Lessons in Democracy from Australia

From Coalition Government to Parliamentary Privilege

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This paper examines Australian developments with respect to the Westminster-model of responsible parliamentary government. Australia has adopted preferential voting and compulsory voting; and it has a long history of governments that are coalitions or that negotiate support from smaller parties and independents, or both. Australia began making its previously 'secret' cabinet handbook available to the public in 1982, and followed this up with release of the Executive Council Handbook and 'caretaker conventions' to prevent a government from making major commitments during an election. And recently it has reduced parliamentary privileges and codified them in statute. Each offers lessons for Canada. To that end, this paper traces the Australian developments and practices beginning with its electoral system and compulsory voting, government formation (including changing governments mid-term), popular understanding of the powers of the Governor General, the unclassified cabinet and executive council handbooks, caretaker conventions and parliamentary privileges. There are lessons on each for other Commonwealth countries to learn, as several countries including the United Kingdom have begun to realize.

The British gave a number of countries a system of parliamentary government.[1] This became known as the Westminster-model, after the Royal Palace in London where the British Parliament has been ensconced since the 13th century.

The British constitution is an unwritten document, though portions of it have been codified by quasi-constitutional statutes. The most important rules, however, are unwritten and governed by convention, which are constitutional rules all parties have agreed to be bound by pursuant to precedent.[2]

Australia, like Canada, is in a slightly different situation than the U.K. as it has a written constitution. But this constitution simply identifies the formal structures of government, such as vesting the executive powers of government in the Queen and allowing these to be exercised by the Governor General in Her stead (s.61) and vesting legislative power in a 'Parliament' composed of the Queen, a 'House of Representatives' and a 'Senate' (s.1). Apart from their Senate being an elected body, the structures of this Westminster-modeled government are identical to Canada; and, like Canada's, a reading of the *Constitution* would make it seem that the Queen and Her Governor have all the power.

It is the unwritten constitutional conventions surrounding the Queen's powers that graft democratic elements onto an archaic monarchical system of government. It is through conventions that the British Parliament was slowly transformed from a group of representatives who assembled to petition at the foot of the Throne into a body in which the wielders of state power must reside and to which they must remain accountable. In colonies like Canada and Australia, the same developmental trajectory occurred as these conventions were transferred, transforming representative government into responsible government.

When it comes to these conventions, the United Kingdom, Australia, Canada and the Queen's other dominions overseas should have identical constitutional rules.[3] Yet the example of Australia shows that these rules are being operationalized

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differently than in Canada. The explanation for these differences is due in part to Australia's electoral system. But these differences are being increasingly seen in other dominions, including the United Kingdom itself, so historical, temporal and cultural factors provide greater explanation for comparative variation between countries of the Commonwealth than any differences in institutional rules.[4]

The foundational principle behind the Westminster-model is that people elect a representative and send him or her to the capital. This MP's first task is to meet with colleagues and act as an electoral college to choose a government and then to hold that government to account on a daily basis. This is the way the Westminster-model is understood in Australia and most other dominions. It is not the way it is understood in Canada.

This is not to say that Canadian PMs have been violating our shared constitutional conventions; rather that ambiguity has allowed Canadian PMs to follow the letter of the constitution without following the spirit.[5]

Canada can therefore learn some lessons about democracy from Australia.

Electoral System

The Australian story begins in 1918 with its electoral system. In the federal electoral district of Swan, a by-election was held which saw the vote on the right of the political spectrum split between the Farmers and Settlers Party (31.4.%) and the governing Nationalist Party (29.6%), permitting the Labor candidate to win with only 34.5% of the vote under the single member plurality electoral system still used to this day in Canada.

The fact that the three political parties so evenly split the vote suggested to the Australian public that there was an inherent defect in SMP, or what is often referred to in Canada as first-past-the-post. All three parties could claim to have the support of roughly 1/3 of the constituents in this riding, but when ideology was taken into consideration, 2/3rds of the voters clearly opposed the views of their newly elected Labor representative.

While one by-election may not normally be expected to encourage a country to reexamine its electoral system, this riding was symbolic. It had been held by the Nationalist former premier of Western Australia, Sir John Forrest, since Australia's 'confederation' in 1901. It was also understood to be an indicator of what was likely to occur on a larger scale in the next and subsequent elections.

Fearful that the urban-rural split among right-of-centre voters would see the Labor Party win a sufficient number of ridings across Australia to form a majority government without receiving the support of the majority of the population, the Nationalist Prime Minister of Australia, Billy Hughes, asked the Parliament to change the electoral system to preferential voting.

Also known as the alternative vote, instant-runoff voting or transferable voting, the ballot asks electors to rank the candidates in order of preference: 1,2,3… The ballots are counted and, if no candidate has received over 50%, then the lowest ranked candidate is eliminated and his votes are distributed to his electors' second choices, and then the next lowest to her electors' second choices and so on, until the candidate who has the support of the majority of voters is identified.

The Farmers and Settlers Party had been a state (or provincial) agrarian party that emerged in New South Wales, with the Victorian Farmers Union and the Country Party of Western Australia gaining ground in those respective states.

In the federal election of 1919, under the new preferential balloting, the Nationalist Party was forced to cede 11 seats to these state-based agrarian parties, but not to Labor as it would have under SMP. The Nationalist Party won 37 of the seats in the lower chamber, compared to 25 Labor; and with one of the two independents agreeing to support the government, Hughes was able to hold onto power. The following year the 11 agrarian MPs united under the banner of the Country Party of Australia.

In the 1922 election, the Labor Party won the most seats, with 29 of the 75 seats in the lower chamber. The Nationalist Party came second with 26, the Country Party 14, five Liberals and one independent. The leadership of the Nationalist and Country parties entered into negotiations to form a coalition government, and one of the prices extracted by the Country Party was the resignation of Billy Hughes as PM.[6] The new leader of the Nationalist Party, Stanley Bruce, then finalized the coalition agreement with the leader of the Country Party, Earle Page, who asked for and received five of a total of 11 Cabinet posts for him and his members, including the post of treasurer. The order of precedence was amended so Page would be PM in Bruce's absence (making him the first de facto Deputy Prime Minister of Australia) and the government became known as the Bruce-Page Ministry.

While the Australian political parties have since evolved in name and format, a coalition government between the leading non-Labor parties has been an

alternative government to a Labor government since 1922. Only once, in 1931, did a non-Labor party (the United Australia Party) have sufficient seats to form a government without negotiating a coalition, but they returned to a partnership with the Country Party after the following election.[7]

Today the two main political parties in opposition to Labor, and in semi-permanent coalition, are the Liberal Party and the National Party. An election flyer aimed at supporters of the National Party might indicate that the Liberal party is the second choice. Liberal party flyers might make the inverse recommendation.

This is strategic voting without forcing electors to do the vote calculus of determining which candidate is ahead in their riding so as to stop the candidate/party they don't want to win, something we know is very difficult for voters to do under Canada's SMP.[8] In Australia, the electoral system, ensures that one of the non-Labor parties is competitive in each riding; provides the opportunity for political parties to throw their support to the party closest to them in terms of ideology and policy if their candidate is eliminated; and enables independents and regionally popular small parties to win seats.[9]

SMP has been entirely eliminated for legislative elections in Australia. Most of the lower chambers at the state-level have transitioned to preferential voting, with the exception of Tasmania and the Australian Capital Territory where a form of single transferable voting has been adopted due to the multi-member constituencies.[10]

Compulsory Voting

At the same time as Australia was considering changing its electoral system to preferential voting, compulsory voting emerged as another possible improvement for Australian democracy. While it did not initially make it into the *Electoral Bill* of 1918, it was adopted federally in 1924 through a private members' bill.[11] What is compulsory, of course, is not 'voting' but registering to vote and then showing-up at a voting booth. After that, citizens are free to spoil their ballot or leave it blank.

Failure to show-up at a poll on Election Day results in the non-voter being sent a form letter. The recipient can pay a $20 fine or explain their absence due to illness (no doctor's note required), travel, religious objection or forgetfulness. About 80-85 percent of eligible Australians register to vote; less than four percent of these fail to vote. Among these registered non-voters, 80 percent provide excuses; five percent pay the fine; and 15 percent are mostly conscientious objectors who court the higher $40 fine or a brief prison stint to express their discontent with the system. The fine for non-voting is roughly a tenth of a parking fine in Australia.[12]

While initially seen as an unpopular change, public opinion shifted rapidly after the introduction of compulsory voting and today polls regularly show that 70-80 percent of Australians support the law. And, of course, the country's registration and turnout statistics put most democracies to shame, even more so at the state- and municipal-levels (turnout in most countries declines between levels of government).[13]

Federal elections occur every three years, though there is no fixed election date and, like Canada, the constitutional convention is that the Governor General dissolves the parliament and issues the writs for an election to be held in each electoral district on a specific day on the advice of the Prime Minister; the advice to issue writs in Australia must be formally delivered to the Governor General through the Executive Council.[14]

The *Commonwealth Electoral Act* sets the campaign period for federal elections between 33 and 58 days, and 10 days are allowed between the dissolution of the House of Representatives and the issuance of writs, so the longest a campaign can be is 68 days. Election Day must be a Saturday.

Government Formation and Change

As noted above, the principle behind responsible parliamentary government is that the voters choose a representative and these representatives collectively, in turn, choose the government and hold it to account. The constitutional convention by which this principle is given effect is that a government remains in power only so long as it has the confidence of the lower chamber of the legislature. Having lost its confidence, the PM has the option to recommend that an election be called or to resign and allow the Governor General to ask a person who does have the confidence of Parliament to form a government.

Because of preferential voting (and single transferable voting) in Australia, often no political party will win a majority of seats in the legislature; and smaller parties and independents (what Australians call 'cross-benchers') are able to win seats and hold the balance of power in the legislature. The willingness of non-Labor parties to form coalitions means that there are often alternative government configurations possible in any parliament.

All this combines to create the expectation that of the two options available to a PM in the event of

a defeat on a confidence question, the PM should resign. And if they try to recommend dissolution, as will be seen below, Governors will refuse to grant the recommendation if an alternative government exists that the Governor believes has the confidence of the chamber.

Here is a dramatic example of responsible parliamentary government as it should work, and does in Australia: In 1941, the House of Representatives opted to change governments and did so by reducing the government's "supply" by £1. The leader of the coalition, Prime Minister Arthur Fadden, resigned and the Labor leader, John Curtin, was asked by the Governor General to form a government.

The pre-vote developments are also noteworthy as they show how the spirit of the conventions can operate independent of the letter. The coalition government was between the United Australian Party and the Country Party, and as the UAP had the most seats its leader, Robert Menzies, had been Prime Minister. Once Menzies realized that the cross-benchers no longer had confidence in his government, he resigned as PM. The Deputy Prime Minister and Country Party Leader Arthur Fadden established a new government and attempted to win the support of the cross-benchers. This all before the House of Representatives formally expressed its lack of confidence by the symbolic defeat on a money vote.

As noted above, today at the federal-level a semi-permanent coalition exists between the Liberal and the National parties, though there are regional sub-parties within this Liberal-National appellation. When they form a government, the leader of the party with the most seats becomes PM and the leader of the smaller party becomes deputy PM and chooses that party's cabinet members. The choice of portfolios is the PM's, though this is done after consultation with the deputy PM.

As for Labor, from 1907 until 2007, members of the Cabinet were elected by the caucus. The PM had considerable influence, though leaders of factions within the party would be able to land themselves seats in Cabinet. The portfolios assigned to these 'elected' ministers were up to the PM. Before the 2007 election, Labor leader Kevin Rudd announced he would be choosing his own Cabinet if he won, though he ended up having the caucus 'elect' his slate of ministers at its first post-election meeting.

For all the main parties in Australia, the leader and deputy leader are each elected by the parliamentary caucus. They can also be removed by the caucus. This is known as a 'leadership spill' because the leadership is deemed to be vacant at the moment prior to balloting.

In Australia, the principle of 'Cabinet government' (rather than 'prime ministerial government') continues to guide public office holders. There are four main reasons for this: (i) the parliamentary caucus selects (and removes) the leader and deputy leader, (ii) there is knowledge of and respect for the constitutional conventions surrounding Cabinet government, (iii) the Governor General's 'reserve powers' are not readily available to PMs as a substitute for Cabinet conventions, and (iv) the rules and procedures of the Executive Council are designed to reinforce these Cabinet conventions.[15] The latter two points will be discussed more fully below.

Key among the conventions surrounding Cabinet government are that: it is up to the PM to select ministers; once appointed, the PM is expected to discuss Ministerial shuffles with his Cabinet, and obtain its support, before advising the Governor to implement a reassignment of portfolios; the PM should ask ministers to resign their portfolios in this (or any other) context and should give the Minister reasons when doing so; ministers should tender their resignation when asked by the PM; and when a leadership challenge arises, the PM can initiate a 'leadership spill' or face Parliament and ascertain if the House's confidence in his Ministry continues to be enjoyed.

The current Prime Minister, Julia Gillard, became PM by asking Prime Minister Kevin Rudd for a 'leadership spill' in October 2010. She was deputy leader and thus Deputy Prime Minister at the time. More recently, Gillard announced a spill in February of this year when Rudd resigned as Foreign Minister as a challenge to her leadership. Rudd ran against her in this spill and she defeated him 71 to 31. Leadership voting is not by secret ballot. The ministers who backed Rudd in the vote have continued in their portfolios.[16]

There are tiers of ministers in Australia, with some ministers sitting in Cabinet and other ministers holding portfolios and being members of the Executive Council (the Australian equivalent of the Privy Council) but not participating in Cabinet meetings unless invited to attend for discussion on a particular issue. This duality gives the PM flexibility in giving leaders of opposing factions, leaders of smaller parties or cross-benchers portfolios; all while the PM and Cabinet maintain control over the government's overall agenda and direction. At the federal-level, parliamentary secretaries are also sworn into the Executive Council and thus are considered like non-Cabinet ministers to be 'Ministers of State'.[17]

In terms of government formation, Australians think of Labor versus Coalition as being the two

possible configurations. Since 1949, the Australian Electoral Commission has, in addition to reporting the actual results by riding, reported the two-party preferred results so Australians know, between the two alternative government configurations, which side has the greatest overall support. But, and it bears repeating, government formation is not about elections in the Westminster-model. The voters choose their representatives in the legislature and those representatives in the lower chamber become an electoral college.

In Australia, governments do not usually wait for the House of Representatives to express its lack of confidence. They negotiate with the MPs for their support. This goes beyond the now 90-years of negotiation between the different non-Labor parties to form coalition governments. It involves negotiating with smaller political parties and cross-benchers for their support on motions of non-confidence and supply.

Take the most recent election: in 2010 the electorate returned 72 Labor representatives and 72 Coalition representatives. The Liberal-National coalition included: 44 Liberal Party of Australia, 21 Liberal National Party (Queensland), six National Party of Australia and one Country Liberal Party MPs. In addition, there were six cross-benchers in the parliament: one of whom had been elected under the Green Party banner, one under the National Party of Western Australia label and four independents. Seventeen days of negotiations took place, during which different government formations were explored.

One of the configurations considered by both Labor and the Coalition involved offering independent MP Rob Oakeshott the post of Minister of Regional Affairs.[18] Regional policy and programs had been a key demand for his support. In the end, he opted to support Labor but not to accept a ministerial position, feeling his regional package would be more easily enacted with him advocating on its behalf from the cross-benches. A Labor government under Julie Gillard was eventually formed with negotiated support from the green MP and three independents.

In the Cabinet, Simon Crean was made the minister responsible for keeping the independents happy. Given their demands, his official portfolio included Minister for Regional Australia, Regional Development and Local Government (he is also Minister for the Arts). He is a former Labor leader (2001-2003) and has spent most of his parliamentary career, now 22 years, as a Cabinet minister, having served under prime ministers Hawke, Keating, Rudd and now Gillard.[19] The designation of a minister of his stature to deal with the cross-benchers is evidence of the importance governments place on Parliament.

Governor General

While government formation in Australia is largely left to the House of Representatives and its party leaders and cross-benchers, Governors General (and Governors at the state-level) are strong believers in the importance of the 'reserve powers'. These are the powers "which the Governor-General may, in certain circumstances, exercise without – or contrary to – ministerial advice… they are generally agreed to at least include:

> 1. The power to appoint a Prime Minister if an election has resulted in a 'hung parliament'; 2. The power to dismiss a Prime Minister where he or she has lost the confidence of the Parliament; 3. The power to dismiss a Prime Minister or Minister when he or she is acting unlawfully; and 4. The power to refuse to dissolve the House of Representatives despite a request from the Prime Minister.[20]

As these are the 'personal prerogatives', in Australia Governors have consulted, and continue to assert the right to consult, with more than just the PM when asked to use the 'reserve powers', and this includes other ministers and MPs, including the Leader of the Opposition.

The Governor General also claims "a supervisory role to see that the processes of the Federal Executive Council are conducted lawfully and regularly" and to "protect the Constitution and to facilitate the work of the Commonwealth Parliament and Government".[21] In addition, the Governor General must satisfy herself that a law has passed each stage in both chambers of Parliament, and receives a certification from the Attorney General in this regard, before giving Royal assent.

In Australia, non-controversially, Governors have refused to grant dissolution. The most recent instance was 1989, when the Premier of Tasmania, Liberal Leader Robin Gray, having failed to win a majority in the election asked for a second dissolution on the grounds that it was a 'hung parliament' (i.e. no party had a majority of the seats in the legislature). The Governor, Sir Phillip Bennett, refused his recommendation and commissioned the Labor leader to form a government. There is an expectation in Australia that Governors will refuse a request for dissolution if it is much before the full three year term.[22]

Also non-controversially, Governors have refused to dismiss Cabinet members when asked to do so by a premier. The most recent example of this was in 1987 in Queensland. Premier Joh Bjelke-Petersen,

facing a cabinet revolt, asked Governor Sir Walter Campbell to dismiss the Ministry (including him) and then reappoint him as Premier with a new Cabinet. Campbell pointed out that he would have to ascertain whether he enjoyed the confidence of the House before re-appointing him (which was by no means clear). When Bjelke-Petersen then asked to shuffle the Cabinet and dismiss five ministers, the Governor insisted that he discuss the proposed Cabinet shuffle with the entire Cabinet and that he ask for the five ministers' resignations, pursuant to the Cabinet conventions. After the Premier did this and the ministers had refused to resign, the GG agreed to the Premier's request to use his 'reserve powers' to dismissed three ministers (or more accurately withdrew their commissions as they serve at the Governor's pleasure).

In response, the party attempted to remove the Premier by convening a meeting of the parliamentary caucus, which proceeded to elect a new party leader. Bjelke-Petersen refused to resign as Premier. During these events, the Governor, a former state Supreme Court Judge, kept the Queen and Palace briefed on developments. And when Bjelke-Petersen tried to contact the Queen and have Her intervene, he was informed that the Queen had full confidence in Her Governor. The Governor then convinced the Premier to convene Parliament and ascertain if his Ministry had the support of the House.

At the time the Governor came under public criticism for failing to dismiss the premier. And speculation was that the Premier might hold onto office with the support of political parties other than his own. Eventually Bjelke-Petersen stepped aside in favour of the new party leader, and the general consensus with hindsight has been that the careful adherence to the conventions surrounding Cabinet government and the 'reserve powers' ensured that this internal party matter did not escalate into a constitutional crisis as it had in 1975.[23]

Noting that it is impossible to foresee all contingencies, and that circumstances will change from case to case and country to county, Governor Campbell outlined in a speech (after leaving office) the overriding principle that should guide a Governor when applying constitutional conventions:

> It should be borne in mind that a Governor, in times of political crisis, has a constitutional right to advise and counsel ministers and those who are seeking to form a government with the object of bringing about conciliation or accord between opposing factions or parties – advice based on the wish for the retention of stable and orderly government.[24]

He went on to say that a Governor must not take sides in an open political conflict and must be guided by the test that the person he chooses to be premier must be the one who can command the majority of votes in the Parliament.

Of course there have famously been two controversial instances of governors dismissing first ministers in Australia. In 1932, New South Wales' Governor Sir Philip Game dismissed Labor Premier Jack Lang after he took all the province's money out of the bank to keep it from being spent on debt interest; and in 1975 Governor General Sir John Kerr dismissed Labor Prime Minister Gough Whitlam after he failed to get supply through the Senate. The events surrounding these dismissals have been well chronicled and need not be recounted here, as they for our purposes are less significant than the fact that the issue for Australians has been to identify and better understand the constitutional conventions and to make improvements where necessary.

For example, one of the events which precipitated the Whitlam Government failing to get supply through the Senate was the decision by the Premier of New South Wales to replace a Labor vacancy in the Senate with a non-Labor temporary appointment. The state legislature can fill vacancies but convention dictated they should be from the same political party which won the seat in the election. In 1977, *Constitution Alteration (Senate Casual Vacancies)* was proposed by the Coalition government that replaced Whitlam. Adopted by referendum at the level of 76 percent, it amended the *Constitution* to require that vacancies can only be filled by Senators from the same party and that these interim Senators would only finish the previous Senator's term, at which point the seat would come up for election.

Additionally, in both these constitutional crises, the first minister contemplated how to stop the Governor dismissing him. This led the states of Queensland and New South Wales to change the foundational basis for the authority of the Governor from prerogative to legislative, replacing the Royal 'letters patent' and Royal 'instructions' with Acts of the state legislature.[25] Included in the Queensland Act is the requirement that the appointment of a Governor can only be terminated by an instrument signed by the Queen under the great seal of the state and only after this instrument has been published in the *Government Gazette*. So the idea that a Premier could simply pick-up the phone and ask the Queen to sack the Governor before the Premier gets sacked is no longer a possibility, if it ever was.

Queensland also leads the way in legislatively entrenching the Australian understanding that the

'reserve powers' are those of the Governor alone. The *Constitution Acts 1867-1978* provide that appointments to public offices are to be made by the Governor-in-Council but the appointment of "officers liable to retire from office on political grounds" (i.e. ministers) shall be vested in the Governor alone (s.14). A 1977 amendment to the state constitution takes this further and states that in appointing and dismissing 'officers liable to retire from office on political grounds' the Governor "shall not be subject to direction by any person whatsoever nor be limited as to his sources of advice" (s.14(2)).

The constitutional convention that a Governor appoints or dismisses ministers on the advice of the premier still applies in Queensland, as in any other Australian state. The purpose of this legislative clarity is to ensure that all concerned know the Governor is not bound by advice in the exercise of the 'reserve powers', namely to dissolve the legislative assembly and to appoint and dismiss the ministers when circumstances require a change of government.

Cabinet and Executive Council Handbooks

In 1982, the Australian government decided to make public the *Cabinet Handbook*.[26] This document includes broad constitutional principles and conventions accepted by the executive branch to be binding on this and all future governments and day-to-day technical requirements set in place by the government of the day and subject to change. For example, it makes clear that a "Westminster-style Cabinet is defined by adherence to the principles of collective responsibility and Cabinet solidarity" (art.12) and then goes on to operationalize both these constitutional conventions. At the other end, it makes clear to ministers that submissions to Cabinet need to be circulated five days before a meeting (art.32), that once submitted to Cabinet or a committee a submission cannot be changed (art.33) and that while it is possible that a matter can be considered without a written submission, this "increases the risk that the Cabinet's decision will result in unforeseen and unintended consequences. It weakens the ability of the Cabinet to apply scrutiny from a whole-of-government perspective and ultimately undermines the Cabinet system itself" (art.36). The more recent versions even sets rules for how and when audio-visual presentations can be made to Cabinet (arts.14-18).

Nothing in this document involves the legislative branch or the conventions surrounding the Governor General's 'reserve powers' (which mediate relations between the legislative and executive branches).[27] This document is specific to what its title implies. It is a handbook for Cabinet ministers and senior members of the civil service. It is written to ensure that proper procedures are always followed and that the constitutional conventions surrounding [*only*] the executive branch are followed in principle and practice.

The government also released the *Federal Executive Council Handbook*.[28] The Executive Council exists to put into official form decisions which have been made elsewhere and thus is the body which gives formal advice to the Governor General by way of written submissions. Matters are debated in Cabinet but made law in the Council.

The Executive Council is established by the Australian Constitution and ministers are sworn into this Council by taking "the oath of allegiance, the official oath and the oath of fidelity" (s.62). Appointments are at pleasure, which simply means they can be removed by the Governor General, but membership is usually for life.[29]

In addition to the constitutional references to the Council, the *Acts Interpretation Act 1901* makes clear that when a statute of Australia refers to the Governor General it is to be read as referring to the Governor General acting on the advice of the Executive Council. The constitutional convention is that the Governor General, when exercising Royal prerogative *in the executive branch* (i.e. not the 'reserve powers'), does so only on the advice of a Minister who can be held to account for that advice by Parliament (and the people come election time).

Documents are placed before the Executive Council through a departmental minute. An explanatory memorandum is attached to the minute which offers the mechanism by which a minister takes responsibility for the advice offered to the Governor General. The Governor General is free to seek more information and to advise against an action or even delay it, pursuant to the often stated convention identified by Walter Bagehot that the Crown has "the right to be consulted, the right to encourage, the right to warn".[30] After doing so, the Governor General signs the departmental minute accepting that advice and then signs the Executive Council minutes bringing the ordinance, appointment or regulation into force.

Like the *Cabinet Handbook*, this document runs the gamut from constitutional provisions to the minutia of day-to-day government administration. The Council must by convention advise on (art.2.1.8):

> The making of proclamations;
>
> The making of regulations and ordinances;
>
> The making and terminating of appointments to boards and commissions;
>
> Changes to government departments;

Issuing writs for elections;
The approval of compulsory land acquisitions;
Approval of international treaties;
Appointment of officers in the armed forces;
Government borrowing overseas;
Grants of lands to Aboriginals; and
The issuing of Treasury Notes and Government Stock.

On the more administrative side, the Council meets every two weeks at Government House (art.2.2.1), ministers must attend if they are on the roster (a rotation is drawn-up at the start of each calendar year; art.2.2.3) and quorum is two ministers plus the Governor General (art.2.2.4).

The goal in releasing these documents was to create transparency in government and to let Australians know how their government operates in both principle and practice.

Caretaker Conventions

When governments lose the confidence of Parliament, or when an election is underway, it is a constitutional convention that no major decisions should be undertaken. Cabinet manuals historically have been secret so the extent of this constraint is not widely known inside government let alone outside government. As most Cabinets and Privy Councils (as the name would imply) operate in secret, government decisions will not be known immediately and sometimes for decades (if ever) thus the convention can be violated without Parliament's and the public's knowledge. This is not the case in Australia, due to the publication of its Cabinet and Executive Council handbooks.

The *Executive Council Handbook* identifies the 'caretaker period' as being between "dissolution of the House of Representatives and the point in time when the outcome of the election is clear" (art.2.3.1). If the government has not been defeated on a confidence question, the Executive Council can meet before the announcement of an election to deal with outstanding appointments and urgent matters, but not after (art.2.3.2). By the Executive Council not meeting during the caretaker period, the caretaker government is deprived of the legal mechanism to access the Governor General's prerogative powers as head of the executive branch and thus cannot do any of the things mentioned. (art.2.3.3).

Building on these primary government documents, the Department of the Prime Minister and Cabinet releases more detailed rules governing the caretaker period.[31] The principle behind the caretaker conventions is stated clearly and succinctly: "with the dissolution of the House, the Executive cannot be held accountable for its decisions in the normal manner, and that every general election carries the possibility of a change of government" (art.1.1). During the caretaker period, governments are not allowed to make major policy decisions that will commit an incoming government, make significant appointments or enter into major contracts or undertakings (art.1.3). And a caretaker government must not put the public service in a position where they are being asked to violate these conventions.

Specifically, the guidelines obligate caretaker government ministers to consult with the opposition spokesperson(s) if a decision has to be made or a contract signed that cannot be postponed before binding a future government (art.2.4), to stop all international negotiations or exchanges and, if impossible, attend only as an observer (art.5.1) and to make only 'acting' appointments to bodies where a Minister has appointment authority (art.3.2) [more senior appointments obviously are already impossible since the Executive Council does not meet to approve 'order-in-council' appointments during elections].

Government advertising must be vetted by the public servants in the Department of the Prime Minister and Cabinet and, even then, for a campaign to go forward it requires bipartisan agreement (art.6.1.1.). And, more recently, in response to the internet, restrictions have been extended to government websites so that they are not used to promote a Minister or the Government during an election (sec.6.2).

Parliamentary Privilege

Another area where Australia has led the Commonwealth of Nations in innovation is with respect to codifying parliamentary privileges. These are immunities from normal laws that were deemed to be necessary for members of the legislature to properly discharge their functions.

Like the Canadian one, the Australian Constitution transferred to the Australian Parliament "all the powers, privileges and immunities" of the U.K. House of Commons, and it authorized the Parliament to establish its own privileges (s.49).[32] It also empowered each House "to make its own rules and orders with respect to: (i) the mode in which its powers, privileges, and immunities may be exercised and upheld" and (ii) for proceedings in either chamber (s.50). Thus the British Commons' immunities and privileges at 1901, when Australia was founded, were put in place.

The privilege of freedom of speech was famously set out in article 9 of the English *Bill of Rights* (1689) which

states: "*That the Freedome of Speech and Debates or Proceedings in Parlyament ought not to be impeached or questioned in any Court or Place out of Parlyament*". This aspect of privilege has been taken to mean that an MP or Senator cannot be brought before a criminal or civil court over something they say or do in the chamber or at committee.[33] The other great privilege claimed by Parliament is known as 'exclusive cognisance', meaning it has exclusive jurisdiction over all aspects of its own affairs: the right to set procedures, determine if there is a breach of those procedures and what then should happen. This includes disciplining its own members for misconduct and punishing anyone, member or not, for interfering with parliamentary business. These two privileges established Parliament's independence from the Crown.

These two privileges also come together in the 'enrolment' principle which prevents courts from examining the procedure by which a bill was adopted; the court must simply accept that, when a bill is placed on the parliamentary rolls (i.e. enrolled), it was adopted according to Parliament's rules. And, as noted above, the Governor General in Australia (and Governors at the state-level) verifies that the bill properly passed all stages before giving Royal assent.

What triggered the review of privileges in Australia was a court allowing testimony that had been given to a Senate Select Committee on whether a High Court Judge should be removed from office to be used by prosecuting and defense attorneys to question the truth and motives of a witness.[34] In response a Joint Select Committee on Parliamentary Privileges was established in 1982 to review the practice and law surrounding parliamentary privileges.

While the initial motive was the court case(s) in New South Wales, the committee took on this project with an eye to determining what privileges and immunities were relevant to a modern democracy. It was accepted from the outset that some privileges and immunities won by the British Parliament from the Crown beginning in the 1300s may not be necessary or appropriate in the 21st century; and that all parliamentary privileges needed to be weighed against the rights and interests of all citizens.

Academics and parliamentary staff appeared as expert witnesses and the hearings generated a great deal of media and public interest. A draft was released and comments solicited; and the final report contained 35 recommendations.[35] Among these were a procedure for a 'right of reply' if people feel they have been defamed during parliamentary deliberations, that immunity should be reduced to only the days on which the House or a committee was sitting (and five days on either side) and that there should be some form of judicial review available for people who are found in contempt of parliament.

The resultant *Parliamentary Privileges Act 1987* implemented many of the committee's recommendations.[36] It defines 'proceedings of Parliament' from the English *Bill of Rights* to mean "all words spoken and acts done in the course of, or for purposes of or incidental to, the transaction of business of a House or of a committee" including: giving evidence before the House or a committee; preparation of a document for the House or its committees; and the preparation and publication of any House or committee proceedings or reports (16.2). It makes clear that these proceedings, this evidence and these reports cannot be used in a court to raise questions about the proceedings in Parliament including the motives and validity surrounding evidence given at a parliamentary committee. While most of the Act's provisions reduce privileges felt to be too sweeping or no longer appropriate (e.g. it eliminates the power to expel a member), it extended the contempt power by allowing for fines to be levied (marrying this with limited judicial review).[37]

Not everyone was in favour of codifying parliamentary privileges. At the time, two members on the committee expressed concern that this would allow the courts to become involved in parliamentary matters (something they considered undesirable).[38] Others have argued the opposite: that contempt should to be transferred entirely to the courts and that immunity protection for parliamentary debate should be reduced to allow civil actions when citizens are defamed.[39] The general belief, however, was that the process and the willingness shown by Parliament to review and reduce its inherited ancient powers strengthened these powers, and Parliament more generally.[40]

It is noteworthy that here, too, the United Kingdom has taken notice. In 1997, a joint select committee was struck to review the law and practice of parliamentary privileges in the 'mother' Parliament at Westminster and, in its 1999 report, the committee recommended a 'Parliamentary Privileges Act' similar to the one in Australia (including adopting the Australian definition for the English *Bill of Rights*' phrase: 'proceedings in Parliament'); and more specifically it recommended the elimination or reduction of a number of privileges, including turning over to the *courts* the determination of contempt and new criminal code provisions for *courts* to apply in the event of a failure to produce documents or appear before Parliament.[41]

Conclusion

The very fact that Governors are called upon to

use the 'reserve powers' against the advice of a first minister reflects the highly combative nature of Australia legislative politics. But the fact that coalition governments and negotiations with cross-benchers is possible in such a competitive environment points to why this country can offer Canada lessons when it comes to institutional rules and behaviour.

The key lesson to take away from Australia is how important first principles are to the proper operation of governance. For example, it is by keeping in mind that the principle behind responsible parliamentary government is government formation and accountability to the Parliament that the constitutional conventions of having the confidence of the House makes sense. Failure to do so is why these conventions are operationalized simply in the negative in Canada (and in the more limited way that loss of confidence triggers a new election). By doing so, Australia uses these same conventions in the positive, and we see the leadership of the larger parties actively negotiating support from other parties and independents before forming a government.

Electoral rules, whether it be preferential balloting or compulsory voting, were similarly rooted in first principles. Obviously there was some self-interest on the part of the government in the move to preferential voting as there will always be when considering electoral rules. But there are other electoral systems that would have advantaged the Nationalist Party more. In the end, Australia could never have made the change in electoral systems if the Australian people did not accept that the new system was rooted in democratic principles and that these principles were in-line with Australian values. It is precisely because Australians had come to believe that an elected representative should have the support of the majority of the constituents that this change was supported, and why it has spread to the state-level, and has continued to enjoy popular support.

The same is true for compulsory voting. While voters seem to have not supported it before its introduction in 1924, they have embraced it since, extending it to the state- and even municipal-levels, as it is also rooted in the principles surrounding majoritarian politics. For Australians, representatives, and thus government, should have the support of a majority of the citizens.

This brings us to coalition governments. In a Westminster-model Parliament, a government needs to be supported by the majority of the people's representatives. A coalition of political parties that has the support of a majority of MPs is seen as far more democratic than any minority alternative in Australia. Any election where no political party wins a majority of the seats is merely the prelude to parliamentary negotiations during the government formation period.[42]

The release of Cabinet and Executive Council handbooks was driven by the belief that in a democracy transparency at the highest levels of power is an obligation to the citizens. Full disclosure and an informed citizenry can only strengthen the government by ensuring public confidence in its decision making ability. The publication of caretaker conventions is in this same spirit and is seen as essential to protect Australian democracy and responsible parliamentary government.

Similarly, the review and reduction of unique privileges that members of Parliament enjoy is believed to have strengthened public confidence in the institution and to have increased popular acceptance for parliamentary privileges and immunities that exempt these elites from society's ordinary laws. Here too, the review was done from the position of first principles. After identifying the purpose of privileges (i.e. parliamentary independence from the Crown), each privilege could be examined through the lens of its role in contributing to that independence today, and a decision could be made as to whether these immunities from society's laws can still be justified in a free and democratic society.

In short, the lesson from Australia has to be the importance of democratic theory and first principles for institutional rules: the need to revisit those principles as part of their application; and the need for a regular review of these rules from the perspective of first principles.

Notes

1 Currently there are 85 countries or states/provinces that use the Westminster-model of responsible government [Anthony Low, "Buckingham Palace and the Westminster model", *The Round Table*, No.304 (1987)].

2 This is the litmus test for constitutional conventions set by Sir Ivor Jennings, *The Law and the Constitution* (London: University of London Press, 5th edn., 1960). It has been accepted and applied by the Supreme Court of Canada (Reference re: Amendment of the Constitution of Canada (1981) 1 S.C.R. 753, 888; and Re: Objection by Quebec to a Resolution to amend the Constitution (1982) 2 S.C.R. 793, 803-818).

3 All had been established prior to the *Statute of Westminster 1931* (U.K. 22 & 23 George 5, c.4), which gave Australia and the other dominions legislative autonomy, and certainly before the *Australia Act 1986* (S.U.K. 1986, c.2), which gave it constitutional autonomy (what is called in Canada 'patriation').

4 See Bruce M. Hicks, "The Westminster Approach to

Prorogation, Dissolution and Fixed Date Elections", *Canadian Parliamentary Review*, Vol.35, No.2, pp 20-27 (2012); and Bruce M. Hicks, "British and Canadian Experience with the Royal Prerogative", *Canadian Parliamentary Review*, Vol.33, No.2, pp 18-24 (2010).

5 Though the current Canadian prime minister has been intentionally misrepresenting the conventions in order to pre-empt the formation of a coalition government by opposition parties in the future. See Peter Aucoin, Mark D. Jarvis and Lori Turnbull, *Democratizing the Constitution: Reforming Responsible Government* (Toronto: Emond Montgomery Publications Limited, 2011).

6 The response of the Canadian Prime Minister, William Lyon Mackenzie King, to these same developments would be to try to use the 'reserve powers' to stay in power, leading to the constitutional crisis known as the King-Byng Thing.

7 It was able to do so because the 1931 election returned 34 UAP members, compared to Labor 14 and Country at 16. The UAP had campaigned as though it was going to form a coalition with the Country party, but opted to govern alone when it found it had more seats than Labor and Country combined. The 1934 election saw eight seats shift to the Country Party from UAP and Labor gain four, forcing it to return to coalition.

8 Only half of the voters in Canada are able to properly identify which of the three main parties (Liberal, Conservative and NDP) is running third in their riding during an election [André Blais and Mathieu Turgeon, "How good are voters at sorting out the weakest candidate in their constituency?", *Electoral Studies* Vol.23, No.3, pp 455-461 (2004)]. The evidence suggests that in Canada only around three percent of voters vote strategically, though this can go as high as 12 percent in a single issue election.

9 This is assuming that the political party wants to give voters this leadership and that their supporters wish to follow the party's advice.

10 STV is also used for upper chamber elections in Australia at the federal and state-level. In multi-member constituencies, the voters need to fill several vacant seats in each election. Like the preferential ballot, voters rank the candidates. For the sake of simplicity, let's say there are four vacancies and a successful candidate needs to get 25 percent of the vote. In addition to eliminating unpopular candidates and distributing the ballots to their supporters' second choices, the votes of candidates who have the support of more than the necessary percent of the population are also distributed to voter's second preferences at a fraction of their value (based on the size of the surplus the first candidate received). This way, all voters will have a representative they support elected.

11 The *Commonwealth Electoral Act 1924* was introduced by Nationalist Senator Herbert Payne. The idea had been recommended by a Royal Commission and compulsory voting was first adopted for the two plebiscites on conscription in 1916 and 1917.

12 In rebuttal, see Frank Devine, "Why Endure a Law That Benefit Only Politicians?: Compulsory Voting Doesn't Put People in the Booths", *The Australian* (June 18, 2001).

13 Only some municipalities have moved to compulsory voting.

14 By contrast, in Canada, an Order-in-Council in 1896 had established that it is the PM who recommends to the Privy Council the dissolution of Parliament. In 1920, Mackenzie King had a new Order-in-Council passed stating that the PM's recommendation was to the Governor General and not the Governor-in-Council. And, in 1957, the formality of the PM's minute going through the Council was eliminated and the Canadian PM now delivers his recommendation privately, without the Cabinet or Council being informed, in a lofty titled letter to the GG called an 'instrument of advice'. Having eliminated the Council, the GG issues a series of proclamations and writs (assuming he agrees with the PM's recommendation; which in Canada he always does).

15 Cabinet conventions make the PM *primus inter pares*, but he is still only one minister among equals. Confidence is not given to the PM by the House but to the entire Ministry. Ministers are appointed by the Governor to the Ministry, with sole authority over and responsibility for any department he may assign to their charge. The difference between Cabinet government and prime ministerial government, which has become the norm in Canada, lies not in constitutional conventions but in the deference the Governor General, ministers, MPs, Senators, the press and the public show to the Canadian PM.

16 Rudd, having resigned as foreign minister, is now a backbencher.

17 Liberal Leader Paul Martin did this for his parliamentary secretaries during his term as Prime Minister of Canada.

18 This ministerial post was described by Labor Leader Gillard as "cabinet-level". But as Oakeshott would not have been bound by Cabinet solidarity it is clear that he would not have been a member of the Cabinet. See "Rob Oakeshott turns down ministry offer" published at http://www.news.com.au/features/federal-election/ministry-offer-for-independent-mp-rob-oakeshott/story-e6frfllr-1225917448775 (accessed on August 13, 2012)

19 He also holds the distinction of being only the second Labor leader to not lead the party in an election. Even though he had been re-elected by caucus following a leadership spill, he opted to step down when public opinion polls suggested he would not win the election. The first Labor leader to not contest an election was Billy Hughes, who had been chosen as leader in 1915 and then quit to form the Nationalist Party in 1916 (it was initially to be called the National Labor Party), taking most of the parliamentary talent with him.

20 Office of the Governor General, "Governor General's Role" published at http://www.gg.gov.au/governor-generals-role (last updated on November 7, 2012).

21 *Ibid.*

22 This is the same constitutional convention as in Canada, though in Canada this is described in proximity to the previous election not to the end of the full term, with a

dissolution request within a year of the previous election being the only circumstances where the PM's request has been denied and, even here, not in every instance.

23 This is the position of Geoff Barlow and J.F. Corkery, "Sir Walter Campbell: Queensland Governor and his role in Premier. Joh Bjelke-Petersen's resignation, 1987", *Owen Dixon Society eJournal* located at http://epublications.bond.edu.au/odsej/5 (accessed on Aug. 16, 2012).

24 Walter Campbell, "The Role of a State Governor, with particular reference to Queensland", Brisbane: Royal Australian Institute of Public Administration, 1989, p.8.

25 In New South Wales it is the *Constitution (Amendment) Act 1987* (S.N.S.W. 1987, c.64).

26 That edition was published in *Politics*, Vol. 17, No.1, pp 146-163 (1982). More recent versions are released directly to the public by the Department of the Prime Minister and Cabinet of the Australian Government. The latest version, cited in this paper, is: *Cabinet Handbook* (Canberra: Commonwealth of Australia, 7th ed., 2012).

27 This is in contrast to the New Zealand and United Kingdom Cabinet manuals that have been released, partially, as an attempt to codify the conventions surrounding the 'reserve powers' of the Queen/Governor General.

28 The latest version is the *Federal Executive Council Handbook* (Canberra: Commonwealth of Australia, 2009).

29 At the state-level the convention is that members resign from the Executive Council when leaving the ministry.

30 Walter Bagehot, *The English Constitution* (1867).

31 *Guidance on Caretaker Conventions* (Canberra: Department of the Prime Minister and Cabinet, 2011).

32 The Canadian *Constitution Act, 1867* (s.18) also allows for the Canadian Parliament to set its own privileges, immunities and privileges and transfers the U.K. Commons' privileges to the Canadian Parliament in the interim, with an additional proviso that the Canadian Parliament cannot increase them beyond those enjoyed by the U.K. Commons at that time of Confederation.

33 This extends to presentations and submissions by witnesses, their drafts, and notes prepared by or shared with parliamentary staff for speeches or questions in the chamber or at a committee.

34 *R. v. Murphy* (1986) 64 ALR 498.

35 Joint Select Committee on Parliamentary Privilege, "Final Report", Australian *Parliamentary Paper* No.219 (Oct. 1984).

36 S.C.A. 1988, c.9.

37 The committee had concluded that Parliament could not levy fines, as the British House of Commons had not levied a fine since 1666 (*supra* note 36, p.219). The belief in Britain is that the House of Commons "probably" does not have the power to fine someone for contempt but that the House of Lords "possibly" does [Oonagh Gay, "Parliamentary privilege and individual members", *Standard Note* No.04905 (London: House of Commons Library, Feb. 10, 2010), p.4].

38 Senators Don Jessop and Peter Rae.

39 See Geoffrey Marshall, 'The House of Commons and its privileges' in S.A. Walkland (ed.), *The House of Commons in the Twentieth Century* (Oxford: Clarendon Press, 1979), pp.213-4.

40 Bernard Wright, "Patterns of Change – Parliamentary Privilege", *Parliamentary Studies Paper* No. 2 (Canberra: Australian National University, May 2011).

41 U.K. *House of Lords Paper* No.32-1/U.K. House of Commons Paper No.214-I (1998-9).

42 Whereas in Canada, on election night where no party wins a majority will see all party leaders and the press announce the result as being the election of a 'minority government'.