

The Pedigree of the Practices: Parliamentary Manuals and Australian Government*

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Most denizens of Parliament House in Canberra and other participants in the parliamentary process are aware that each house of the Australian Parliament has its own manual of its law and practice. The Senate has *Odgers' Australian Senate Practice*, first published in 1953 and now in its tenth edition, and the House of Representatives has *House of Representatives Practice*, first published in 1981 and now in its fourth edition. Other houses have similar manuals; there are, for example, Canadian and New Zealand versions.¹ It is also generally known that these books are the descendants of earlier works on parliamentary procedure. Most people, if asked about their origins, would be able to nominate Erskine May's *Parliamentary Practice*, first published in 1844 and now in its 22nd edition, as the original ancestor of all the tribe.² This is the conventional view. As with many conventional views, it is wrong, or at least misleading. This is not an obscure historical point, but a matter with some significance for the assessment of Australia's system of government.

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¹ D. McGee, *Parliamentary Practice in New Zealand*. 2nd edn, Wellington, NZ, GP Publications, 1994; R. Marleau and C. Montpetit (eds), *House of Commons Procedure and Practice*. Ottawa, House of Commons, 2000.

² T. Erskine May, *A Treatise Upon the Law, Privileges, Proceedings and Usage of Parliament*. London, C. Knight and Co., 1844. Thus the title does not include the word 'practice'. Was the adoption of the conventional title *Parliamentary Practice* in later editions a nod to Jefferson? It was he who began the now near-universal use of that word in the titles of these manuals.

The reputation of Erskine May's work as the original handbook on parliamentary procedure is undeserved for two reasons. There were many works on aspects of the law and procedure of parliament before he compiled his manual. There were no fewer than fourteen of them which were particularly significant, leaving aside collections of debates and precedents which contained no commentary. These works, like Erskine May after them, came to be designated by the surnames of their authors: Smith, Sadler, Elysnge, Scobell, Hakewill, Selden, Petyt, Hale, Rushworth, Atkyns, Chandler, Blackstone and Hatsell. The earliest of the fourteen was Thomas Smith's *Common-wealth of England and the Manner of Gouvernement Thereof*, published in 1612, and notable for its use of the term 'commonwealth'. The most recent was John Hatsell's *Precedents of Proceedings in the House of Commons*, published in 1781.³ In Erskine May's time, Hatsell was the great parliamentary authority, having been revised in editions up to 1818. In his preface to his first edition, Erskine May, while acknowledging Hatsell, claimed to provide the first comprehensive treatise on parliamentary law and practice. It must be conceded that the earlier works did not cover all of the material which Erskine May sought to encompass, and the latter's volume was certainly more comprehensive and authoritative, while relying heavily on Hatsell.

More significant than the existence of these books is the point that Erskine May was not the first comprehensive treatise. That title properly belongs to a work first published in 1801 by Thomas Jefferson, *A Manual of Parliamentary Practice*.⁴

The thesis that Jefferson's work was the real prototype of all parliamentary manuals rests not only on its comprehensive coverage, but on the way in which it draws upon

³ The complete list of the 14, in chronological order, with abbreviation of their sometimes enormously long titles, is:

- Sir Thomas Smith, *Common-wealth of England and the Manner of Gouvernement Thereof*, 1612.
J. Sadler, *Rights of the Kingdom; or Customs of Our Ancestours: Touching the Duty, Power, Election or Succession of Our Kings and Parliaments ...*, 1649.
H. Scobell, *Memorials of the Method and Maner of Proceedings in Parliament ...*, 1656.
H. Elysnge, *The Ancient and Present Manner of Holding Parliaments in England ...*, 1660, and subsequent editions.
W. Hakewill, *Modus tenendi Parliamentum: or, The Manner of Holding Parliaments in England ...*, 1671.
W. Petyt, *Miscellanea Parliamentaria ...*, 1680. He, or another Petyt called George, was the author of the anonymous but famous *Lex Parliamentaria ...*, 1690.
J. Selden, *Of the Judicature in Parliaments ...*, 1681.
Sir Robert Atkyns, *The Power, Jurisdiction, and Priviledge of Parliament*, 1689.
Sir Matthew Hale, *The Original Institution, Power, and Jurisdiction of Parliaments*, 1707.
J. Rushworth, *Historical Collections of Private Passages of State ...*, 1721.
Richard Chandler, *The History and Proceedings of the House of Commons From the Restoration to the Present Time*, 1742.
Sir William Blackstone, *Commentaries on the Laws of England*, 1765, and subsequent editions.
J. Hatsell, *Precedents of Proceedings in the House of Commons; with observations*, 1781, and subsequent editions.

⁴ T. Jefferson, *A Manual of Parliamentary Practice: for the Use of the Senate of the United States*, 1801, and subsequent editions.

all of the previous sources, including the significant fourteen and many more. Jefferson's knowledge of these sources, most of which he acquired for his own library, is amazing. He cites them in a way which indicates that he had thoroughly mastered their contents. This disposes of something of a myth that Jefferson composed his manual only when he became Vice President, with the constitutional task of presiding over the Senate (a task now seldom performed by his successors), and had to take an interest in parliamentary procedure. On the contrary, he made a long and deep study of the subject, and had composed an earlier work, called the 'Parliamentary Pocket-Book', which he never had printed.⁵

In a belated recognition of the primacy of Jefferson's work, two clerks of the House of Commons, Kenneth Bradshaw and David Pring, in a comparative study published in 1972, *Parliament and Congress*, acknowledged that the *Manual of Parliamentary Practice* was the best statement of what had been at that time the law of the British Parliament.⁶ This assessment is assisted by the way in which the manual was originally printed, with references to the United States constitution and Senate precedents in italics and House of Commons practices in Roman type, with the latter reported even when not strictly relevant in the American context.

Erskine May, however, ignored Jefferson's work. It is tempting to put this down to the British assumption of superiority and a determination not to acknowledge the upstart republic on the other side of the Atlantic, but there were other factors involved. Jefferson himself recognised that what he had written was not original in relation to the British Parliament but relied on the earlier sources, and Erskine May, while frequently citing Hatsell, preferred to return to the primary sources, the journals and debates of the two houses. The full title of Jefferson's book (most of these works had lengthy titles) described it as being 'for the Use of the Senate of the United States', thereby creating an undeserved impression of specialisation. Constitutional provisions and new precedents set by the Senate were irrelevant in the British context. Finally, even in this early period, Parliament and Congress had diverged in their procedures to an extent which limited any potential procedural cross-fertilisation between them. So Erskine May became the authority in the British Empire and subsequently in the Commonwealth of Nations, while Jefferson received greater attention in 'foreign' countries (he was soon translated into the major European languages and is still referred to in many non-British legislatures). Both works continued through their various editions, with the divergence increasing with each edition.

All this provides little excuse for the deference shown to Erskine May and the neglect of Jefferson in Australia. Australia's Constitution and bicameral parliamentary

⁵ *Jefferson's Parliamentary Writings*, in W. Howell (ed.), *The Papers of Thomas Jefferson*. 2nd series, Princeton, N.J., Princeton University Press, 1988. According to the editor (p. 3), Jefferson began his study of parliamentary procedure as early as 1762 as an apprentice lawyer. By a curiosity of history, Jefferson's Manual was adopted by the US House of Representatives as an authority on its practice, and is included in its manual of practice, *but without those passages referring only to the Senate!* The Senate's manual consists of its rules and resolutions, which are more of a code.

⁶ K. Bradshaw and D. Pring, *Parliament and Congress*. London, Constable, 1972, p. 1. This statement appears to have been commonly made about Jefferson's work, but the origin of it has not been traced.

structure, unique in the British Empire, were largely based on those of the United States. This should have elevated the significance of Jefferson's work and the precedents to which he referred. His manual could have been more relevant in Australia. A striking example is Jefferson's description of the way in which the United States Senate, contrary to the House of Commons procedure, had adopted the practice of allowing senators to move amendments to different parts of a bill non-sequentially. This is now the practice of the Australian Senate, but has become so by a process of convergent evolution rather than imitation. In a chamber in which many amendments are moved and made to bills, and in which there is no limitation on the number of amendments which may be moved by any member or the time which may be spent considering them, the practice makes a great deal of sense. Had they looked into Jefferson, Australian senators might have come to that conclusion much earlier. Similarly, Jefferson records that the Senate had arrived at a rule that any senator could require a complicated question to be divided, which led to 'embarrassments' unless interpreted in application. Again, the Australian Senate has arrived at the same position, by evolution and not by imitation.⁷

While Jefferson was not called upon as an authority, there was in the early Australian Senate a greater consciousness that it was different from the British Parliament, and a greater willingness to consider other sources. For example, in 1904 the first President of the Senate, Richard Baker, declined to follow the British rule that an amendment to a bill must be in accordance with the principle of the bill as agreed to at the second reading, and held that relevance to the subject matter of the bill is the only test of acceptability of an amendment, citing the American procedure as a persuasive authority.⁸ Baker was strongly of the view that the Australian Senate should establish its indigenous identity by building up its own precedents and rules. He dissuaded it from adopting a standing order, still in force in the House of Representatives, to provide that House of Commons procedures must be followed where the standing orders are silent or doubtful.⁹ Baker's view of the independence of the Senate was not consistently followed by his successors, with the result that Erskine May came to be cited more frequently.

This acceptance of Erskine May as *the* authority on parliamentary matters in Australia was the result of historical and cultural factors. It has been argued elsewhere¹⁰ that in the period from about 1920 to about 1950 there prevailed in Australia a 'Westminster hegemony': Australia's system of government was seen as a 'Westminster system', or it was perceived that it should be made to work as a 'Westminster system' ought, regardless of the provision of a very different set of institutions by the framers of the Constitution. The Westminster hegemony was partly the product of Empire loyalty, seeing Australia as part of a great world Empire, which was closely related to feelings of insecurity in a world that had become much more dangerous since 1901. The reverence accorded to Erskine May was part of that historical cultural phenomenon.

⁷ 1812 edition (by Jefferson himself), in *Jefferson's Parliamentary Writings*, pp. 383, 399–400.

⁸ Senate Debates, 14 July 1904, p. 3243.

⁹ For an account of this matter, see H. Evans (ed.), *Odgers' Australian Senate Practice*. 10th edn, Canberra, Department of the Senate, 2001, p. 20.

¹⁰ H. Evans, 'The other metropolis: the Australian founders' knowledge of America', *The New Federalist*, no. 2, December 1998, pp. 30–1; H. Evans, Introduction, *The Biographical Dictionary of the Australian Senate*, vol. 1, Carlton South, Melbourne University Press, 2000, pp. 7–8.

More recently, the severance of remaining constitutional links between Australia and the United Kingdom, and the weakening of political links, has led to a divergence between the Australian and British parliaments, which, in turn, has led to something of a decline in the authority of Erskine May. Australian parliamentary procedures now largely stand on their own. In the current edition of *Odgers' Australian Senate Practice*, there are no references to Erskine May or to Jefferson, virtually no references to British or American parliamentary procedures, and references to British or American law only where it has been explicitly adopted, or is likely to be of persuasive value in Australian courts. Baker's vision of indigenous Australian procedures has therefore largely been realised. The reference to Odgers around the world as a stand-alone manual adds to that realisation.

The establishment of an Australian parliamentary procedure, recorded in its own manual, may be regarded as an aspect of the recent rediscovery that Australia does not have a 'Westminster' system of government, that it was not intended to have such a system by the framers of its Constitution, and that we should stop trying to force our system to comply with what are thought to be Westminster norms. There is now a substantial body of literature on that theme, corresponding with a greater appreciation of Australia's independent character.¹¹

The 'Westminster system', however, has powerful support, particularly by ministries of whatever political persuasion, because it has become a system of executive domination of parliament, and ministers would like to convince us that we have, or should have, such a system. The various editions of Erskine May have reflected the development of executive control over parliament. So quotes from Erskine May often find some favour with executive governments and their advisers. In 1998, in refusing to comply with the Senate's order for documents about the waterfront lockout affair, the government relied on 'the practice in this parliament', and referred, inaccurately, to the procedure of the House of Commons about matters sub judice as recorded in Erskine May, which is different from the formulation applied by Senate presidents.¹² Quotation of Erskine May could almost be regarded as a sinister sign, that the quoter is seeking to commit some anti-parliamentary and un-Australian sleight of mind in support of some executive outrage. It may be best that we leave Erskine May to the British.

As for Jefferson, may he rest in peace. It is now too late to make up for our earlier neglect of him, but at least we should now acknowledge that he was the true pioneer.

¹¹ Two examples: C. Sharman, 'Australia as a compound republic', *Politics*, May 1990; B. Galligan, *A Federal Republic: Australia's Constitutional System of Government*. Cambridge, Cambridge University Press, 1995.

¹² The statement of the alleged 'practice in this parliament' consisted of an incomplete and unsourced quotation of a resolution of the House of Commons as recorded by Erskine May, which, apart from being incomplete, ignored a subsequent modifying resolution also recorded in that work: see the advice to senators in the transcript of the estimates hearing of the Economics Legislation Committee, 2 June 1998, p. E125; *Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament*, 22nd edn, ed. D. Limon and W.R. McKay, London, Butterworths, 1997, pp. 383-4.