BOOK REVIEWS

Parliament, the Executive and the Governor-General by G. Winterton (Melbourne University Press, Melbourne, 1983) pp. v-viii, 1-376. Price $39, ISBN 0 522 84242 9; ISSN 0726-4852.

Executive power is a neglected subject in Australian constitutional literature, and for good reason. The provisions of the Commonwealth Constitution dealing with executive power are terse and enigmatic. They contain little by way of direct statement. Instead, they merely provide a source of implications. This perhaps curious result reflects a desire on the part of the draftsmen of the Constitution to leave the subject of executive power in the shadowy realms of constitutional convention and common law, partly to gain the flexibility inherent in the British constitutional framework and more to avoid the near impossible task of specifying the rules relating to this branch of government.

The task which the author sets himself in the book is to examine what the Commonwealth government can do without legislative authorization, and to analyse the constitutional relationships both among the components of the executive branch and between that branch and the legislature and the judiciary. The challenge inherent in that task is one of integration. The written and unwritten elements of the constitutional framework must be brought together. Two steps are involved in this process: definition of the content of the constitutional conventions and common law, and interpretation of the written provisions of the Constitution in light of that definition. These two steps are closely related, perhaps inseverable. However, as the author acknowledges at the outset, British constitutional law offers guidance in relation only to the first of them:

> Whereas in the largely unwritten British Constitution the 'conventions' restraining the Monarch's independent discretion have to contend only with other unwritten rules, such as the Royal prerogative, in Australia the principles of responsible government (most of which are not expressed in the Constitution) must compete with powers expressly conferred on the Governor-General. In such a situation, it can be an uphill battle to maintain that the unwritten principles should prevail — as the events of 1975 demonstrated.[1]

The author marshalls a great weight of scholarly research to meet this challenge. The essential issues of separation of powers, parliamentary control of the executive, the nature of prerogative power and judicial review of executive action are tackled forcefully and meticulously. The scope of Commonwealth executive power is examined from two directions: breadth (where the issue is that of federal division of executive power between the Commonwealth and the States) and depth (where the limits within the Commonwealth sphere, suggested by the separation of powers doctrine, are considered). The author concludes that the breadth of Commonwealth executive power is marked out by the limits upon Commonwealth legislative power contained in ss. 51, 52 and 122 of the Constitution. In conformity with that approach, Commonwealth power derived from 'nationhood' should be grounded in s. 51(xxxix) (in domestic matters) and s. 51(xxix) (in foreign affairs), rather than in s. 61. The depth of Commonwealth executive power is defined by the prerogative or common law powers of the Crown related to the subject matters of Commonwealth legislative power. In particular, the reference in s. 61 of the Constitution to 'maintenance of this Consititution' does not, in the author's view, add depth to the executive power beyond that attributable to the prerogative. To hold otherwise would invite the possibility that this aspect of Commonwealth executive power lies beyond legislative control. On the contrary the author takes the stance that executive power is fully amenable to legislative (and judicial) control. If a single theme emerges from the book, it is this.

[1] Winterton G., *Parliament, the Executive and the Governor-General* (1983) 4.

> It is clear that, like all constitutional provisions, those conferring powers upon the Governor-General cannot be interpreted literally, as if the Constitution were inscribed on a *tabula rosa*. They must be read against a background of fundamental, yet (therefore) implied, consitutional doctrines. One of these is responsible government; another is parliamentary supremacy. Just as the constitutional provisions conferring executive power must be read subject to responsible government, ensuring that powers vested in the Governor-General are exercisable only on ministerial advice, so they must also be interpreted in conformity with parliamentary supremacy, with the result that Parliament can regulate their exercise by the Governor-General acting on ministerial advice. The only argument for discounting the implications of parliamentary supremacy appears to be some vague notion, founded on a few *obiter dicta* which have never been applied, that, unlike all contemporary British constitutions, the Commonwealth Constitution introduced a legal separation of 'legislative' and 'executive' powers. But the alleged separation of these powers, which cannot be implemented feasibly, has been almost totally ignored in judicial review of the delegation of legislative power, and was not referred to in the only judicial comment relevant to the present issue — that of Jacobs J. in the *A.A.P.* case — is simply too tenuous a ground on which to resist the implications of the fundamental constitutional concept of parliamentary supremacy, which was one of the foundations on which Jacobs J. rested his observations.
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> In short, it is submitted that exercises of executive power are subject to control by Parliament, not only *retrospectively*, through political means such as ministerial responsibility, but also *prospectively*, by legislation.[2]

For this reviewer, though, nagging questions remain. First, while the case made for recognition of responsible government as a feature of the Commonwealth Constitution is strong, the problem of defining the content of that doctrine, particularly in the light of the powers of the Senate, remains unresolved. Moreover, denial of independent discretion to the Governor-General may well represent the general rule, but possible exceptions to this rule demand closer examination. Candidates for this treatment must be the appointment of a Prime Minister in a multi-party parliamentary situation, the dissolution of both Houses of Parliament pursuant to s. 57 of the Constitution, and the submission to referendum under s. 128 of the Constitution of a proposed law for alteration of the Constitution passed twice by the Senate but rejected by the House of Representatives. Secondly, the case made for recognition of parliamentary supremacy as a feature of the Commonwealth Constitution, at least to the degree asserted by the author, is less than totally convincing. The status of this doctrine in Britain appears attributable to a constitutional history somewhat removed from our own. Thirdly, the troublesome language of s. 2 of the Constitution is dismissed rather too lightly. The intriguing suggestion that s. 2 may allow a transfer of the Queen's prerogative powers regarding the States from Her Majesty to the Governor-General remains little more than a suggestion. But on whose advice must Her Majesty act in effecting such a transfer?

The subject matter of this book does not lend itself to neat organization. Central issues are bound to recur. Still, the introductory chapter entitled 'The Executive Branch' seems unnecessarily incursive into the body of the text, not merely raising those central issues but at times pre-empting their detailed consideration. Also, the concluding chapter on 'Reform and the Future' is an anticlimax, more in the nature of an essay on a distinct though related theme than the resolution of those central issues.

But these criticisms pale beside the quality and quantity of the research displayed in this work. *Parliament, the Executive and the Governor-General* is a very fine book. The author may not have quieted the debate on Commonwealth executive power — sensibly, he did not set out to do so. What he has done is set the agenda for all future discussion of that most difficult topic.

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[2] *Ibid.* 99-100

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