

PARLIAMENTARY GOVERNMENT IN NEW SOUTH WALES

Book Notes by Alan J. Ward*

THE PREMIERS OF NEW SOUTH WALES, 1856–2005, David Clune and Ken Turner, 2 vols., Sydney: Federation Press, 2006.

DECISION AND DELIBERATION: THE PARLIAMENT OF NEW SOUTH WALES, 1856–2003, David Clune and Gareth Griffith, Sydney: Federation Press, 2006.

To commemorate the 150th anniversary of responsible government in New South Wales, a Sesquicentennial Committee was commissioned to sponsor projects on the history of representative government in the state. Two excellent products are reviewed here. The first is a two volume work of biographies of all the premiers of New South Wales from 1856 to 2005, edited by David Clune (New South Wales Parliamentary Library) and Ken Turner (University of Sydney). Clune joins with his Parliamentary Library colleague, Gareth Griffith, in the second book, an impressive history of the New South Wales Parliament.

These two works provide a comprehensive history of representative government in New South Wales but they do not provide a clear account of the evolution of responsible government, the subject of the celebration, because it is not clear from them what the term means. Clune and Griffith identify the elements of the model as it was understood in 1856: governments held office with the confidence of the Legislative Assembly, the expenditure of public monies required parliamentary approval, money bills originated in the Assembly, and the Governor ordinarily acted on ministerial advice (Clune and Griffith: 28). But this is not a description of responsible government today. If a model of responsible government were to hand to guide us, we could track its evolution in these otherwise excellent books quite easily, but it was not written into the Australian colonial, state or Commonwealth constitutions, and Australian attempts to define it tend to focus on British concepts, such as constitutional conventions, the reserve powers of the Crown, and ministerial and collective responsibility, which are contested concepts. R.S. Parker hinted at an alternative approach when he argued in 1980 that responsible government in Australia is a narrow, and essentially British, variant of parliamentary government, but he was wrong to conclude that parliamentary government cannot be identified as a model in its own right.¹ It can, and it provides a useful way of understanding more completely what these books tell us about New South Wales.

Parliamentary government is practiced in a large number of countries around the world. Most of them have had the model written into constitutional law, Ireland, for

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¹ R.S. Parker, 'Responsible Government in Australia', in P. Weller and D. Jaensch, *Responsible Government in Australia*, Richmond, Victoria: Drummond, 1980, pp. 11–18.

example, since 1922, and this is the case, too, in Norfolk Island and the Australian Capital Territory. In addition, the draft Northern Territory constitution of 1996, which was abandoned when statehood was rejected in 1998, substantially codified parliamentary government, and the Turnbull report of 1993 showed how it could be done for the Commonwealth.² Given these examples and their high level of agreement, it really is not difficult to construct a generic model of parliamentary government that we can apply to New South Wales.

When British politicians began to speak of ‘responsibility’ in the eighteenth century they meant that ministers should be drawn from, and answerable to, Parliament. The sovereign was responsible for the choice of ministers, but as a consequence of the revolution of 1688, which led to the rights of Parliament being recognized by statute, this choice had to be acceptable to a majority in the House of Commons that controlled the supply of money to the Crown. Over time the model became more complex and a study of contemporary constitutions and the practices of parliamentary government around the world indicate that it has eight core characteristics. These are either constitutional rules or political practices that are consequential to these rules.

First, whilst in some continental European parliamentary countries ministers may not sit in Parliament, in most parliamentary countries they do. Australia is in this large sub-set, and the first characteristic of the Australian variant of parliamentary government is, therefore, that ministers sit in Parliament. *Second*, the executive, the Government, is formed by members of Parliament who have the support, or at least the acquiescence, of a majority in Parliament. Furthermore, because it is impractical to have the Government responsible to two majorities that might disagree, responsibility in a bicameral parliament is to one house, the more popularly elected one.³ If the Government loses its support in this house it must resign immediately, and there are always constitutional ways to arrange this. *Third*, disciplined political parties exist to facilitate government formation and the legislative process. *Fourth*, in a bicameral parliamentary system one house, in practice, again, the more popularly elected one, has primacy. *Fifth*, a Cabinet composed of department ministers uses party discipline in Parliament and control of the public service to dominate policy-making and administration. *Sixth*, the Prime Minister, who is both the Government’s leader and a party leader, dominates the Government. *Seventh*, the head of state is primarily a figurehead with limited powers who poses no serious challenge to the authority of the Prime Minister and Cabinet. *Eighth*, the system has a powerful tendency to concentrate power in the Prime Minister and Cabinet.

The first characteristic of parliamentary government in Australia is the rule that ministers must sit in Parliament. This is constitutional law in some Australian states

² Australia, Republic Advisory Committee, *An Australian Republic: The Options*, ‘The Report’, 102–16.

³ Only in Italy does the Constitution require the Government to secure the support of both houses. Fortunately they tend to agree.

and the Commonwealth but not in New South Wales, where it has been a convention since self-government. Oddly, a constitutional amendment to Section 4 of the New South Wales Constitution, requires junior ministers to have seats, but not their senior colleagues.

Nor is there any reference in the New South Wales Constitution to the second characteristic of parliamentary government, the rule that the Government must have the support of the lower house. Again, this is a convention. Clune and Turner write, 'No Governor ever imagined he could decline to swear in the leader of the party or parties that had won a majority of seats in the Assembly,' (Clune and Turner, v.1: vii) but Governor Denison believed the first Premier could sit in the Council. Stuart Donaldson, an Assembly leader, refused to serve in a Government led from the Council and Denison, in appointing Donaldson, set the precedent that the Premier sits in the Assembly. Only one New South Wales Premier has been appointed from the Council, Barrie Unsworth, in 1986, and he immediately transferred to a seat in the lower house at a by-election.

The corollary to the rule that the Government must be supported by a majority in the lower house is that it must resign if it loses that support. This was accepted as a convention, too, in New South Wales from the beginning of self-government, although quite what it meant was not clear. Donaldson resigned less than three months into his term, Clune and Turner tell us, 'owing to lack of support' in the Assembly, but his successor, Charles Cowper, resigned because he lost a vote of confidence (Clune and Turner, v.1, 228). Cowper's successor, Henry Parker, resigned because he lost a vote on what he would have called a matter of 'vast consequence' (Clune and Turner, v.1, 64). These reasons could all be grounds for a resignation today, but it does not follow that an election could be called to find a successor. A constitutional referendum in 1993 installed Section 24B in the Constitution which provides that a Governor might dissolve the Assembly short of its four-year term were the Government to lose a vote of confidence or be denied a supply of money for ordinary annual services of government by the Assembly. In other cases he is expected to replace the Government with another from the same Parliament.⁴ Party discipline ordinarily prevents these contingencies but every parliamentary system recognizes the possibility that the government might lose its support in the lower house and permits an early election in at least some circumstances to find a replacement, if this proves necessary.

By convention no New South Wales Government has ever had to resign because it had no majority in the Legislative Council. For many years the Commonwealth Senate and all the state upper houses could force the Government out of office by denying it a supply of money. This never happened in New South Wales, but it was eliminated even as a possibility by a constitutional amendment in 1933 that brought

⁴ Having set this apparent limitation on the Governor in Section 24B (2), paragraph Section 24B (5) is bizarre. It permits the Governor to ignore paragraph 2 at will, although by convention he would be expected to act on the Premier's advice.

the state into line with the great majority of parliamentary constitutions by prohibiting the Council from rejecting a bill for the ordinary annual services of government. Bertram Stevens saw the reform through Parliament and a referendum but, strangely, this very important reform it is not discussed in the chapter on Stevens in Clune and Turner.

The third characteristic of parliamentary government, party government, is a consequence of the rule that governments must have the support of a majority in the lower house. Disciplined parliamentary political parties give MPs who share values and policies the best chance of forming governments and sustaining them in office long enough to see their policies enacted. It took Australian politicians a long time to realize that parliamentary government is necessarily party government, and as late as the 1950s, Liberals were reluctant to concede that the Council was a party house. In the early days of self-government there were no parties, only factions and leaders who were brought together, Premier James Martin wrote in 1863, 'by such accidental combinations as might appear to be able to command a majority in the Legislature' (Clune and Turner, v.1, 111). The adverse effects on the stability of Governments and their legislative success are abundantly clear in these books. Since the advent of the modern party system, the norm is for a Government to leave office after losing a general election, not after losing support in the lower house, which party discipline ordinarily prevents. Nineteenth century practice was quite the reverse. Nineteen of 29 ministries between 1856 and 1901 were terminated by defeats in Parliament, not by election defeats. Since 1910 governments have lasted longer and have had better legislative records, although Clune and Griffith cite numerous examples of devastating intra-party conflicts that damaged party competitiveness in the modern period in New South Wales, particularly in the Australian Labor Party.

The rule that the lower house has primacy, the fourth characteristic of parliamentary government, is clearly written into parliamentary constitutions abroad, and has been constitutional law in Britain since 1911, but it is often questioned in Australia because of its powerful upper houses. All the colonies and the Commonwealth began their lives with upper houses that could reject any bill, including supply, and most of them still can. This prompted a long series of proposals to reform upper houses dating back to the 1850s. The right of the New South Wales Legislative Council to reject supply was abolished in 1933, but it may still reject anything else. Furthermore, exercising a newfound legitimacy since popular elections were introduced in 1978, and free of Government control since 1988, the Council has staged a revival as a house of legislative review, scrutiny and inquiry. It regularly defeats the Government in divisions and its committee system is now 'a formidable instrument for scrutinizing the Executive and conducting inquiries into matters of public concern' (Clune and Griffith: 687).

Governments tend to regard upper houses which they do not control as obstructions to be overcome, but this actually depends on the premier of the day. Indeed, in time the need to negotiate and compromise may become imprinted on governments.

Clune and Griffith find that ‘the full blooded confrontation between the Houses’ that marked the radical, economic rationalist Greiner Coalition Government of 1988–1991 was not evident in Bob Carr’s 1999–2003 Labor Government which showed, they write, ‘that “strong” bicameralism could coexist with the efficient flow and management of Government business’ because ‘the passage of Government legislation has become a consultative business’ (Clune and Griffith: 686–7).

Despite a great deal of evidence of the Council’s lively influence on legislation and government scrutiny, Clune and Griffith provide ample data to indicate that the New South Wales Assembly, and the Government that controls it, has supremacy in Parliament. The Government is responsible to a majority in the Assembly, not the Council. Ministers may sit in the Council but the Premier and a majority of the Government always sit in the Assembly. Since 1933 the Council has not been able to block supply but the Council’s agenda has always been dominated by Government bills sent up from the lower house, and even with the upper house under opposition control in the period 1991–94, Clune and Griffith note that the Government ‘usually got what it wanted in some form,’ although it ‘had to accept negotiation and compromise as part of the price’ (Clune and Griffith, 566). Significantly, no opposition or private member bills can succeed without the Government’s approval in the lower house. Between 1995 and 2003 only six private member’s bills became law, all with the Government’s support or acquiescence. We should also note that Legislative Council Standing Orders concede priority to Government business in both the Council and its committees and that Government members chair important Council committees, even when they are in the minority. Finally since the Council lost its power to reject supply bills in 1933, the Government, through the Assembly, has controlled the Council’s budget. All of this suggests that although it is more powerful than most upper houses, the New South Wales Council has accepted its subordinate status.

The fifth characteristic of parliamentary government, the central role of the Cabinet in policy-making and administration, is not mentioned in the New South Wales Constitution either. The colonial constitution identified five ministers and required them to be appointed to the Executive Council, which was chaired by the Governor. Clune and Griffith note that this body, which has no equivalent in Britain, makes the Government collectively responsible for a wide range of matters, but it is not the Cabinet. It was the New South Wales *Gazette* that first used the titles Premier and Cabinet, not the Constitution. In 1856 Governor Denison believed the Executive Council would be the centre of governance, as it had been before self-government, but he was quickly disabused and the Cabinet, composed today of department ministers who are simultaneously party leaders, has been the primary source of decision-making in the state since 1856.

One frequently asserted rule of parliamentary government is that ministers are collectively responsible for Government business, but this is rarely found in constitutional law. In the nineteenth century some New South Wales ministers did

not sit in the Cabinet and they voted against their colleagues quite often, but for the most part collective responsibility was observed and ministers resigned in cases of policy differences with their colleagues. In the twentieth century collective responsibility tightened up, but less as a constitutional rule than as a pragmatic element in party discipline.

Another frequently asserted rule of parliamentary government is that ministers are individually responsible to Parliament for their departments' policies and administration. Ministerial responsibility has always existed in New South Wales in the sense that ministers represent their departments in Parliament, but it is less clear that they must resign if found responsible for serious errors of policy or administration. Cabinet solidarity and party discipline will ordinarily protect ministers in such cases in the Assembly, and the Council, by convention, has no authority to force a resignation. Bob Carr's Treasurer, Michael Egan, MLC, was three times suspended from the Council without resigning. However, ministers have often resigned over issues of personal integrity.

The sixth characteristic of parliamentary government is that the Premier dominates the Cabinet. The premiership was a different office in the nineteenth century than today, in part because few Premiers came to office as a result of election victories, and without the support of party discipline, they had to massage fragile Assembly majorities. Nowadays the Premier is a party leader who is judged by whether he or she can lead the party to election victory. As always, the leader is commissioned by the Governor to form a Government, assigns portfolios, chairs the Cabinet and sets its agenda, but the modern Premier has a substantial department through which to monitor or intervene in the business of ministerial colleagues at will. And of course, the leader is the focus of the modern media's attention.

Given the roles of Cabinet and Premier in parliamentary government, it will be no surprise that the seventh characteristic of the model is the weakness of the head of state. The first governor after self-government, Denison, thought responsible government was 'an absurdity born in the minds of vain colonials and ignorant politicians in Britain' (Clune and Turner, v.1, 21). He also believed that the Executive Council would be the centre of governance in the colony. That was not to be, but Clune and Griffith make clear that governors intervened in government affairs well into the post-colonial period. They opposed packing the appointed Legislative Council to secure Government majorities unless the Government had an election mandate for its policies. Governors quite often refused to dissolve the Assembly. And of course, in 1932 the Governor dismissed Premier Lang. However, the Governor essentially disappears from these books after 1932.

The final characteristic of parliamentary government is, in a way, the sum of all that has gone before; the tendency of the model to centralize power in the Prime Minister and Cabinet. A theme that Clune and Griffith use throughout their book is the tension in New South Wales, as in all parliamentary systems, between executive government, with its focus on the Government's ability to make decisions, free of

parliamentary constraints, and liberal government, with its focus on Parliament's ability to debate, review and scrutinize. These books confirm that since the emergence of modern political parties in 1910, New South Wales has experienced the growing power of the executive.

The only occasion in recent times when the Liberal model appeared to shine in the Legislative Assembly was from 1991 to 1994 when Premier Nick Greiner was forced by three Independents in a hung Parliament to introduce parliamentary reforms to retain office. But this was an aberration, and the liberal model faded when Labor gained a majority in 1995. Clune and Griffith conclude that 'the reality [in the Assembly now] is that the 'executive model is dominant and will probably continue to be so' (Clune and Griffith, 692). In an age of adversarial party politics, no Government is going to surrender control of the lower house.

The liberal model has been more evident in the Legislative Council but only when the Government is in a minority, which has been the case since 1988 but need not be permanent. When Premier Neville Wran's Government was in a Council minority in the 1976–78 session it lost every Council division. In 1978–80, it was in a majority and it won every division. However, no Government has controlled the upper house since 1988 and the liberal model appears to have flourished in the Council as a house of review and scrutiny since then. Council members have grown in professionalism, there is an enhanced use of committees, and there are other signs of Council autonomy. But with only 42 members, the Council is too small a body to institutionalize a powerful committee system that might truly hold the executive to account, and Clune and Griffith are sceptical of a 'gene pool limited to 42 members' (Clune and Griffith, 694). More importantly, we have not really seen the institutionalization of the liberal model in the Council. That would require long-term support from both major parties, which does not exist. Instead, we see Governments yielding, of necessity, to the demands of a very assertive handful of independents and minor party members who hold the balance in the Council, which is surely not an ideal liberal model. Fred and Elaine Nile become awfully important in the latter pages of Clune and Griffith.

These books indicate that the exigencies of Council representation have saved New South Wales from the worst excesses of executive dominance, Bjelke-Petersen's Queensland, for example. Nonetheless, one can also conclude from them that New South Wales lies squarely within the parameters of parliamentary government, and this includes the strong tendency in the model to concentrate power in the executive. They could well be sub-titled, 'the rise of the executive state in New South Wales.' ▲