

RESEARCH REPORT No 21

MANDATES, PROMISES AND SURPRISES¹

Geoff Gallop

In my talk today I'm going to argue that the claim made by a government that it has a mandate is just that but no more and that it is only as good as that government's capacity to back it up in the face of inevitable conflict. In saying this I'm not saying that a mandate isn't important but rather that it needs to be situated in relation to not illegitimate claims by other participants in the political process whether parliamentarians, the courts and other accountability agents or citizens generally. Its importance lies in the discipline it ought to impose on leaders and parties when they present their policies and promises during an election campaign. More generally I'm going to make a point about how the discussion in and around mandates needs to be located in the broader context of increased voter disenchantment about politics today. There's the mandate governments claim to have and there's the one our electors would prefer!

What is politics?

Let me begin, however, by reminding us all about the nature of politics. It is, as Bernard Crick noted in his irreplaceable book *In Defence of Politics* (1962) a complex activity that arises in the context of a diversity of goals and interests.² It involves power (the capacity to do things) and influence (the capacity to influence those with power) and it takes us into all social institutions, starting you might say with the family and going right through to the state and international forums. It invites a discussion on what are the sources of conflict and consensus in our community and it leads one to ask: Who are the winners and who are the losers? To quote Crick again:

Politics are, as it were, the market place and the price mechanism of all social demands – though there is no guarantee that a just price will be struck; and there is

¹ Paper delivered at TJ Ryan Foundation, Brisbane, 19 February 2015. Geoffrey Gallop AC is Professor and Director of the Graduate School of Government at the University of Sydney and chairman of the Australian Republican Movement. He was the 27th Premier of Western Australia.

² Bernard Crick, *In Defence of Politics*, Revised Penguin Edition, 1964, p.25.

nothing spontaneous about politics – it depends on deliberate and continuous individual activity.³

In our system of democracy the rules that govern the pursuit and exercise of power and influence are underpinned by two principles - firstly the accountability of government to the people and, secondly, the obligation of governments to act according to law and in the public interest. In order to provide for the first there needs to be 'free, fair and regular' elections and for the second a set of agencies, most notably parliament and the courts, with sufficient independence to safeguard the public interest. In other words democracy as we know it isn't just a numbers formula for finding out who governs but also a set of disciplines about how our governments should go about their business as servants of the people. This is often forgotten when discussing questions of political legitimacy and illegitimacy.

To make all of this work on a day-to-day basis there are both 'constitutional laws' and 'constitutional conventions'. The former are provided in the words of our Constitution (subject to interpretation of course) and the latter have been defined by A V Dicey in 1883 as follows:

The other set of rules consist of conventions, understandings, habits, or practices that - though they may regulate the conduct of several members of the sovereign power, the Ministry, or other officials - are not really laws, since they are not enforced by the courts. This portion of constitutional law may, for the sake of distinction, be termed the 'conventions of the constitution', or constitutional morality.⁴

Much has been said and written about the laws and conventions that apply in Australian politics and it is not my intention to go over those discussions today, except to say that I don't believe it helps to look upon a mandate as a constitutional convention, as some may wish to do. Like conventions mandates are unenforceable in law but unlike conventions our system could work without them. Conventions are rules necessary for the functioning of our system but the claim that one has a mandate to do this or that is more in the province of political argument. No matter how hard we push and pull the concept it remains in the realm of politics rather than law and convention. John Nethercote put it this way:

The mandate idea is quintessentially a political doctrine in two important senses. In the first instance, it exists in the realms of political debate and competition. It is not a term which is ... to be found in constitutions or laws. ... A second sense in which

³ Ibid., p.23.

⁴ Quoted in Wikipedia, *Constitutional convention (political custom)*

mandate is a political doctrine is its provenance. It has been developed by politicians themselves in the context of electoral and parliamentary activity.⁵

What do we mean by a mandate?

How, then, is the term itself used in political debate? According to Wikipedia it is 'the concept of a government having a legitimate mandate to govern via the fair winning of a democratic election'. Nethercote puts it this way:

It is a doctrine which seeks to reinforce the legal basis on which election winners take the reins of government with a claim to legitimacy in so doing; the winners take office as agents of popular will as well as in their own right.⁶

Being able to do the things promised in an election is one side of the coin but there is another side as well:

New governments who attempt to introduce policies that they did not make public during an election campaign are said to not have a legitimate mandate to implement such policies.⁷

It takes us into that sometimes crystal-clear and sometimes murky territory of what a party said - and didn't say - in an election period. On the one side is the government ('we said we would do it and should be allowed to') and on the other their opponents ('you said you weren't going to do it and we will do all we can to stop you') – two sides of the one coin we might say.⁸

In discussion around the term a distinction is often drawn between a general mandate to form a government and a specific mandate to do particular things. Gough Whitlam speaking in August 1975 spoke of the difference between 'a permit to preside over the administration of government' and 'a command to perform'. The former he described as a conservative and inadequate definition. 'The mandate as I interpret it', he said, 'is to move by specific programmes toward the general goals and the general objectives accepted by the people at elections.'⁹ For Whitlam this was an important statement of democratic principle and for him just governing with a view to re-election was to undermine the

⁵ John Nethercote, *Mandate: Australia's Current Debate in Context*, Department of the Parliamentary Library, Research Paper No 19, 1998-99, p.4.

⁶ Nethercote, p.4.

⁷ Wikipedia, *Mandate (politics)*

⁸ See Scott Prasser and Graeme Starr, *Policy and Change: the Howard Mandate (1997)* quoted in Nethercote, p.14.

⁹ Quoted in Nethercote, p.13.

purpose of elections as a bridge to the future. However, whatever the principles involved the distinction is a useful one to which I will return later.

What's going on here is clear - the election of a government is said to give a special status to the promises it gave during that campaign. Indeed the election is seen as the key to accountability, as having sorted out through the process who is to govern and what they are expected to do. It's peaceful, it's fair and it's effective as a way to manage conflicts of ideas and interests.

Political complications

However, a number of complications soon follow. Firstly, in the Commonwealth and five of the States there are two Houses of Parliament and not just one. Those elected to the Upper Houses, often representing a narrower range of interests and ideas claim a right at least to be consulted but also to say 'no' in the event of fundamental disagreement with the elected government. Secondly, there's no guarantee that the governing party itself will have a majority in the Lower House. Negotiation over promises given - and not given - inevitably follow. These are political realities in our system and more often than not are unavoidable.

One should also note that all of this necessary consultation and negotiation will be taking place after an election in which some issues will have been canvassed more comprehensively than others and from which lots of different conclusions may be drawn from the voting patterns displayed. Indeed the government may have won on a seats basis but not on a two-party preferred basis. Add to that the possibility of different voting patterns in the two Houses of Parliament and different levels of support for different parts of an election platform. Indeed it may be the case that a majority of electors don't like or vigorously oppose a particular policy proposal but still vote for the party that makes such a promise; their judgment might be about that party's general capacity to administer (as Whitlam described it) rather than about its promised policies. These are all considerations that will be taken into account by non-government MPs when a government claims a mandate and seeks their support in the Parliament.

Given these circumstances political parties who win government often find that in order to survive they have to compromise on some commitments and in certain situations ditch some altogether. They have to make a calculation of what is and what isn't acceptable given what they had previously committed to. So too do their opponents need to make calculations about whether, where and how to resist. There's no 'science' here, it's all an 'art' and it involves political judgement. Where 'mandates' come into play is to remind governments that when they make such adjustments they are required to provide a proper and defensible justification to the electors. It's a case of Machiavelli yes - but with and not without the ethics associated with making a promise.

Changed circumstances and new challenges

The same logic applies in the event of 'changed circumstances' or 'events' that weren't anticipated. It may be the case, for example, that an issue emerges about which no thought had been given - or commitments entered into - during an election campaign. We wouldn't say a government responds on the basis of a mandate, except in the most general of senses that it was elected to govern (back to that Whitlam distinction again). Professor Hugh Emy put some skin on these bones writing in 1996 that when faced with the unexpected a government should 'at least try to respond consistently with established policy and/or its political principles.'¹⁰ It may, however, be an issue of such significance (and controversy) that a government determines that a new and early election is required to provide the authority needed for any initiative seen as necessary. In this case the government would have to convince the Governor or Governor-General that it was a wise course to follow, which raises the question "does a government have a mandate to seek a mandate?"

'Changed circumstances' is a trickier category to deal with, particularly as it relates to budgetary policy. No government can predict economic futures with the precision required when detailed election commitments are being drawn up but still many promise 'no increase in taxes' or 'no cuts to health and education' when put on the spot by aggressive journalists during an the campaign. It's all about winning they are told by their hard-headed advisers and worry about the consequences later, when you are in government and not before. Even in the best of times promises like this – and the promise to do no deals with others to form government – have an air of unreality about them and are fraught with political danger. Governments just can't control all the variables as much as they would like to and to pretend otherwise is plain silly.

One wonders, then, what it can mean to say you have a mandate when the politics on the one hand and circumstances on the other say otherwise. Governments have to deal with the circumstances as they present themselves - and that may mean a hung parliament, an unruly Upper House, a declining revenue base or a new and unpredicted challenge. Rather than being a foolproof principle the mandate is a guide - albeit imperfect - to what is meant by trustworthy government. Parties that campaign to win through obfuscation of purpose (often called 'spin') and/or bad faith in respect of promises given (often called 'lies') can rightly be criticised. Explaining in some detail what is intended and making promises to which one is really committed is part of the transparency required to give meaning to democratic accountability. It's that 'trust factor' about which so much has been said in recent days.

Public interest considerations

Another aspect of this trust factor relates to the very system itself and the expectations we have - and should have - about its working. In our system it's not just 'the numbers' that matter but also 'the principles'. It's been designed such that the majority party can form government but not such that it can do all that it pleases.

¹⁰ *ibid.*, p.29.

This takes me to another distinction related to promises. Parties may promise what is specific and easily capable of definition, for example a particular law or policy initiative. On the other hand they may promise what is in effect an aspiration associated with which will be a particular set of outcomes. Examples include emergency waiting lists and times, employment growth, stopping the boats, and reducing crime. It's what we might call promising and then governing according to various themes – and it's much easier than doing the homework required to propose initiatives that have the chance to work but which may be complex and costly. Certainly parties have to market themselves and these are objectives that electors will want to hear about but the more important question is **how and at what expense**. The 'whatever it takes because we have a mandate' answer to the question may be good short-term politics but carries dangers in the medium and longer-terms. For example, there is the Constitution and a whole host of laws, state and federal, which provide a framework within which politicians have to work. Following the public interest and acting lawfully are not just optional extras to governing on behalf of the majority but rather legal obligations for both elected and non-elected officials. The WA Inc. Royal Commission put it this way: 'The institutions of government and the officials and agencies of government exist for the public, to serve the interests of the public'.¹¹ Acting lawfully, following due process, avoiding conflicts of interest, ensuring freedom of political communication are just some of the many we may mention.

This takes us back to the beginning and the understanding we have about what democracy means. In Australia it starts with 'the people' and the votes they cast in an election but it doesn't end there. It's also about 'the public interest' and that means the rights of minorities as well as the interests of the majority, the future (and past) as well as the present and the natural environment as well as our economy and society.¹² The contract between the government and the people is an ongoing one - even though broken down into the intervals created by free, fair and regular elections.

It follows that any claim to have a mandate is not only qualified by politics but also by the public interest and to that end we have created a range of agencies of accountability such as a Corruption Commission. Not surprisingly then we may find, as John Nethercote notes, that the mandate is sometimes invoked not just in relation to parliament but also to the courts and public sector agencies.¹³ In this context things can get very ugly very quickly with a so-called popular mandate on the one side and a whole range of time-honoured principles on the other battling it out.

Concluding remarks

¹¹ *Western Australian Royal Commission into the Commercial Activities of Government*, Part ii, 12 November 1992, 1.2.5.

¹² See Geoff Gallop, "What is involved in serving the public interest?" in Bob Douglas and Jo Wodak (eds), *Who speaks for and protects the public interest in Australia?*, Australia 21 forthcoming.

¹³ Nethercote, p.3.

In our politics today the idea of a mandate is primarily rhetoric used by governments keen to get on with the job following an election win. There's clearly a point to it because winning an election must mean something but it's immediately complicated if it becomes obvious that what was said in an election campaign wasn't really meant or was in fact a smokescreen to conceal real intentions. Sometimes it's the very people who emphasize their mandate to govern who undermine its value to them by picking and choosing from the promises they have given. It's complicated further by the reality of parliamentary politics (particularly but not only in bicameral parliaments), changing circumstances, unpredicted events requiring a response and the legal requirements placed around executive government.

These further complications lead me to ask: Is the use of the idea of a mandate holding back governments rather than advancing their cause as Whitlam understood it, as agents of much needed change in the face of vested interests? It's tempting our election winners to follow a particular path. Firstly it gives them an unrealistic view about what they can and can't achieve in the face of opposition. Indeed it encourages them to think all opposition is illegitimate. Secondly it encourages the use of over-arching themes as election promises rather than well researched and thought out policies. Thirdly, it encourages governments to look for short cuts around the obstacles they face on the basis that voters have given them a mandate to do what it takes. Put these three together and you get an attitude that facilitates obstruction rather than co-operation and conflict rather than consensus, hardly the basis upon which to achieve lasting results.

No one would doubt that a public interest based consensus is hard to achieve, as is government that is both strong and purposeful on the one hand but also open and accountable on the other. This is, however, what our democratic values tell us we should seek – and what significant sections of the electorate are saying is missing today. For them a mandate that matters would be one that is based on truth-telling in elections and beyond, a wider and more meaningful engagement of the community in decision-making and respect for the public interest when governing.

The first would imply less extravagant promises, more concern for the detail of things, a greater recognition of the inevitable trade-offs involved in policy and caution when it comes to predictions about the future. This goes to the culture of politics as it is currently practised in parliament and the media. The second would imply greater use of random selection and deliberative techniques in framing policy and policy priorities, thus adding new energy and insights to our representative democracy. This goes to the willingness of our major players to allow new influences at the table of power. The third would imply renewed commitment to the separation of powers and the work of independent agencies

of accountability¹⁴. All big calls you might say but certainly important if we are to renew and re-invigorate the social contract between governments and their electors.

¹⁴ See Geoff Gallop, *Reform in Australia today – why not listen to the people?* (TJRyan Foundation, Research Report No 17 (2015): http://www.tjryanfoundation.org.au/_dbase_upl/Why_Not_Listen_To_The_People.pdf