Minority government in Victoria

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‘Hasta la vista, baby!’ was one of the more colourful contributions to the parliamentary lexicon by Jeff Kennett, Premier of Victoria with a crushing majority since 1992.¹ At the time, he was predicting what the electorate would say to the Leader of the Opposition; few who remembered his turn of phrase thought parliament would say the same to him after the 1999 election, but so it turned out.

The change of government

The election on 18 September was painfully protracted. Counting in close lower house seats finally gave the Liberal–National coalition 43 members and the ALP 41, with three independent members. The last of the 88 seats was not decided until 16 October, when a supplementary election caused by the death of a candidate on the eve of the election took the ALP’s numbers to 42.

The supplementary poll could have been contentious. Under s 164(5) of the Constitution Act Amendment Act 1958 (Vic), an election fails if a candidate dies after noon on the day of nomination and before the polling day. The time of the candidate’s death in the Frankston East election was unclear, but a sensible interpretation of the provision prevailed. Death of a candidate before the completion of polling should be enough to trigger a supplementary election, even if it occurs on the day of the poll.

No one party had a majority in the lower house of the new parliament. Surprising confusion surrounded the proper description of this state of affairs. Dictionaries and British texts call this a hung parliament, but most Victorian observers seemed to reserve this term for an equally divided house, in which two sides split 44–44.

Whatever it was called, the new house left the balance of power in the hands of the three independent members. Two, Russell Savage and Craig Ingram, had been National Party supporters in the past, while the third, Susan Davies, was once an ALP candidate, but they had common concerns about openness and accountability in government and the social and economic problems of rural areas (all three represented electorates outside Melbourne).

¹ Victoria, Legislative Assembly, Parliamentary Debates, 27 October 1993, p 1359
As it became clear that they would hold the balance of power, the three members released an ‘Independents’ Charter’ in which they announced the terms on which they would support a government from either side. They asked for written responses from the coalition and the ALP and said that they would announce their decision after the supplementary election in Frankston East.

In the media, Mr Kennett now became the ‘caretaker Premier’, as if his official title had changed. Although this was a fair reflection of his increasingly shaky position, in law he retained the Governor’s commission and remained just as much the Premier. As for the conventions of caretaker government, set out in guidelines issued by the Department of Premier and Cabinet, they applied to him no more and no less after the election (until the result was clear) than they had when parliament was first dissolved.

Mr Kennett began calling on Westminster tradition to support his hold on government. That tradition, so he said, demanded that the independents back the party (or the coalition) with the largest number of seats in the lower house.

The British literature on the formation of minority governments does not support the claim. As Rodney Brazier has written, ‘there are no “rules” about government formation from a hung Parliament’—aside, that is, from the principle that the person best able to command a stable majority in the lower house (or at least to maintain a stable government) should be appointed.2 In Victoria, the shifting combinations that produced minority governments during extended periods earlier in the century defy summary. It is enough to note that the State’s last minority government, which lost office in 1952, was formed by the smallest party (the Country Party), with ALP support.

After the supplementary election, the three independents announced in separate statements that they would support the ALP. It had accepted the proposals in the Independents’ Charter in their entirety; the Liberal–National Party coalition, on the other hand, disagreed with sections of the charter, including the proposals for upper house reform. The independents criticised the record of the Kennett government and expressed their hopes for better prospects for areas outside Melbourne under Labor. Craig Ingram, whose election campaign was based on increasing the flow of the Snowy River, thought the ALP offered more hope on this issue as well. For all that, the novelty of supporting Labor did not come easily to the two independents with conservative backgrounds and staunchly conservative electorates.

The ALP government’s majority in the lower house was now clear, albeit very slim. The independents signed a memorandum of understanding with the ALP to confirm their support. It only remained for the Premier to resign and make way for the appointment of the new ministry led by Labor leader Steve Bracks.

For a moment, it looked as if Mr Kennett was calling on Westminster tradition again to delay his departure. It entitled him, he said, to remain as Premier until he was defeated in the lower house. This was partly true and partly misleading. There would be no question of dismissing a defeated Premier before parliament had met, and the idea that a Premier has a right to meet

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parliament has support from British precedents. But in practice the so-called right is only relevant when the numbers in the lower house are unclear. If, as in Victoria, the government loses its majority to an alternative administration supported by a clear and definite agreement with independents, it would be foolish and potentially damaging to the State for the outgoing Premier to hang on.

Despite a parting claim to a right to meet parliament in his farewell speech to the media, Mr Kennett resigned quickly once the independents announced their decision. In the end, the process was more like an exceptionally drawn-out version of an ordinary election defeat than a genuine crisis over formation of a minority government. With support for the ALP in the lower house clear, the Governor was not embroiled in any of the complications that made formation of a minority government in similar circumstances in Tasmania in 1989 so tortuous.

The charter

The Independents’ Charter is the basis of their support for the new minority government. In it, they undertake to vote with the government on ‘appropriation and supply bills’ and all motions of no confidence, ‘unless there is evidence of fraud, misappropriation or illegal activities’. They reserve the right to vote as they choose on other legislation, although they undertake to negotiate with the government. They warn that they will withdraw their support from a government that

- ‘demonstrates mismanagement or misuse of public finances,
- is shown to be corrupt, which supports any practices which are corrupt or which violates accepted standards of public probity
- abuses the spirit of democratic parliamentary practice and procedure’.

The charter resembles the memorandum of understanding that set out the terms on which independents supported the Greiner government in New South Wales in 1991, but it is far less detailed, with none of the memorandum’s draft bills and detailed timetables. Nor does the Victorian charter seek to involve independents in general government policy and administration, as the Tasmanian Parliamentary Accord of 1989 did.

The charter covers five topics: open and accountable government, parliament, rural Victoria, assurances for independent members, and privatisation. Of these, the proposals for rural Victoria have the most immediate electoral importance for the independents, but some of the proposals for the machinery of government are far-reaching. They include reform of the upper house, freedom of information laws and legislation concerning the Auditor-General and the Director of Public Prosecutions.

New legislation

The new government has already introduced legislation to implement these last three proposals. The Audit (Amendment) Act 1999 (Vic) reverses controversial changes to the office of Auditor-General made by the Audit (Amendment) Act 1997 (Vic). It moves provisions concerning the Auditor-General’s appointment and tenure from the Audit Act 1994 (Vic) to

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3 Eg Bogdanor, op cit n 2, p 96–7; Butler, op cit n 2, p 73
the *Constitution Act* 1975 (Vic) and amends and entrenches them, although, as with other entrenched provisions of the *Constitution Act*, only absolute majorities in both houses are required for future amendments. The act preserves the status of the Auditor-General as an independent officer of the parliament and restores the capacity of the Auditor-General’s Office to conduct audits for itself.

The act goes beyond mere restoration of the law as it stood until 1997. The parliamentary Public Accounts and Estimates Committee takes on new powers. Appointment of the Auditor-General is now to be made on the recommendation of the committee. The Auditor-General must confer with, and have regard to audit priorities determined by, the committee and must submit a draft annual plan to it for its comments, to which regard must be had in the final plan. The Auditor-General’s annual budget is to be determined in consultation with the committee, which can also vary obligations imposed on the Auditor-General by some sections of the *Audit Act* and by the *Financial Management Act* 1994 (Vic) and the *Public Sector Management and Employment Act* 1998 (Vic). All in all, these provisions make the committee a significant check on the Auditor-General.

The *Freedom of Information (Miscellaneous Amendments) Bill* 1999 reverses some of the changes to FOI law made under the previous government. The bill repeals provisions restricting disclosure of names and addresses through FOI access, added after disclosure to a convicted murderer of names of nurses at Frankston Hospital early in 1999. But it increases protection for names and addresses under the separate exemption for personal information.

The exemption for cabinet documents is narrowed, so as to exclude documents that have been considered by cabinet although they were not prepared for that purpose. The exemption for information acquired from businesses (commonly, although hardly accurately, known as the commercial-in-confidence exemption) is amended to apply only where disclosure is likely to expose the business unreasonably to disadvantage.

Finally, the *Public Prosecutions (Amendment) Bill* 1999 (Vic) takes existing provisions concerning the appointment and tenure of the Director of Public Prosecutions and puts them into the *Constitution Act*. It also removes restrictions on the power of the DPP to initiate prosecutions for contempt of court, imposed by the *Public Prosecutions Act* 1994 (Vic). Interestingly, though, the bill does not reverse one of the other major changes made by the 1994 act: the placing of the Office of Public Prosecutions under the control of the Solicitor for Public Prosecutions rather than the DPP. This separation of administrative control was the subject of strong objection by the outgoing DPP, Bernard Bongiorno, in his 1994 annual report.

At the time of writing, the *Freedom of Information (Miscellaneous Amendments) Bill* and the *Public Prosecutions (Amendment) Bill* awaited royal assent, after passing with Liberal and National Party support. All three bills are significant, but they could be reversed by future legislation. Deeper structural change—and with it the key to future amendment of these and other acts—would come with a fourth bill whose passage through parliament will be much more difficult, if it passes at all.

The *Constitution (Reform) Bill* 1999 (Vic) would introduce proportional representation for the upper house, in accordance with the Independents’ Charter. Victoria’s Legislative Council is elected by preferential voting in two-member electorates, each composed of four lower
house electorates. Half of the members (one from each electorate) are elected simultaneously with each lower house election. Electorate boundaries are drawn by the independent Electoral Boundaries Commission, but at present the small number of ALP members in the upper house are returned with large majorities and a much larger number of Liberal members are returned with small majorities. Even after the 1999 election, the Liberal Party retains a majority in the Council in its own right.

The bill proposes an upper house of five electorates returning seven members each by proportional representation. Two electorates must be primarily outside the metropolitan area and two primarily within it. The number of electorates and the size of the house, and the bill as a whole, are a starting-point for negotiation, in which the representation of country areas and the fate of the current large Liberal membership of the Council will be key issues. Other provisions would introduce a fixed four-year term for both houses.

Negotiation and amendment would be no bad thing for some of the other provisions of the bill. A startling provision proposes that annual appropriation bills will be enacted by the Legislative Assembly alone. It is understandable that the ALP might try to remove the power of the upper house to block supply (although this was not one of the proposals in the Independents' Charter). It also reinforces the proposed fixed term. But taking away the Council’s power even to consider or debate the appropriation bill makes a strange contrast with the policy of the rest of the reform bill, which is to revive the upper house as an effective house of review. The difficulties are compounded by problems with the proposed definition of the bills that are to be passed by this alternative procedure. The New South Wales model for limiting the Council’s power over supply would be far preferable, giving it the opportunity to debate and pass an appropriation bill but not to block it.

Conclusion

Victoria no longer stands out as the only State not to have had a minority government in the last ten years. Since the election, the new government has boosted its numbers slightly, and its spirits considerably more, by winning the former Premier’s seat (never before held by Labor) in the by-election caused by his resignation. But it is still at the mercy of the independents, although now less dependent on the combined support of all three.

For all its apparent weakness in parliament, the new government is proposing fundamental constitutional change. The Kennett government left the Constitution Act largely unaltered during its seven years in office, despite its sweeping reforms elsewhere. The Bracks government is already very different. A constitutional commission, one of the elements of the Independents’ Charter, may work over the current proposals and produce more. If the biggest changes for decades are accepted by the finely-balanced lower house and the Liberal majority in the Council, it will be a remarkable demonstration of the capacity of consensus politics to reshape a constitution.
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