Head of State – Parliament Relations: Walter Bagehot and *Constitution Act 1934* (TAS)

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Sometime during the next six months Tasmanians will go to the polls to elect a new House of Assembly. However, this is not what most voters believe they will be doing. There is a widely shared assumption amongst the voters, media and political parties that the purpose of the ballot will be to elect a Government. Many will recognise that their vote for a Premier or a Government is filtered through the Parliament without being aware of the precise linkages at work. However, even those who are vaguely aware of the role of the Parliament, there is a fairly general belief (as there is across Australia) that the intermediacy of the legislature is largely *pro forma*. The assumption that the preferences expressed in the polling booth ought to be translated more or less directly into Governmental outcomes has been clearly on display at the national level over the past decade. The public repeatedly gave vent to outrage whenever internal party spills changed what many voters perceived as their intended vote for a particular Prime Minister or a Government.[1]

While this electoral disconnect could be disparaged simply as civic ignorance, it would be rather unfair. For very practical reasons, the voting public is entitled not to notice the "blip" between the ballot box and the installation of a Government following the election. The mandate theory of elections, diminished constituency-based pre-selections and the increasingly presidential style of campaigning have combined to reinforce the idea that voters should be electing a Government rather than a parliament. Moreover, there is no generally accepted more nuanced public narrative on how votes wend their way from ballot box to the Executive Offices.

Arguably, however, it really does not matter if the electorate is unaware of the more arcane aspects of the internal mechanics of parliamentary democracy. In most circumstances, it seems to be a case of, "no harm, no foul". Unfortunately, "most circumstances" does not apply when voting does not follow the expected two-party script of elections being a referendum on Government. And, in Tasmania's post-Federation experience, such exceptions are far from unusual. The State adopted the Hare-Clark proportional representation system in 1907 for the House of Assembly with a result that about a third of its parliaments since this time have produced non-majority Governments. Consequently, Tasmania has encountered recurrent episodes of uncertainty regarding how the electoral outcome should be interpreted for the formation of a Government.

This paper looks at how Tasmania has dealt with the uncertainties of forming a Government through the lens of the role of the head of state in this process. The central concern for this paper is the way in which the office of the Tasmanian Governor has been dragged into the partisan manoeuvrings to resolve non-majority electoral outcomes in recent years. Just as Bagehot observed, conventions are not easily translated into law. An apparent disregard of the conventions relating the dual roles of the head of state occurred when some Westminster

[1] Kevin Rudd, for example, explicitly used the claim of the removal of a prime minister "elected by the people" to fuel public anger at the party caucus decision to replace him with Julia Gillard as leader. Dennis Shanahan, 'How Julia Gillard's ambition destroyed Kevin Rudd and ALP', *The Australian*, 16th of November, 2013, Accessed 21 May 2017.

conventions were codified, rather accidently, in the mid-1970s. Ironically the voting public's ignorance of the general conventions regarding the head of state was matched by that of the politicians who drafted the Section 8B(3) amendment to the *Constitution Act 1934* (Tas). A casual and partisan disregard of the consequences for this legal change opened the door for the electoral exploitation that has occurred since. Given that the misconceptions at the heart of Section 8B(3) provided the opportunity for such mischief, this self-inflicted constitutional wound is one that can be, and ought, to be easily addressed before the next election.

Bagehot on Parliament as an "Electoral College"

Walter Bagehot's classic, *The English Constitution*, has been an influential exposition on the Westminster model's relationship between the head of state and the Parliament.[2] Given that this year marks the 150th anniversary of its publication, I had looked forward to some scholarly celebration of the sesquicentenary of this classic.[3] Sadly, outside of events in Bagehot's home town of Langport in Somerset, I have not found much to indicate that the anniversary is being noted much less celebrated. This paper will not redress this oversight but the research behind it has been motivated, in large part, by this anniversary. I have found Bagehot's focus on the dual role of the sovereign (head of state) as a component of the Parliament and as titular head of the Executive useful backgrounding in my teaching and practically relevant for my work in the Pacific Islands. Especially intriguing is his complaint that "hundreds of errors have been made in copying the English constitution" from not understanding the important conventions underlying the Westminster system.[4]

Bagehot believed that Westminster conventions have often lost clarity and political force as they have travelled abroad for a variety of reasons including the attempt to incorporate them into law. Whether the local constitutional adaptions made at independence to the Westminster model should be regarded as "errors" by the countries that have adopted this system can be debated. A key analytical issue for me has been whether the translation of the Westminster conventions into new black letter law, constitutional or statutory, achieves either the same objective as the convention or strengthens other equally important democratic aims. The republican debate in Australia has demonstrated the challenges in turning the Westminster conventions into new constitutional law.[5]

The English Constitution was the collective product of almost two years of articles in a new journal, *The Fortnightly Review*, as Bagehot felt Britain's constitutional monarchy needed to be better understood especially in relationship to a politically resurgent US after its civil war. Although a member of the Liberal Party, he was closer to the Tories in his respect for the organic evolution of the Westminster system.[6] Unlike the American republican constitution which was drafted deliberatively over less than four months, Westminster's unwritten constitution was heavily contextualised by centuries of temporisations accepted as politically

[2] Walter Bagehot, *The English Constitution* (New York: Dolphin Books, 1867).

[3] Barry K Winetrobe, Chair of the Bagehot Memorial Fund has very helpfully identified the precise date of the publication in book form as being sometime between February 4 and February 20, 1867.

[4] Walter Bagehot, *The English Constitution*, (New York: Dolphin Books, 1867), 248.

[5] See for example: George Winterton, 'Reserve Powers in an Australian Republic' (1993) 12(2) *University of Tasmania Law Review*.

[6] David Clinton, *Tocqueville, Lieber, and Bagehot: Liberalism Confronts the World* (New York: Springer, 2003) 13.

binding. Significantly, many of the powers of the British Crown were transferred either to the Parliament or made responsible through their use to the Parliament. So today, Queen Elizabeth II, as the British head of state, has inherited two separate distinguishable roles in the Parliament and the Executive.

Even without the benefit of the recent Donald Trump dysfunction, Walter Bagehot prophetically railed in his writing against the US Electoral College as an undistinguished mechanism for electing the nation's head of government. In his view, it was a mere cypher made up of unknowns who lacked a deliberative capacity. It was not so much that the US Electoral College was a rubber stamp for the voters, it was that its members had no subsequent responsibility for their selection – they vote "and they go home".[7] By contrast, Bagehot fatefully asserted that "the House of Commons is an electoral chamber; it is the assembly which chooses our president."[8] Thus, by remaining in office, as it were, the House of Commons does more than decide on a Ministry; it takes continuing responsibility for the choice it has made through a variety of mechanisms of executive oversight.

Of course, the idea that the Commons elected the Prime Minister was not psephologically accurate even in Bagehot's day. It was a rhetorical point in his contest of ideas with the Americans. Nevertheless, the evocative imagery has become both more as well less connected with reality both in terms of popular perceptions and in political practice with the passage of time. Pacific Island countries such as Fiji, Samoa and Tuvalu actually have taken Bagehot almost at face value and provided mechanisms for the parliament to elect the Prime Minister.[9] In other regional parliaments with constitutional arrangements closer to Bagehot's day, as Tasmania, the conventions have generally been continued. And, as in the UK, public expectations have become thoroughly focused on political party performances in the general election rather than on any deliberative role for the lower house in selecting a Ministry. Even in the rare cases of a "hung parliament", the public expects the parties to sort out the issue of who forms a Government rather than to see some sort of vote on the floor of the chamber. Consequently, the real surrogate in most Westminster parliaments for the US Electoral College is to be found behind the closed doors of party rooms.

Contrary to the imagery of an active role for the Commons as an electoral college, the power of a Westminster lower house over the formation of a new Government is negative rather than proactive. It can only refuse to support to the sovereign's nominee for the premiership (by a want of confidence motion or denying supply) if it disapproves of the head of state's choice. Generally, the negative sanction is rarely necessary after an election, for several reasons. Unlike parliamentary seats, ministerial commissions conventionally do not lapse with the dissolution of Parliament, thus, there is normally a set of advisers to provide the sovereign with guidance on who call to form a Government. The outgoing ministry has a duty to avoid embarrassing the head of state by providing the best advice on who might form a stable administration. Further, to give sufficient time for such advice, typically the Government of a defeated governing party/coalition holds on to its ministerial commissions

[7] Bagehot, *The English Constitution*, p. 172.

[8] Bagehot, The English Constitution,] p. 171.

[9] See: *Constitution of Fiji 2013* Art 93(3), *Constitution of Samoa* Art 32(2)(a) and *Constitution of Tuvalu* Art 63. In the case of Fiji, the election is only triggered if there is no party majority and the position is contested. Samoa provided the electoral procedure by Standing Orders as the constitution is silent on how the Head of State was to know who to commission.

in a (loosely) caretaker capacity until there is a safe pair of hand into which to relay the executive baton. However, due to Section 8B(3), "typical" does not apply to Tasmania.

Governor-in-Parliament and Governor-in-Council

A critical issue for this paper regarding the formation of a Government under the Westminster model is how the initiative to commission a Government is made. If the decision is not a clockwork process without any independent volition involved, whose resolve prevails? In Tasmanian's case, the head of state through the Governor, as the viceroy, commissions ministers. Being a constitutional monarchy, however, there is a general expectation that the Governor will act on advice. So, where is the scope for discretion and what are the boundaries for the exercise of independence? The answers rest with the two sets of conventions/constitutional provisions relating the head of state to Parliament.

The concept of the Queen-in-Parliament has been formally incorporated by statute into Tasmanian politics. Tasmania's *Constitution Act 1934* defines the Parliament at section 10 as: "The Governor and the Legislative Council and House of Assembly shall together constitute the Parliament of Tasmania". Most, but not all, of Australia's neighboring parliamentary jurisdiction follow the black letter law approach. For example, Samoa's head of state is also constitutionally recognised as a constituent element of the Parliament. Sec 42 states "There shall be a Parliament of Samoa, which shall consist of the Head of State and the Legislative Assembly". Despite being the third draft of a republican constitutive instrument, even Fiji's 2013 constitution [Sec 46 (1)] states that "Parliament consist(s) of the members of Parliament and the President".[10] However, for example, the Constitutions of the Solomon Islands and Tuvalu seem to imply conventionally that the head of state has a legislative function while detailing in the written constitution most of the reserve powers associated with the head of state-in-parliament role.[11]

Under the Westminster model of responsible Government, the distinctions between the two roles serves to identify the head of state's scope for independent action. The Governor exercising her executive powers "in-Council" acts on directive advice since the Executive must be accountable and responsible to the Parliament. Thus, in Tasmania, the *Acts Interpretation Act 1931* s 43 states that any reference to 'Governor' in statutes means 'the Governor . . . acting with advice of the Executive Council'. On the other hand, the Queen-in-Parliament must have some discretion in the advice she accepts to preserve some independence for the institution of Parliament. This independent discretion is commonly known as her reserve powers since these cannot be subordinated to Executive direction. Australia's former High Court Chief Justice, Sir Harry Gibbs has argued that these powers have democratic importance. He asserted that the reserve powers play an important role in preserving the institutional distinction between the legislative and executive arms of government in the

[10] This apparent tautological definition of Parliament is one of the confusing aspects of the *Constitution of Fiji 2013*. Unlike earlier constitutions, the 2013 version has lost any word for the legislative component of the Parliament which excludes the head of state. Yet, it has three other usages which do implicitly exclude the President.

[11] In a number of regional constitutions, the reserve powers appear to be handed to the Executive arm of government. These issues including the consequences of failing to adequately distinguish between the sovereign's dual roles and the extent to which they are separately preserved are part of the larger regional study.

Westminster system:

> The 'reserve powers', are designed to ensure that the powers of the Parliament and the Executive are operated in accordance with the principles of responsible government and representative democracy, or in other words to ensure that the Ministry is responsible to Parliament.[12]

The Strange Case of Tasmania's Section 8B(3)

As noted above, the convention on ministerial commissions is for the ministers to retain their commission after the dissolution of the Parliament through the election and afterwards until the head of state withdraws it or reaffirms it. This ensures that the administrative apparatus of the state continues without disruption from campaign politics. It also ensures the decision on the executive baton is made with a reasonable view of the post-election political landscape. Thus, when the head of state acts, it is in an environment of relative certainty where any decision is unlikely to be second guessed.

Curiously for a Westminster polity with a proportional electoral system that regularly produces non-majority results from its general elections, the Section 8B(3) of the *Constitution Act 1934* (Tas) almost seems designed to mandate the vice regal use of the Crown's reserve powers in periods of uncertainty.[13] The amendment provided that a Minister "may continue in the office of Minister of the Crown until the expiration of the period of 7 days following the day of the return of the writs for the ensuing general election."[14] The only circumstance in Australia close to the Tasmanian constitutional limits on ministerial tenure is to be found in the Northern Territory. Section 37(d) of the *Northern Territory (Self-Government) Act 1978* provides that ministerial commissions terminate when: "the Legislative Assembly first meets after a general election of the Legislative Assembly" unless filled sooner.

Perhaps even more curiously, Tasmania had relied on the usual conventions until the 1977 statutory change. Bagehot's warning should have been heeded. The slippery slope of codification began with the amendment of the *Ministers of the Crown Act 1923* to specify by statute that the Governor was to appoint ministers rather than relying on the Letters Patent for this power. It was not a primary purpose of the Act (which set salaries and numbers) but the change opened an opportunity for a legal challenge on the timing and use of the Governor's powers. Significantly, the Section 3(2) amendment to the *Ministers of the Crown Act 1923* stated that "if a member appointed as provided by this section ceases to be a member, he shall cease to be a Minister of the Crown." Given all members of Parliament (including ministers) cease to be members on the dissolution of the Parliament, the opportunity for future legal mischief ought to have been clear.

The mischief arrived in a challenge to ministerial action under the *Poisons Act 1971* which was invalidated by a court as it was made "without authority".[15] The shock of the legal decision was palpable with the need for some legislative correction to clarify ministerial authority

[12] Sir Harry Gibbs, *Reserve Powers of the Governor-General and the Provisions for Dismissal* (20 August 1995) Australians for Constitutional Monarchy <http://www.norepublic.com.au/index.php?option=com_content &task=view&id=166&Itemid=24>, accessed 16 May 2017.

[13] The Hare-Clark system of proportional representation used for Tasmania's House of Assembly elections has returned non-majority results for nearly a third of elections since introduced in 1907.

[14] Tasmania, House of Assembly, Constitution (Ministers of the Crown) Bill 1977 (Second Reading Notes) 1.

[15] Tasmania, House of Assembly, Constitution (Ministers of the Crown) Bill 1977 (Second Reading Notes) 1.

urgent. Without a Hansard, it is not clear why it was felt necessary to diverge from previous Tasmania practice and that pertaining across Australian parliaments when the *Ministers of the Crown Act 1923* was amended in 1975. Nevertheless, the 1977 response to the 1975 change only half addressed the failings of the 1975 Act. While it provided for ministers to retain their commissions after the dissolution of the Parliament but went on to specify a time limit with their expiration a week after the return of the writs.

Since 1977, Tasmania's statutory time limit on ministerial commissions has raised issues on all three occasions when minority Governments have followed general elections.[16] The first occasion arose following the 1989 general election. The governing Liberal Party lost its parliamentary majority when the election returned 17 Liberals, 13 Labor and 5 "independent" Greens. Before the end of the 7-days period following the return of the writs, the Governor, General Sir Phillip Bennett, was faced with a Premier, Robin Gray, who believed that a new election would restore his majority. The Premier also disparaged the capacity of the Labor Party to enjoy enough support from the Greens as a group since each one had stood formally as an independent. The Governor was unwilling to call new elections immediately and yet aware of the possible embarrassment of commissioning a new Premier who failed at the first hurdle when the new Parliament met. Sir Phillip elected to recommissioned Gray and his Government before the end of the week following the return of the writs despite the minority status of the Liberals and suggestions that the independent Greens would support the ALP. The Governor still had challenges when Gray's minority Government lost a want of confidence vote on the first meeting of House. Bennett took soundings from the Greens to ascertain the strength of their accord with Labor before deciding to award the commissions of Government to the Labor leader, Michael Field. The vice-regal wisdom of seeking to guarantee some stability for another minority Government with fewer members than the Gray minority Government had supported an untested new political grouping on the cross benches might be questioned. The alternative, however, was less palatable as it involved accepting Gray's desire for new elections.[17]

The next minority result occurred following the 1996 general election but this one did not create any serious vice regal angst or the use of the reserve powers to deal with Section 8B(3).[18] Nevertheless, the entire election campaign was played out against the backdrop of Section 8B(3) as both parties campaigned on a pledge of not governing in minority despite polls suggesting that neither of the major parties could secure a majority. In the event, the governing Liberal Party, under Premier Ray Groom, lost its majority as predicted but this time there was no additional suitor for the Treasury benches. The Labor Party honoured its campaign promise and refused to negotiate with the Greens for Government. Opposition leader Michael Field blamed his party's worst ever electoral defeat in the 1992 election on

[16] There was another occasion post-1977 when the Governor's use of reserve powers arose in connection with a minority Government. The situation arose in November 1979 due to party defections that cost the Labor Government its majority. The Premier of the non-minority Government sought a lengthy prorogation to reconsolidate its position but the Governor was unable to support the full request. See: Don Morris, 'The Perils of Defining the Reserve Powers of the Crown' (paper presented at The Twenty Eighth Conference of The Samuel Griffith Society, Adelaide, 12th-14th of August, 2016) 8.

[17] Richard A. Herr, 'Reducing parliament and minority governments in Tasmania: strange bedfellows make politics – badly' (2005) 20(2) *Australasian Parliamentary Review* 130-143

[18] I have looked at this period in some detail in my "Reducing parliament and minority governments in Tasmania: strange bedfellows make politics – badly", *Australasian Parliamentary Review*, Vol. 20, No. 2, Spring 2005: 130-143

Labor's 1989 accord with the Greens to form a minority Government. Thus, there was no viable alternative Government waiting in the wings. Nonetheless, there was still a political problem. Groom had campaigned on a promise not to lead a minority Government so he resigned. The Governor simply accepted Groom's resignation and, on his advice, commissioned the new Liberal leader, Tony Rundle, in his stead. The Greens' support from the cross benches had been pledged publicly during the campaign to which ever party formed a minority Government. Sir Guy Green, the Governor did not feel the need to test this pledge of support (as Bennett required of the independent Greens in 1989) since Rundle was confident of Green party support in this circumstance.

The third occurrence was also the second time that a significant post-election public imbroglio was created by Sec 8B(3). The 2010 election was fought out with the polls showing a minority outcome. As in 1996, the major parties attempted wedge politics by claiming that they would not govern in minority. Indeed, both redoubled their efforts to be convincing since now both the Labor and Liberal parties had experience of governing the Greens and found this to be toxic electorally. Their desperation reached a level that both major parties were willing to commit *lèse-majesté* of a sort by making Government House central to their campaigns. Each publicly dared the other side to make explicit the advice it would give the Governor in the event of a hung parliament. The Liberal strategy from Opposition was that if it could maneuver the governing Labor Party into refusing Government with Green support, it would be able to accept Government without a "deal" with the Greens by exploiting the Greens' campaign promise that they would support either side to promote stable Government.

The election results proved the polls correct with the ALP winning 10 seats, the Liberals 10 and the Greens taking the remaining 5 seats. Having lost his majority, media speculation was rife that Labor Premier, David Bartlett, would advise Governor Peter Underwood to commission Opposition Leader Will Hodgman.[19] It appears that Hodgman expected Bartlett to hold to a campaign pledge that he would give the Governor such advice if the Opposition received more votes overall than Labor. There were a number of flaws with this "clean hands" approach to securing Government without directly seeking Greens' support. The tactic failed when the Labor Party and the Greens finally worked out a power sharing arrangement after the Governor's decision to recommission Bartlett in the interim to avoid the 7 days deadline of Section 8B(3). Although Governor Peter Underwood's decision took virtually the same approach as Bennett in 1989,[20] the campaign rhetoric made it such a source of public interest that Government House published the reasons for the decision on the Government House website.[21] Again, the Governor's actions were second-guessed with some commentary suggesting that commissioning Bartlett on the grounds of future stability was unwarrantedly speculative.[22] However, this is precisely the unsatisfactory circumstance that Section 8B(3)

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[19] Bruce Montgomery, *Libs left languishing on the draughts board in Tasmania* (9 April 2010) Crikey <https://www.crikey.com.au/2010/04/09/libs-left-languishing-on-the-draughts-board-in-tasmania/>

[20] Governor Bennett made a report to Parliament on his reasons and approach to the commissioning of the 1989 minority Government. See: Tasmania, *Summary of Constitutional Events involving His Excellency the Governor of Tasmania*, Parl Paper No 21 (1990).

[21] Office of the Governor of Tasmania, *The reasons of the Governor of Tasmania, the Honourable Peter Underwood AC, for the commissioning of the Honourable David Bartlett to form a government following the 2010 House of Assembly election* (Published online by Government House, Tasmania, 9th of April 2010) Accessed 4 July 2017.

[22] Anne Twomey, 'Appointing the Premier in a Hung Parliament - The Tasmanian Governor's Choice' (2010) 25(2) *Australasian Parliamentary Review* 58.

creates. It obliges Government House to act without the benefit knowing exactly how the political forces in the chamber will shake out and without the benefit of being able to secure authoritative and disinterested advice. This is also precisely why the conventions on ministerial commissions before 1975 served Tasmania so well despite the regular electoral vagaries of the Hare-Clark system from 1907.

Conclusions

Walter Bagehot certainly had grounds for his assessment that adopting and adapting the Westminster parliamentary model without understanding the unwritten conventions posed risks. The transfer of the Westminster model around the globe over the 150 years since he wrote has provided many examples to support his concerns. Nevertheless, the effective codification of many of the Westminster conventions into constitutional law also serves to demonstrate there is a constitutional validity to the established conventions. And perhaps this is the best argument as to why the uncodified conventions should be understood and protected appropriately. And, just because certain elements have not been put into black letter law does not mean they do not serve some constitutive purpose and value. The failure to recognise the conventions dealing with ministerial commissions and the role of the head of state in this process created the politically dysfunctional amendment to the *Constitution Act 1934* (Tas) that is Section 8B(3).

Section 8B(3) has not achieved any of objectives of the conventions it revised nor has it strengthened any other equally important democratic aim. Indeed, it has exacerbated the problems of managing the relations between and amongst the head of state, the Government of the day and the Parliament. Critically, it has exposed Government House to partisan wedge politics and so encouraged a sense that the use of reserve powers can be mobilised for partisan advantage. The contrast between Tasmania and the United Kingdom in 2010 with regard to the partisan respect for the head of state could not have been starker. The British practice incorporated in the 2011 Cabinet Manual makes clear that the Sovereign would not expect to become involved in any negotiations leading to formation of a Government where there no clear majority outcome. Indeed, the Queen even absented herself to Windsor Castle during the negotiations to underscore the point.[23] It is difficult to imagine that, had the Queen been in residence in Government House, Tasmania that she would have been used as a partisan prop the way her viceroy was in 2010.

To a real extent, Tasmania's experience since 1977 has helped to validate Sir Harry's concerns that the head of state's role "in-Parliament" needs to be separated from that of the head of state-in-Council to protect the Parliament. Had the advice to the Governor regarding the use of the reserve powers been directive rather than consultative, the Government could have manipulated events for partisan advantage perhaps even overturning one election result. It is scant comfort to think that abuse of the relevant conventions would not have occurred. Partisan advantage over-ruled significant constitutional proprieties on at least two occasions since 1977. The Parliament was reduced in size 1998 in an attempt to eliminate the Greens

[23] Philip Murphy, *No hung parliament means a sigh of relief for the Queen* (8th of May, 2015) The Conversation, <http://theconversation.com/no-hung-parliament-means-a-sigh-of-relief-for-the-queen-41527> accessed 2nd of September, 2017.

as a parliamentary party without out any reference to the voters. And, in the same year, despite centuries of convention and some constitutional scaffolding, the Treasurer was appointed from the upper house.

Independently of any debate over the Governor's reserve powers, role as Governor-in-Parliament or modern relevance of some long-standing Westminster conventions, there simply is no positive reason for keeping Section 8B(3). It was created by error in a hasty response to an Act that displayed gross ignorance of the relationship between the ministry and Parliament. It serves no democratic purpose for accountability. Quite the reverse. It has regularly generated uncertainty and dissatisfaction with the electoral process and occasionally undermined the public confidence in the neutrality of the Queen's representative in Tasmania. In summary, the sooner the *Constitution Act* is amended to remove Section 8B(3) the better for the health of Tasmanian democracy.