the Governor can legally and constitutionally give the Royal Assent at the Government Offices, or elsewhere, to all Bills, except the Appropriation Bill, presented to His Excellency by the Clerk of the Parliaments, for Her Majesty's assent, in pursuance of Joint Standing Order XV. Such assent should afterwards be notified by Message to both Houses of Parliament according to the precedent above-mentioned and the practice in other colonies.[14]

Following this advice the Governor then only gave assent to bills in the presence of the Parliament when the appropriation bill required assent or at prorogation. In 1906 the Governor did not attend the Parliament to prorogue the Parliament, but he did attend to give the royal assent to the appropriation bill.[15] In 1907 this process also stopped and it appears that after that time the governor has assented to all bills outside of the chambers and reported back to the Houses via message.

We have seen above that the clerk of the parliaments' role in the royal assent process is set out in the joint standing orders, that is, to certify that the bill has been passed by both Houses (8 and 9) and to present the bills to the governor for assent (10).[16] However on the rare occasion when the royal assent process is not a smooth one, it is important to consider what exactly the role, responsibilities and powers of the clerk of the parliaments are.

May states '[w]hen bills…have been finally agreed to by both Houses, they await only the Royal Assent to be declared to Parliament…and from that sanction they cannot be legally withheld.'[17] This statement has been used to claim that the governor must assent to all bills presented. However, a more sensible interpretation is that it means that no one should prevent a bill from being presented to the governor.[18] It could be argued that it is the role of the clerk of the parliaments to ensure this. There are certainly Victorian examples of the clerk of the parliaments presenting bills to the governor for assent even though he had been advised in

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[14] Minutes of the Proceedings of the Legislative Council (Vic), No 58, Tuesday 22 January 1878, p 160. The Victorian precedent referred to occurred in 1864 and 1865 when Governor Darling gave the royal assent at Government House 'in consequence of his inability to attend at the Parliament Houses'. See Minutes of the Proceedings of the Legislative Council (Vic), No 5, Tuesday 9 February 1864. And see Minutes of the Proceedings of the Legislative Council (Vic), No 10, Tuesday 31 January 1865. One wonders if Charles Darling was ill or simply avoiding the latest controversy in which he was involved. See The Australian Dictionary of Biography, Online edition, http://www.adb.online.anu.edu.au/biogs/A040020b.htm, viewed 1 February 2007.

[15] Minutes of the Proceedings of the Legislative Council, No 32, 21 December 1906, p 113.

[16] Joint Standing Orders (Vic) adopted by the Legislative Assembly on 9 August 2006 and by the Legislative Council on 22 August 2006 and operational from the first sitting day of the 56th Parliament (that is, 19 December 2006).

[17] May, 23rd edition, p 652.

[18] Waugh, 2006, p 73.

advance that the bill would not be assented to.[19] Such a practice prevents any accusations being levelled against the clerk of the parliaments of withholding a bill from the royal assent.

Two further actions that the Clerk of the Parliaments took in 2005 when the Governor temporarily withheld assent from a bill provide a sound precedent for the future. The Clerk of the Parliaments retained the bill awaiting assent. While this meant that he still had the responsibility of presenting it for assent in the future, it is inline with the advice of May which states that '[b]ills awaiting Royal Assent remain in the custody of the clerk of the parliaments'.[20] Secondly, as part of his duties as an officer of the Parliament, the Clerk of the Parliaments advised the presiding officers that assent had been withheld. Supporting the argument that the Clerk of the Parliaments had done all he could on this matter the President ruled:

> I have … discussed this matter with the Speaker of the Legislative Assembly, and we are both satisfied that the Parliament has fully discharged its obligations in relation to this bill. The Clerk of the Parliaments presented the bill for assent in the usual manner…The Parliament has no power to insist on the Governor giving his assent.[21]

A further concern for the clerk of the parliaments is section 18 of the *Constitution Act 1975 (Vic)* — the manner and form provisions. These state that '[i]t shall not be lawful to present to the Governor for Her Majesty's assent any bill' which alters certain sections of the Constitution unless the bill has been passed in a certain manner. While the attorney-general's certificate confirms for the governor that these requirements have been met, it is the clerk of the parliaments who presents most bills to the governor for assent, and therefore the clerk of the parliaments would also need to be assured that the manner and form requirements had been met. Indeed an injunction was taken out against the Clerk of the Parliaments in 1953 in an attempt to prevent him presenting a bill to the Governor for assent; the claim being that the manner and form requirements had not been met.[22]

We now turn to consider the governor's role and powers in the process. The Governor of Victoria is the Queen's representative in Victoria. Prior to 1986 the Governor's powers as the representative were bestowed by implication or committed through various letter patents and royal instructions.[23] Thus the power to give assent to bills was implied but was restricted by royal instruction. The royal instructions of 29 October 1900, for example, included instructions for categories of bills to which the Governor could not assent. Bills in these categories were reserved for the assent of Her Majesty.

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[19] See the 1958 and 2005 examples below.
[20] May, 23rd edition, p 652 – footnote 4.
[21] Hansard (Council, Vic), 20 October 2005, p 1561.
[22] *McDonald v Cain* [1953] VLR 411. This is discussed further below.
[23] Thomas, 1999, p 226.

> VII. The Governor shall not, except in the cases hereunder mentioned, assent in Our name to any Bill of any of the following classes:
>
> 1. Any Bill for the divorce of persons joined together in holy matrimony.
> 2. Any Bill whereby any grant of land or money or other donation or gratuity may be made to himself.
>
> 3. Any Bill affecting the currency of the State.
>
> 4. Any Bill the provisions of which shall appear inconsistent with obligations imposed upon Us by Treaty.
>
> 5. Any Bill of an extraordinary nature and importance, whereby Our prerogative or the rights and property of Our subjects not residing in the State, or the trade and shipping of the United Kingdom and its Dependencies, may be prejudiced.
>
> 6. Any Bill containing provisions to which Our assent has been once refused, or which have been disallowed by Us;
>
> Unless he shall have previously obtained Our Instructions upon such Bill through one of Our Principal Secretaries of State, or unless such Bill shall contain a clause suspending the operation of such Bill until the signification in the State of Our pleasure thereupon, or unless the Governor shall have satisfied himself that an urgent necessity exists requiring that such Bill be brought into immediate operation, in which case he is authorized to assent in Our name to such Bill, unless the same shall be repugnant to the law of England, or inconsistent with any obligations imposed upon Us by Treaty. But he is to transmit to Us by the earliest opportunity the Bill so assented to, together with his reasons for assenting thereto.[24]

Then in 1986 the Commonwealth and British Parliaments passed the *Australia Act 1986* which declared that the governor of each state shall be the Queen's representative in that state.[25] In effect it transferred the powers and functions of the monarch in Victoria to the Governor of Victoria.[26] Therefore when the *Constitution Act 1975 (Vic)* refers to Her Majesty in section 15, any powers or functions that are related to that are exercisable by the governor. It is therefore the governor who gives the royal assent to bills. Section 7 of the *Australia Act 1986 (Cth)* also makes it possible for the Queen to give the royal assent should she be present in Victoria. It appears that this has not occurred in Victoria and that, in the UK, the Queen last assented to a bill in person in Parliament in 1854.[27]

The governor's power to assent to bills in the name of Her Majesty is fairly clear, even if it is only an implied power; the governor has been assenting to bills in Victoria for 150 years. But does the governor have the power to withhold to assent to a bill, that is, to refuse assent to a bill, or to delay the giving of assent? Waugh argues that as section 15 of the *Constitution Act 1975 (Vic)* implies that each component of the Parliament must give its consent to the passing of a law, it

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[24] Instructions passed under the Royal Sign Manual and Signet to the Governor of the State of Victoria and its Dependencies, in the Commonwealth of Australia, 29 October 1900.
[25] *Australia Act 1986 (Cth)*, section 7.
[26] Thomas, 1999, p 226–7.
[27] Hood, 1973, p 100.

therefore follows that each component can also withhold that consent.[28] Examples are given below of bills where the governor has indeed withheld or delayed assent in Victoria. Also discussed below are situations in which a governor might wish to withhold or delay assent and who should make such decisions. Therefore, it seems, no matter how uncomfortable it might make those involved — 'There has been a breach of procedures in that a bill presented to the Governor has been refused assent'[29] — assent can indeed be refused or delayed.

Some examples from other jurisdictions give an indication of the other powers a governor has with regard to the royal assent. In a case in New Zealand a majority of judges were of the view that royal assent did not have to be given within a certain time.[30] The Supreme Court of Queensland ruled that a bill could not be assented to in part.[31] In 1976 assent was withdrawn from a Commonwealth bill after it was realised that the bill had been presented to the Governor-General in error and had not yet passed both Houses. Campbell, however argues that once assent is given it cannot be withdrawn; she allows only this one exception.[32]

Given the argument above, that bills are not automatically assented to but that assent can be withheld, consideration must be given to who decides whether or not a bill should be assented to. Is royal assent part of the legislative process or an executive act? Can the governor act of his own accord or must he act on advice? Whose advice must or can the governor take?

The constitutional basis for royal assent in Victoria gives the immediate impression that royal assent is part of the legislative process.

> The legislative power of the State of Victoria shall be vested in a Parliament, which shall consist of Her Majesty, the Council, and the Assembly, to be known as the Parliament of Victoria.[33]

In other words, royal assent is part of the 'legislative power' of the State. This is supported by the enacting words that were used in Acts until 1986. 'Be it enacted by the Queen's Most Excellent Majesty by and with the advice and consent of the Legislative Council and the Legislative Assembly …'[34]

Twomey notes that based on these enacting words and the definition of the Parliament in section 15 of the *Constitution Act 1975 (Vic)*, 'it has been observed by some Australian judges that a Governor is acting as part of the Parliament in giving

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[28] Waugh, 2006, p 69.
[29] Hansard (Vic), 25 October 2005, p 1626.
[30] Campbell, 2003, p 11 refers to *Simpson v A-G* [1955] NZLR 271.
[31] Campbell, 2003, page 11 refers to *R v Commissioner for transport; Ex parte Cobb and Co Ltd* [1963] Qd R 547 at 548.
[32] Campbell, 2003, page 11.
[33] *Constitution Act 1975 (Vic)*, section 15.
[34] See for example the *Parliamentary Committees Act 1968 (Vic).*

assent and that assent is part of the legislative process.'[35] Such an argument is further supported by the fact that, in Victoria, the governor used to give his assent in one of the legislative chambers of the Parliament.

It could be argued then, that when giving the royal assent the governor should act on the advice of the Assembly and Council and that if the two Houses pass a bill, they are advising the governor to assent to it. Such an argument fits neatly with the principles of representative democracy. The people of Victoria elect representatives to parliament to make laws on their behalf. Therefore when it comes to part of the law making process, the governor should take the advice of these representatives.

This certainly seems to be the view of Dr J Davis McCaughey, who was Governor of Victoria between 1986 and 1992. In discussing the constitutional responsibilities of a governor he touches on the subject of the governor giving the royal assent and writes:

> He does so not on the request of the Premier, but being waited upon by the Clerk of the Parliament. What is being enacted is the law of the land, which has come through Parliament. For better or for worse, the people's representatives have passed this legislation. The Governor, in affixing his signature to the bills presented to him, is not simply reinforcing the power of the government of the day. He is recognising the authority of the Parliament.[36]

Twomey records an example from New Zealand from the 1870s where the Governor-General was advised to refuse giving royal assent because the ministers objected to the way the bill had been amended. The Governor-General ignored this advice and assented to the bill. 'He considered that ministers were entitled to oppose the Bill during its passage through the Parliament, but nor at the stage of assent.'[37]

However, following the commencement of the *Australia Act 1986 (Cth)* the enacting wording was changed to simply say 'The Parliament of Victoria enacts …'[38] and a new section 87E was added to the *Constitution Act 1975 (Vic)*.

> 87E. Advice to Governor
>
> Where the Governor is bound by law or established constitutional convention to act in accordance with advice —
>
> (a) the Executive Council shall advise the Governor on the occasions when the Governor is permitted or required by any statue or other instrument to act in Council; and

[35] Twomey, 2006, p 581.
[36] McCaughey, 1993 p 3.
[37] Twomey, 2006, p 584.
[38] See for example the *Parliamentary Committees Act 2003 (Vic)*.

> (b) the Premier (or, in the absence of the Premier, the Acting Premier) shall tender advice to the Governor in relation to the exercise of the other powers and functions of the Governor.[39]

Waugh argues that because of section 87E it is 'very doubtful' that the governor acts on the advice of the Parliament when giving assent because the section implies that if the governor is to receive advice, it must come from either Executive Council or the premier.[40] We need to ask, when it comes to giving the royal assent, is that one of the occasions when the 'Governor is bound by law or established constitutional convention to act in accordance with advice'?

Certainly many commentators on the issue argue that the governor acts on advice when giving the royal assent to bills. In Britain, Bogdanor explains, it would be wrong for the sovereign to be making personal judgement calls when it comes to giving assent because that could involve the sovereign in controversy. 'Thus the principle that the sovereign speaks and acts on the advice of his or her ministers serves to shield the sovereign from responsibility so that criticism of the sovereign's government is directed not at the sovereign but at ministers.'[41] Writing on the Commonwealth Constitution in 1902, Moore asserted that when it came to the governor-general giving royal assent he or she may be guided by 'Royal Instruction and the advice of his Ministers' and 'ought to act on the advice of his Ministers'.[42] Richard McGarvie, Governor of Victoria between 1992 and 1997 argued, while he was Governor, that whether exercising power on behalf of the Queen, amongst which he included giving royal assent, or acting under his or her own right, the governor acts on the advice of the ministers. The only exception he allowed were the reserve powers, of which more later.[43] Enid Campbell, writing specifically about the royal assent to bills in 2003, stated without argument '[b]y constitutional convention, the discretion of the vice-regal representatives to assent to Bills or withhold assent is exercised on ministerial advice.'[44] Most recently, Waugh, writing in 2006 on a specific instance in Victoria when a premier advised a governor to delay the royal assent, argued '[i]t would be anomalous if this, alone among all the powers of the Governor, were a subject on which Ministers cannot give advice.'[45]

Under section 7(5) of the *Australia Act 1986 (Cth)*, if the Queen were present in Victoria and were to exercise her right to give royal assent to a bill she would be advised by the premier. It makes sense to imagine that the rest of the time, the

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[39] *Constitution Act 1975 (Vic)*, section 87E inserted in 1994 by the *Constitution (Amendment) Act 1994 (Vic)*.
[40] Waugh, 2006 p 70.
[41] Waugh, 2006 p 70 quotes V Bogdanor, *The Monarchy and the Constitution*, Oxford, 1995, pp66–7.
[42] W Harrison Moore, The Constitution of the Commonwealth of Australia, London, John Murray Albemarle St, 1902, www.setis.library.usyd.edu.au 7 January 2007, p 95.
[43] McGarvie, 1997 p 132.
[44] Campbell, 2003, p 10.
[45] Waugh, 2006, p 70.

premier could advise the governor on the same matters.[46] Further, the principles of responsible government support the concept that the governor gives the royal assent on the advice of the executive, either Executive Council or the premier. The governor should not take action of his own accord, but rather be advised by the ministers who are responsible to the parliament and through the parliament to the people.[47]

If we accept the arguments above and agree that the governor acts on the advice of the executive when giving the royal assent, we need to consider next who precisely should give that advice and whether or not the advice is binding. If we follow the argument that the constitutional basis for royal assent in Victoria is section 15 of the *Constitution Act 1975 (Vic)*, royal assent is a power of the Queen and therefore is a power of the governor as the Queen's representative and not a power of the Governor in Council.[48] Therefore, taking section 87E into account, royal assent is an action of the governor, on which the premier may give advice. Close attention must be paid to section 87E however. It does not say: 'In these situations, the governor must act on the advice of the premier'. Instead it directs 'the Premier…shall tender advice'. Having established an argument for allowing the premier to give advice on the subject of royal assent, we need to investigate whether or not the governor is obliged to follow this advice.

McCaughey, on advice to the governor in general, argues:

> It says nothing about the obligation of the Governor always to accept that advice. It implies, correctly as I think, that the Governor should not act, presumably on an important or serious matter, except after receiving advice. It is quite wrong to suggest that the clause says what the Governor must do.[49]

Whereas McGarvie explains: 'It is best to think of advice from Ministers as a mandatory request because the Governor must follow it.'[50]

It is interesting to see that two governors of Victoria, within 10 years, held such different opinions. It seems the issue has not been comprehensively tested and is not settled. Generally, however, it is considered that when the governor acts without, or contrary to, advice, he is using his reserve power. McGarvie explains when a governor might consider using the reserve power. 'It can be exercised in extraordinary or emergency circumstances without, or contrary to, ministerial advice in order to prevent the democratic system from being abused.'[51]

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[46] Waugh, 2006, p 70.
[47] Green, 2006, p 14.
[48] Waugh, 2006, p 70.
[49] McCaughey, 1993, p 4. McCaughey is actually referring to the wording of the letter patent that set up the Executive Council. The *Constitution Act 1975 (Vic)* was only updated in 1994 to include section 87E, which is the section on advice to the Governor. The wording, however, remains almost unchanged.
[50] McGarvie, 1997, p 131.
[51] McGarvie, 1994, p 51.

In Victoria the reserve powers are not codified but are usually seen to be those involved with appointing or dismissing the premier and dissolving or refusing to dissolve the parliament.[52] But Green argues for a broader use of these powers. He explains that if it is within a governor's reserve power to dismiss a premier who has acted illegally it makes sense that the governor would also be able to take the 'less serious step of declining to accept advice from the Executive Council to do something which is unlawful'.[53]

The decision of the governor on whether or not to follow advice tendered on the giving royal assent would perhaps depend on the situation at hand. It is therefore worth considering the circumstances in which it might be desirable for the governor to do anything other than give immediate assent to a bill. These include situations when the bill has not been validly passed or is unlawful or for the sake of good democracy. Alternatively a premier may advise against assenting to a bill for policy reasons; the government may not agree with the bill or there may have been a change of government since the bill was passed.

Under section 18 of the *Constitution Act 1975 (Vic)* certain sections of the Constitution can only be altered if the amending legislation is passed with an absolute or special majority or approved at a referendum. The Constitution actually says that it is 'not lawful' to present such bills to the governor if they have not been passed as required. Alternatively a bill might be considered unconstitutional; perhaps not in the spirit of the Australian Constitution or acting in some way against the rights set out in the recently commenced *Charter or Human Rights and Responsibilities Act 2006 (Vic)*. Twomey argues that in such situations, providing the attorney-general's certificate were attached, 'the appropriate course is to give assent and leave the determination of any legal dispute to the courts, rather than usurp judicial power by determining whether a Bill has been validly passed'.[54]

Indeed there have been several cases where the courts have been willing to consider such matters[55] but there is some uncertainly about whether a court should intervene before the bill has been given the royal assent or after. Based on precedent it would seem that such cases can be heard before the governor assents to the bill.[56] But based on the judgement of the High Court in *Cormack v Cope*, Campbell explains:

> … the High Court of Australia has made it fairly plain that, even if a court has jurisdiction to intervene prior to completion of the legislative process, it should

[52] Thomas, 1999, p 228.
[53] Green, 2006, p 15.
[54] Twomey, 2006, p 586. She also quotes the federal Attorney-General, who, while considering that an amendment in the bill was unconstitutional, still advised the governor-general to give his assent. 'The Attorney-General responded that for ministers to advise the withholding of assent on the grounds that a provision was unconstitutional would be to "usurp the functions of the High Court".' p 594.
[55] Twomey, 2006, p 586 and Campbell, 2003, p 12.
[56] *McDonald v Cain* [1953] VLR 411 and see Twomey, 2006, p 586.

> ordinarily not do so. Rather, it should await challenge of the validity of a statute which has received the Royal Assent[57]

It is also possible to imagine a situation in which the executive of the day did not agree to a bill which had been passed by the parliament, for example, if government members were given a free or conscience vote and the result was not as the executive had expected or wished. Alternatively a minority government might disagree with a bill passed on its watch. In such situations, Twomey argues that there would be no legitimate grounds for ministers advising against assent.[58] She suggests that if the royal assent were withheld it would most likely result in 'a vote of no confidence and a reassertion of the will of the Parliament'.[59] In addition she argues that the executive would probably not advise against assent as they would not want to draw attention to the fact that their wishes had not been upheld by the House; it might be seen as a vote of no confidence.[60]

Alternatively, if there was a change of government, it is conceivable that the ministers of the new government might wish to advise the governor not to assent to a bill passed before it took power.[61] Twomey argues that it would be preferable, from a process standpoint, for the new government to instead amend or repeal the Act.[62] In Victoria many laws commence on the day or day after they receive the royal assent, giving a government no time to pass amending legislation. In this case Twomey condones advising the delay of royal assent to give the Parliament an opportunity to consider annulling the offending legislation.[63]

It the cut and thrust of politics, however, it is easy to imagine a government trying to bluff its way through the very actions Twomey is advising against. Lindell certainly appears sceptical of a government following convention or doing the right thing when it comes to giving advice about royal assent to a bill it did not agree with. In response to a claim that dicta exist to 'support of the view that there is a clear convention that the Executive Council must advise the Vice-Regal representative to assent to Bills that have passed through the Houses of Parliament'[64] he states

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[57] Campbell, 2003, p 12.
[58] Twomey, 2006, pp 600–1.
[59] Twomey, 2006, pp 600–1.
[60] Twomey, 2006, p 592.
[61] This is unlikely to happen in Victoria, following a change of government after an election, as any bills requiring royal assent are presented to the governor well before the election. Such a situation has more of a historical feel where a ministry lost the confidence of the Assembly and the governor simply appointed a new premier who did have the support. In the current era of strong party politics such as situation is unlikely to occur.
[62] Twomey, 2006, p 598.
[63] Twomey, 2006, p 598.
[64] Lindell, 2003, p 139, footnote 13

> 'In the view of the author the true test for the existence of such a convention can only arise where a minority government holds office and legislation has been passed against the wishes of such a government'.[65]

Finally it is possible to image a governor wanting to refuse to give assent on ideological grounds.

> The Governor's main responsibility is to do all that can be done to ensure that Victoria's democracy works. Democracy requires a system including elections, Parliament, Government and Courts. It also requires the attitudes that are essential to its working — that the great majority of citizens have confidence in their community and its democracy, a respect for others and their rights and just interests, and a readiness to accept and comply with their responsibilities and the decisions of the organs of democracy mentioned above.[66]

If a governor asked to give the royal assent to a bill that went against those pillars that he or she was supposed to support, could the governor refuse to assent to the bill? Or alternatively, if a governor were advised to refuse assent in one of the policy situations above, could a governor, seeing such an action as being contrary to democratic principles or likely to damage the confidence of citizens in the democracy, act against such advice and give the royal assent? In Australia a governor is probably not justified in acting in such a manner 'because laws that subvert the Constitution or the system of responsible and representative government are capable of being held invalid by a court'.[67]

It is interesting to briefly consider what the implications would be, if a governor did act against the advice of the premier.

> If the Premier's advice were wilful or injurious to the office of Governor, and the Governor had to refuse, that would be a serious matter for the Premier, who would possibly have to face the consequences at the hands of the people if his advice were ever made known. If the Governor were stubbornly to ignore the Premier's advice on an important matter, that would have serious consequences for him, should the Premier wish to take the matter further.[68]

It is difficult to imagine much of a public outcry if the governor where asked to delay assent for a few weeks while the government attended to some technical, legal or amending details in the background, as we will see in the recent Victorian example below. However, perhaps following a politically charged debate ending in a free vote or vote against a minority government, the public attention might be captured and the premier and governor would need to be aware of the consequences of their actions if they did anything other than assenting to the bill in question.

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[65] Lindell, 2003, p 139, footnote 13.
[66] The Role of the Governor of Victoria, published by the Office of the Governor, 1994. Melb., p 4.
[67] Twomey, 2006, p 591.
[68] McCaughey, 1993, p 4.

While it is valuable to academically debate what is and is not constitutional when it comes to advising the governor on the giving of the royal assent, it is worth also examining what has happens in practice in Victoria — actions taken, advised and followed as part of the everyday work of clerks, governors, the Executive Council and their staff. Twomey makes the astute observation that parliamentary officers and officials from the Governor's Office usually have the opposite view to academics when it comes to the issue of advising the governor on the royal assent.[69]

Since the 1860s the Executive Council has been advising the governor of Victoria to assent to bills.[70] Twomey reports that on 12 June 1996 the Executive Council issued a standing instruction to the governor to assent to each bill, which was accompanied by the attorney-general's certificate.[71] It would appear that the practice of advising the governor to assent to bills began early in the Parliament's history, when the Governor of the time took two bills, to which he had been asked to assent, to an Executive Council meeting and sought the advice of the Executive Council on whether or not he should assent to the bills in question.[72]

A snapshot of the opinions of clerks taken in 1954 offers another opinion entirely. At that time the Clerk of the Parliaments in Victoria, Mr McLachlan, was preparing for the royal visit and the possibility that the Queen would give her assent to bills while in Victoria. He wrote to each parliament in Australia, New Zealand and Great Britain, asking whether the governor must seek the advice of the Executive Council before assenting to bills. He explained his own view on the matter:

> I hold the view that His Excellency, although he must seek the advice of his Executive on matters of administration, is not required to seek their advice on Bills submitted to him for assent. He complies with his Royal Instructions in seeking the legal advice of his law officers of the Crown, namely the Attorney-General.[73]

The responses from his fellow clerks are quite emphatic and include: 'At no stage does the Governor-General seek the advice of approval of the Executive Council.'[74]

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[69] Twomey, 2006, p 593.

[70] Waugh, 2006, p 71. Minutes of the Executive Council 9 July 1860 to 21 January 1862, for example 9 July, 25 July and 3 September 1960. In each case the Governor informs the Executive Council that he has received certain bills for the royal assent and the Executive Council then advises him to assent to the bills (or occasionally to reserve them for Her Majesty's assent, see 17 September 1860). Circa 1954 memo from the Clerk of Executive Council to the Governor (file: Royal Assent to Bills): 'It has been the practice in this State to announce at meetings of the Executive Council:- "His Excellency is advised to give Royal Assent to the following Bills".' 1984 Minutes of Executive Council: 'His Excellency was this day requested to give the Royal Assent to the following bills:-'.

[71] Twomey, 2006, p 583.

[72] Circa 1954 memo from the Clerk of Executive Council to the Governor (file: Royal Assent to Bills).

[73] Letter from Mr McLachlan, Clerk of the Parliaments and Clerk of the Legislative Assembly, Victoria, 25 January 1954 (file: Royal Assent to Bills).

[74] Letter to Mr McLachlan, Clerk of the Parliaments and Clerk of the Legislative Assembly, Victoria, from F C Green, Clerk of the House of Representatives 28 January 1954 (file: Royal Assent to Bills).

and: '…the question of whether the Governor should or should not assent to any Bill has absolutely nothing whatever to do with the Executive Council …'[75]

The only dissenting voices come from England where '[t]he Queen, in giving her Royal Assent to Acts of Parliament, does not depart in any way from the convention that the Queen acts on the advice of her Ministers'[76] and South Australia where the Executive Council recommends assent but the Clerk felt that the governor was not obliged to follow the advice.[77]

We now turn to consider examples of problems that have arisen with the royal assent process in Victoria. Since much of parliamentary practice in Victoria is based on precedent, we need to know what those precedents are. In the first decade of the Parliament of Victoria the Governor withheld the royal assent from at least two bills. On 24 November 1857 His Excellency Henry Barker withheld assent from *An Act to assimilate and simplify the Oaths of Qualification for Office, and to recognize and establish in Victoria the right of absolute civil equality of all Her Majesty's subjects irrespective of religious belief*.[78] An explanation for this action was given immediately thereafter in the Assembly. 'The bill in its present form, implied that civil liberty, irrespective of religious creed, had not previously existed in this colony, and His Excellency was not prepared to affirm that proposition.'[79] However this reasoning appears no to have been accepted by the other members. For example:

> He thought that the excuse made by the hon. gentleman for the postponement of the royal assent was a very lame one for the measure seemed to be simply postponed because the terms of it threw a doubt on the fact that some of Her Majesty's subjects had not always enjoyed civil liberty irrespective of religious belief.[80]

Some debate then followed about whether the Governor had withheld assent of his own accord or had followed the advice of his ministers. The general consensus seemed to be that the Governor acted on the advice of his ministers and that this made the Government look foolish having introduced the bill in the first place.[81] It is difficult to judge from this distance whether Henry Barker was simply protecting the reputation of his queen or whether the Government was playing politics.

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[75] Letter to Mr McLachlan, Clerk of the Parliaments and Clerk of the Legislative Assembly, Victoria, from H Robins, Clerk of the Legislative Assembly, NSW 28 January 1954 (file: Royal Assent to Bills).

[76] Letter to Mr McLachlan, Clerk of the Parliaments and Clerk of the Legislative Assembly, Victoria, from F W Metcalfe, Clerk of the House of Commons 4 February 1954 (file: Royal Assent to Bills).

[77] Letter to Mr McLachlan, Clerk of the Parliaments and Clerk of the Legislative Assembly, Victoria, from G D Combe, Clerk of the House of Assembly SA 4 February 1954 (file: Royal Assent to Bills).

[78] Minutes of the Proceedings, No 90, 24 November 1857, p 310.

[79] The Victorian Hansard, Vol 2, 24 November 1857, p 1398.

[80] The Victorian Hansard, Vol 2, 24 November 1857, p 1398.

[81] The Victorian Hansard, Vol 2, 24 November 1857, pp 1398–1400.

Less that a year later, on 4 June 1858, the Governor withheld assent from another bill — *An Act to shorten the duration of the Legislative Assembly*.[82] An explanation for this was given immediately afterwards, during the Governor's address to the Parliament upon prorogation:

> The Bill for shortening the duration of Parliament was passed by the Assembly without the concurrence of a majority of the whole House. I have been advised that such a majority was necessary under the Constitution Act, and that it was also requisite that it should be reserved for the signification of Her Majesty's pleasure.
>
> To have transmitted to the Secretary of State a Bill which had been irregularly passed, would have been to incur the risk of having it returned to me for re-introduction. As means of avoiding this delay, I have disallowed it, with a view to its early introduction in the ensuing Session. As it could not take effect, even with the present Parliament, until the end of next year, this delay will be of no consequence, and it can be re-enacted, reserved, and received back from England, long before the earliest possible period for its operation can arise.[83]

Interestingly, given some of the other examples list here, this pronouncement seemed not to have resulted in any complaint in the chambers. Presumably in this instance the Attorney-General did not provide the certificate stating that the bill was lawful and the Governor therefore took the sensible action of withholding assent. Perhaps the politics had been played out in the Assembly in not passing the bill with an absolute majority and so no political interference was required at the stage of royal assent.

In April 1953 an injunction was taken out against the Clerk of the Parliaments to prevent him from presenting or attempting to present the bill for An Act to be known as the *Electoral Districts Act 1953* and against the ministers of the Executive Council preventing them from getting or attempting to get the Governor to assent to the bill. The plaintiffs, two members of the Assembly, argued that the bill was one that should have been passed by an absolute majority. It appears that at that time the manner and form provisions of the Victorian Constitution were even more confusing than they are today. When the matter was heard the Court ruled in favour of the defendants and the bill was duly presented for and given the royal assent. In the course of proceedings the Court ruled, based on *Trethowan v. Peden* (1930) 31 SR (NSW) 183 among others, that it had the jurisdiction to interfere in the royal assent process as assent did not occur 'within the four walls of Parliament' and therefore they were not interfering with the powers immunities and privileges of the Parliament.[84]

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[82] Minutes of the Proceedings, 4 June 1858, p 122.
[83] Minutes of the Proceedings, 4 June 1858, p 123.
[84] *McDonald v Cain* [1953] VLR 411, Gavan Duffy J, p 419. It is interesting to consider if the Court could have come to the same conclusion if the process of giving the royal assent in the Council chamber had not come to an end in 1878.

Initially, as part of this process, a writ was issued against the Clerk of the Parliaments seeking a declaration against the presentation of the bill for royal assent.[85] The Executive agreed to withhold assent until the matter had been heard[86] but apparently the Clerk of the Parliaments was uncomfortable with this arrangement.[87] He wrote to the Speaker advising '[t]he issue of the writ appears not to impose any legal restraint on me in carrying out the duties imposed on me by the Joint Standing Orders of both Houses' and that he planned to present to bill for assent.[88] An order was therefore made preventing the Clerk of the Parliaments from presenting the bill for assent until the hearing.[89] After the hearing and after the bill had been assented to, the Clerk of the Parliaments again wrote to the Speaker advising of the outcome.[90] In this situation it appears that the Clerk of the Parliaments acted appropriately — attempting to present to bill for royal assent and not following the arrangements of the Executive. Perhaps in this situation the Premier would have been justified in advising the Governor to withhold assent to avoid any difficulties that may have arisen had the Court found that the bill should not have been presented for assent.

The Police Offences (Trap-Shooting) Bill, which was to make trap shooting illegal from the day of assent, was introduced in the Council in late 1958. The Premier, who had voted against the bill, clearly had some concerns about the bill immediately coming into operation. He reminded the House: 'Possibly a number of gun clubs have arranged fixtures covering the Christmas–New Year period.'[91] The morning after the bill was passed in the Assembly, the *Herald* reported that the Premier had announced that the bill would not receive the royal assent until the new year.[92] It seems that assent was delayed by the Premier instructing the Attorney-General to withhold his certificate.[93] The Clerk of the Assembly appears to have had some concerns at the time as to whether this was constitutional[94] and he was not the only one. A privilege motion was immediately moved and debated in the

[85] Hansard (Vic), vol 241, 15 April 1853, p 772.
[86] *Electoral Districts Bill 1953 — Proceedings had in the Supreme Court of Victoria in the cases J G B McDonald and K Dodgshun ,Plaintiffs, and H K McLachlan, Defendant, in Action No 553; and J G B McDonald and K Dodgshun, Plaintiffs, and John Cain and others, Defendants, in Action No 554*, Parliamentary Paper No 37, 1953, p 34, Affidavit of P Moerlin Fox.
[87] *Electoral Districts Bill 1953 — Proceedings had in the Supreme Court of Victoria in the cases J G B McDonald and K Dodgshun, Plaintiffs, and H K McLachlan, Defendant, in Action No 553; and J G B McDonald and K Dodgshun, Plaintiffs, and John Cain and others, Defendants, in Action No 554*, Parliamentary Paper No 37, 1953, p 30, Affidavit of J G B McDonald.
[88] Hansard (Vic), vol 241, 15 April 1853, p 772.
[89] *Electoral Districts Bill 1953 — Proceedings had in the Supreme Court of Victoria in the cases J G B McDonald and K Dodgshun ,Plaintiffs, and H K McLachlan, Defendant, in Action No 553; and J G B McDonald and K Dodgshun, Plaintiffs, and John Cain and others, Defendants, in Action No 554*, Parliamentary Paper No 37, 1953, p 14.
[90] Hansard (Vic), vol 241, 15 April 1853, p 830.
[91] Hansard (Vic), vol 256, 2 December 1958, p 2208.
[92] Hansard (Vic), vol 256, 3 December 1958, p 2245–6.
[93] Legislative Assembly (Vic) file, Royal Assent held over.
[94] Legislative Assembly (Vic) file, Royal Assent held over.

Legislative Council, with the mover noting 'If Parliament passes a measure, is the will of the Parliament to be flouted by the Premier?'.[95] While the privilege motion was defeated along party lines it is clear that there was grave concern for the precedent that was being established.

> The failure to proclaim this measure may be relatively harmless inasmuch as there are no serious consequences flowing from it, but it may well be that because a Bill not being proclaimed by the Government, grave consequences could ensue. I suggest that a precedent should not be established.[96]

This delay of the royal assent seems to have occurred on purely political and populist grounds, with the Premier not wanting the Governor to immediately assent to the bill because '[i]t would be like banning football a week before the grand final.'[97] Further, the method used to delay assent does indeed seem to be unconstitutional and against the axiom that bills 'cannot be legally withheld' from royal assent.[98]

In 1984 two bills amongst a list of 19 did not receive the Attorney-General's certificate in time to get royal assent on Tuesday 20 November 1984. This caused a flurry of activity for the Assembly's procedure officer as he established how the Acts should be numbered if two from the list were not to be assented to. While there was no scrutiny in these cases, probably because the multitude of bills passed at the end of the session were assented to over a period of weeks and the Assembly was dissolved and an election held before Parliament met again, the notes from time indicate that the Government of the day was actively involved in the assent process.

> The reason submitted for the holding over of the *Subordinate Legislation (Review and Revocation) Act* 1984 was that the Attorney-General wished to discuss certain related matters with the Treasurer. The reason supplied for the holding of the *Films (Classification) Act* 1984 was that the Attorney-General wanted to find out how long it would take for the Act to be printed.[99]

Neither explanation seems reason enough to justify withholding the Attorney-General's certificate. When it appeared that assent was to be delayed for a further week because the Attorney-General's certificate had still not been issued it was explained that 'it was being withheld on instruction of the Premier.'[100] Assent, however was not further delayed and nothing further came of it. Again the delay seems to be orchestrated by delaying the presentation of the attorney-general's certificate. A more constitutional approach would probably have been for the Premier to directly advise the Governor to withhold assent.

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[95] Hansard (Vic), vol 256, 3 December 1958, p 2246.
[96] Hansard (Vic), vol 256, 3 December 1958, p 2251.
[97] The Herald, as read into Hansard (Vic), vol 256, 3 December 1958, p 2246.
[98] May, 23rd edition, p 652.
[99] Memo to Clerk of the Parliaments, Mr J H Campbell from the Procedure Officer Neville Holt, dated 21 November 1984, Legislative Assembly (Vic) file: Royal Assent held over.
[100] Memo to Clerk of the Parliaments, Mr J H Campbell from the Procedure Officer Neville Holt, dated 29 November 1984, Legislative Assembly (Vic) file: Royal Assent held over.

In late 2005 royal assent to the Racing and Gambling Acts (Amendment) Bill was delayed for six weeks. The Clerk of the Parliaments initially presented the bill to the Governor on 11 October 2005 and at that meeting the Clerk of the Executive Council read out advice from the Premier to the Governor, advising that the Governor should not sign the Racing and Gambling Acts (Amendment) Bill. The Clerk of the Parliaments was informally told that assent would be delayed for six weeks and this information was later confirmed by letter. The Clerk of the Parliaments advised the Presiding Officers that the bill had not been assented to and they informed their respective Houses at the time when the royal assent of bills is usually announced.[101] The proposed delay in assent received some significant attention. In the Parliament, members took points of order,[102] asked questions to the Premier and other members,[103] spoke on the issue during the grievance debate in the Assembly,[104] and in the Council moved an urgency motion on the issue[105] and later a motion condemning the Government.[106] Media attention included a range of newspaper articles and a segment on *Stateline (Vic)*.[107] All this scrutiny was divided between concern that assent could be delayed:

> By advising the Governor to withhold assent without seeking parliamentary authority to change the commencement date of the bill, the Premier has circumvented all the established procedure set out in Victoria's constitutional arrangements.[108]

and a desire to uncover some political intrigue behind why the delay was needed:

> I refer the Premier to the racing minister's claim today that Racing Victoria requested the six-week delay for royal assent to the racing and gambling bill. Given that Racing Victoria categorically denied this claim will the Premier confirm that the decision to delay the bill was at the request of, amongst others, the Tasmanian Labor Premier.[109]

In a letter to the Speaker and President, the Premier explained the delay as follows:

> The government elected to advise the Governor to defer the assent to the bill once it was brought to the attention of the government, after the bill passed through Parliament, that there were significant compliance issues with a group of stakeholders with respect to that new enforcement regime. The government

[101] Votes and Proceedings (Vic), No 139, 18 October 2005, p 848.
[102] Hansard (Assembly, Vic), 18 October 2005, p 1447. Hansard (Council, Vic), 20 October 2005, pp 1501–2.
[103] Hansard (Assembly, Vic), 19 October 2005, pp 1514 and 1517; 20 October 2005, pp 1616 and 1620. Hansard (Council, Vic), 19 October 2005, pp 1496–7.
[104] Hansard (Assembly, Vic), 26 October 2005, pp 1768–70.
[105] Hansard (Council, Vic), 25 October 2005, pp 1625–44. The motion was defeated along party lines.
[106] Hansard (Council, Vic), 23 November 2005, pp 2203–22. The motion was defeated along party lines.
[107] *Herald-Sun*: 20 October 2005, p 2; 21 October 2005 p 30.*The Age*: 28 October 2005; 16 November 2005, p 7; 1 December 2005. *Stateline*, ABC, broadcast 28 October 2005.
[108] Hansard (Council, Vic), 25 October 2005, p 1626.
[109] Hansard (Assembly, Vic), 20 October 2005, p 1620.

> considers that the delay is appropriate, to ensure that those stakeholders are given every opportunity to bring themselves into compliance with the new regime before it commences.[110]

The Act was due to come into operation on the day after the day on which it received the royal assent.

In this situation the Premier took the more widely accepted action of advising the Governor to delay giving his assent, rather than trying to delay assent through some other means such as withholding the Attorney-General's certificate. Based on the Premier's explanation for the delay, the delay seems reasonable — it would not be good government to introduce legislation that the community could not comply with. However it does lead the observer to ask if some alternate action could have been taken, for example could the Governor instead have recommended amendments to the bill under section 14 of the *Constitution Act 1975 (Vic)* changing the commencement date of the bill. One is also left wondering why the Government did not realise sooner that there would be a problem with compliance with the new laws; after all it was a Government bill and was passed with general support from the opposition parties.[111]

The royal assent process is clearly not as straightforward and controversy free as one might expect. The process for assenting to bills has even changed during the 150 years of the Parliament of Victoria. Assent can be delayed or refused which brings a multitude of further complications. While history shows that clerks and members of parliament might feel that royal assent is a matter for the governor alone and should not be interfered with by the executive, history also shows that the executive has regularly participated in the royal assent process. Executive Council has given advice on assenting to bills, premiers and attorney-generals have delayed the attorney-general's certificate and the premier had advised the governor to delay royal assent. Academic consideration of the issue is not conclusive but generally seems to support the contention that the premier can advise the governor to withhold the royal assent. Few decisive precedents exist that set out on what basis this advice can and should be given and even more problematic is whether or not the advice must always be followed. One would hope that good governance will rule such decisions in the future, but the precedents of the past do not always set the best example and sometimes despite our best intentions politics interfere with doing the 'right' thing. In such a world, it is probably best that the clerk of the parliaments and the governor do everything they can to assure that bills are assented to and leave the politics to the politicians. ▲

[110] Letter was read out by the President. Hansard (Council, Vic), 24 November 2005, p 2301.
[111] Hansard (Assembly, Vic), 13 September 2005, pp 828 and 831.

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