

# State Legislative Councils – Designing for Accountability

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Accountability is central to liberal democracy and has certain basic institutional requirements. Accountable governance assumes that power alone is not sufficient justification for action; that public decisions and actions should be justified, or accompanied by good reasons; and that justifications must be able to be tested, with remediation of associated decisions or actions to follow if justifications are found wanting.

This sort of governance is not possible if power is concentrated. Indeed, it has long been held to require a separation of legislative, executive and judicial powers—albeit with the relationship between legislative and executive powers usually understood, in systems of parliamentary government, more in terms of ‘balance’ than ‘separation’.<sup>1</sup> The rationale is that dispersion of power, combined with ‘checks and balances’ to create interdependence, encourages robust testing of justifications and, ultimately, government by discussion, persuasion and compromise, which is synonymous with liberal democracy.

The design and operation of key parts of Australia’s political system make the dispersion of institutional power required for accountability difficult to achieve. Australia combines parliamentary executives with single-member electorate systems for most of its lower houses of parliament, and with party discipline as strong as can be found in a liberal democracy. Such circumstances notoriously empower political executives and enfeeble the non-executive component of parliament. Fortunately, in most of its

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jurisdictions, Australia also retains powerful upper houses potentially able to act as counterweights to executive-dominated lower houses and to ensure that the crucial parliamentary roles of review of legislation and scrutiny of the executive are adequately performed. This chapter investigates the design features of Australia's upper houses, in particular its state upper houses, for their contribution to the creation of institutions with appropriate strength and autonomy.

I begin by briefly reviewing the state of play in the state upper houses (the Legislative Councils). Since the mid-twentieth century, the status and autonomy of the Legislative Councils have been transformed, largely by changes to their electoral arrangements.<sup>2</sup> They have been comprehensively democratised through introduction of equal universal suffrage, compulsory voting, equal apportionment of electoral districts and regular redistributions (or, alternatively, establishment of a single state constituency). Democratisation has been accompanied by other major innovations, in particular adoption of proportional representation for mainland Legislative Councils. In similar fashion to the Senate in the postwar era, these bodies have been strengthened by the differentiation of electoral systems between upper and lower houses. This change has resulted in upper houses whose partisan composition differs more reliably from that of lower houses than was the case in the past. In a polity with highly disciplined parliamentary parties, such a difference is an essential condition for upper house autonomy. Since the party systems in Australian upper houses elected by proportional representation have evolved to ensure that neither major party (bloc) typically has a majority, upper houses are less able to be dominated by the agenda of either of the contestants for government. Figure 1 summarises the history of this raft of changes.

These changes have encouraged the Legislative Councils to become increasingly active and credible in the performance of key parliamentary roles.<sup>3</sup> By comparison with lower houses, they operate as legislatures, considering the detail of legislation and effecting significant legislative revision. They have for some time had committees dedicated to the scrutiny of regulations and other secondary legislation to ensure conformity with fundamental principles of administrative law, and have begun to extend this work to the scrutiny of primary legislation. With regard to scrutiny of the executive, the Councils now conduct question times (questions without notice) which are arguably more effective in some cases than those in lower houses. Moreover,

**Figure 1**  
**Key Aspects of Democratisation in Australian State Upper Houses**

A: Universal suffrage.

B: Compulsory voting (i.e. compulsory enrolment and voting).

C: Equal apportionment, including process for regular redistributions.

D: Breaking of long term control of upper house by a single party (bloc).

PR: Adoption of proportional representation.

WA



SA



VIC



NSW



TAS



Notes:

- 1 Compulsory enrolment was introduced for the SA Legislative Council in 1973, compulsory voting in 1985.
- 2 Labor also had a majority in the Victorian Legislative Council for a period of several weeks in 1985.
- 3 Refers to first loss of control by a major party after the introduction of direct election in 1978.
- 4 The Tasmanian Legislative Council has always been largely composed of independents.

the Councils have outstripped the lower houses in the development of committee systems to perform scrutiny as well as policy development functions. Their committees include those with specific scrutiny functions, for instance, with regard to budgetary estimates, as well as those with broad investigative functions related to policy or portfolio areas. Overall, there is little doubt that both the quantity and quality of review and scrutiny are superior in upper than in lower houses throughout Australia.

Nevertheless, there are significant differences in capacity and performance among the Legislative Councils, resulting from differences in design. The purpose of the chapter is to attempt to determine, primarily through discussion of these differences, the desirable features of an upper house expected to play a key accountability role in a system of parliamentary government. The points made are intended to have particular application to the re-establishment of an upper house in the unicameral jurisdiction of Queensland or to the reform of upper houses elsewhere in Australia.<sup>4</sup>

### Size

Australia's upper houses vary substantially in size of membership. The Senate (seventy-six members) is by far the largest. The jurisdiction with the next largest upper house is New South Wales (forty-two), followed by Victoria (forty, down from forty-four prior to the 2006 election), Western Australia (thirty-four, to increase to thirty-six at the election due in 2009), South Australia (twenty-two) and Tasmania (fifteen). There is no ideal size for an upper house, but lack of members can limit the capacity of an upper house to equip itself with, and operate, the machinery of a modern house of review and scrutiny.<sup>5</sup> The small chambers in Tasmania and South Australia are undoubtedly severely constrained in this respect, as indicated by their committee arrangements, touched on later in the chapter. Despite having more than twice the membership of the Tasmanian chamber, the Western Australian Legislative Council may also be smaller than desirable, as suggested perhaps by its decision not to develop a system of policy- or portfolio-related committees, like those in all the larger Australian upper houses. Thus, a minimum of around forty members would seem to be desirable for a state upper house. However, the desirable size might be reduced a little were it decided, in accordance with an oft-advocated reform,<sup>6</sup> to exclude ministers from membership of the upper house or, as in the Tasmanian case, to limit their representation to one.<sup>7</sup>

Further, it might be observed that there is no ideal ratio of numbers of upper to lower house members. This is a design issue where joint sittings are provided for, especially if these are readily available to resolve inter-house disagreements (only the case in Victoria). But it would be unnecessary and undesirable for the size of an upper house to be determined by what should be, at most, a rarely utilised dispute resolution mechanism.

Currently, ratios of upper house to lower house memberships around Australia vary from 0.45 in the two largest state parliaments, those of Victoria and New South Wales, to 0.6 in WA and Tasmania. But needed enlargements of small upper houses might reasonably result in higher ratios; indeed, it would be quite justifiable in such cases for ratios to exceed unity.

Queensland could arguably improve its governmental arrangements with no increase in total parliamentary membership by creating an upper house of forty-two members alongside an Assembly reduced in size from eighty-nine to forty-seven. However, the price would be greatly weakened local representation (a lower house function in mainland Australia), a large reduction in the primary base for recruitment of ministers, and a very undesirable imbalance between front and backbench members of the governing party in the lower house. Such difficulties might be alleviated by allowing (at least some) ministers to be drawn from outside parliament if a substantial increase in the size of the parliament could not be contemplated for whatever reason.

### **Powers**

Australia's upper houses are all relatively powerful. Unlike many of their counterparts around the world, they are not restricted in their capacity to initiate, defeat or amend ordinary legislation. Despite the complaints of executive governments, which typically view as intolerable any constraint on their power to legislate, very few government bills are defeated by contemporary Australian upper houses. The fact that no party or party bloc now has a guaranteed, long-term upper house majority has helped to ensure this result. Some legislation is amended and some legislation is stillborn or laid aside as the views of upper house majorities crystallise. Arguably, this is just as it should be in a liberal democracy, where deliberation should be valued, along with collective decisions made by representatives of true majorities of citizens rather than those representing merely the largest minority.

But does not a government with a lower house majority have a mandate to enact its legislative program? This claim is heard so often that it has the ring of conventional wisdom. The current Victorian Government felt so confident about the reality of the mandate that they have had reference to it included in the Victorian Constitution. The Victorian Legislative Council is now formally enjoined by section 16A of the Constitution to exercise its powers with regard to 'the right and obligation of the current government to implement' its specific and general mandates. Even so, giving constitutional form to a self-serving fiction does not make it true or enforceable. The mandate theory is at least 99.9 per cent baseless, as Bach has most recently shown in a careful discussion of its application to the context of the Australian Commonwealth Parliament.<sup>8</sup>

The main distinction among Australian upper houses with regard to their powers is between, on the one hand, the New South Wales Legislative Council (since 1933) and the Victorian Legislative Council (since 2003), both of which are limited to a suspensory veto (or power of delay) of one month over bills appropriating moneys for the 'ordinary annual services' of the government and, on the other hand, all other upper houses which are restricted only in their power to amend directly such financial legislation. On one view, this difference is of little consequence since there is little incentive to use the powers which have been removed in New South Wales and Victoria. While Oppositions are decreasingly likely to control upper houses, there remains widespread anxiety about repeating the experience of November 1975, and there seems to be agreement among the major parties that the core, if not the whole, of the budget should not be subject to amendment. It is notable that the blocking of budget legislation, or threats to do so, did not play an obvious role in exposing or resolving governmental crises in Western Australia, South Australia or Victoria in the early 1990s.

Evidence that powers over budget legislation are being used sparingly, if at all, offers at least as much support for the case to retain (or restore) this power in full measure, or include it in constitutional provisions for a new upper house, as it does for the opposite case. It is unclear why, as a matter of principle, upper houses whose democratic credentials are generally as good, if not better, than lower houses should not have the capacity to play a role in budgetary policy or to threaten to withhold support for a budget, at the least, until executive government takes action to resolve serious concerns about its behaviour, for instance by holding a public inquiry.

## Deadlocks

Where upper houses are powerful and, as is increasingly the case in Australia, typically possess a different partisan composition to lower houses, deadlocks will at times arise. Deadlocks over financial legislation are the most serious kind, since they may result in gubernatorial intervention and enforced dissolution of the lower house, with or without dismissal of the government. The possibility of such dramatic consequences is eliminated in New South Wales and Victoria through severe restriction of the Legislative Council's power—effectively removing bicameralism for one class of legislation. In other states, as at the Commonwealth level, there has been vigorous debate about the need for reform following the events of 1975. As noted above, however, the changed circumstances of upper houses (particularly the absence of Opposition majorities) have greatly reduced incentives for misuse of the power to reject or defer budget legislation, and hence the possibility of deadlocks over essential public finance.

There are improvements in constitutional design which might nevertheless be considered. At least two reforms have been suggested which would leave the financial power of upper houses intact but further reduce or eliminate the possibility for abuse of the power for short-term partisan reasons. One is to ensure that the upper house cannot completely terminate the flow of funds to the executive, through legislation to allow spending to continue beyond the expiration of the previous year's appropriation, but at a restricted rate.<sup>9</sup> The other reform requires the context of a fixed-term parliament. It proposes that, following a lower house election caused by the blocking of supply, a new government be restricted to completion of the term begun by its predecessor.<sup>10</sup>

With regard to deadlocks over ordinary legislation, state constitutions take a variety of approaches. The matter is not addressed by the constitutions of Western Australia and Tasmania. The South Australian Constitution provides several alternatives: dissolution of the lower house in the case of rejection of a 'bill of special importance' (s. 28A); a double dissolution for a bill which has been rejected twice by the Council or has twice failed to pass, with a general election between rejections, but without a subsequent joint sitting as provided for in the Commonwealth Constitution (s. 41); and election of two additional members for each Council district (s. 41). The New South Wales Constitution takes yet another tack, providing for the possibility of a binding referendum for a bill which has been twice rejected

or which has failed to pass, with a three-month interval between the first rejection in the upper house and the second passage through the lower house. The bill may be referred to a Free Conference of Managers and/or to a joint sitting (for consideration but not a vote) prior to the calling of a referendum by the Governor (s. 5B).

New South Wales and, since 2003, Victoria are the only jurisdictions to incorporate reference to a conference of managers in their constitutions,<sup>11</sup> but the other states provide for this mechanism in their standing orders. Interestingly, conference committees have been used often over the years to resolve inter-house disagreements in Tasmania<sup>12</sup> and South Australia but hardly at all in Western Australia and New South Wales. The potential of this device seems to have been reduced in recent times, however, with the shift towards minor party control of the balance of power in mainland upper houses. In these circumstances, it seems that governments would rather negotiate directly and exclusively with relevant minor parties.<sup>13</sup>

Whatever their particular strengths and weaknesses, the mechanisms for dealing with inter-house conflict over ordinary legislation reviewed so far have in common that they preserve the equal power of upper and lower houses in the legislative process. The mechanism recently established in Victoria by the *Constitution (Parliamentary Reform) Act 2003* clearly weakens bicameralism, however. Under the new s. 65 A-G of the Constitution, if a bill fails to pass the Legislative Council in a form acceptable to the Assembly within two months and the disagreement is not resolved by the Dispute Resolution Committee, it becomes a 'deadlocked' bill. Deadlocked bills may be stockpiled and, if the Council again fails to pass them when they are reintroduced following a general election, they may be dealt with by a joint sitting of the two houses. The typically superior numbers of the governing party<sup>14</sup> in a joint sitting means that the lower house (that is, the governing party and the executive) will prevail. Since there is no onerous special electoral process preceding the joint sitting, as is the case with the double dissolution requirement in the Commonwealth Constitution, these changes have, in effect, reduced the power of the Legislative Council over ordinary legislation to a suspensory veto, not qualitatively different from that of the House of Lords.<sup>15</sup> If, as suggested above, the idea of the mandate is phoney, upper houses elected by proportional representation intrude into the legislative process to only a modest extent, and the purpose of an upper house is in part to require legislation to reflect the opinions and interests of



at least a genuine majority of citizens, weakening bicameralism to this extent seems unwarranted and undesirable.

### Term of election and rotation of members of upper houses

Originally, Australian upper houses, like many others, were designed to be permanent or continuing bodies and ones which were able to take a 'longer view' of the interests of the communities they represented than were lower houses. Appointment of members for life, along with the inability of the houses to be dissolved, were the means chosen to achieve these purposes in Queensland and New South Wales. In the other states, where members of upper houses were elected, the means were terms of election independent of the terms of lower houses, terms of greater length than those of lower house members, non-dissolution,<sup>16</sup> and 'rotation' of members (or staggered elections). The latter set of rules was subsequently adopted for the Senate.

State upper houses have evolved significantly from these origins through changes to terms of election and rotation. First, there has been a trend towards terms of election which are dependent on the terms of lower houses. As Figure 2 shows, in South Australia, New South Wales and Victoria, terms of election are now tied to those of lower houses. Secondly, term lengths are typically shorter than they were in the early elective upper houses and, in recent times, Western Australia (1987) and Victoria (2003) have shifted to term lengths similar to those of their lower houses (see Figure 3). Thirdly, in most states, rotations have been simplified—in other words, fewer elections are required for the membership of a chamber to be renewed—and, in the cases of Western Australia and Victoria, have been eliminated.

Figure 2

#### Independence of Term of Election to Australian Upper Houses

Term Independent of Lower House	Tied to Term of Lower House (number of lower house terms)
Tasmania	South Australia (2)
Western Australia	Victoria (post 2003) (1)
Senate*	New South Wales (2)
	Victoria (pre 2003) (2)

\* The Senate's term is dependent on the term of the House of Representatives (only) in the case of a double dissolution.

**Figure 3**  
**Electoral Term (Maximum) of Australian Upper Houses Compared**  
**with Maximum Term of Corresponding Lower Houses**

Same Length	Longer Term
Victoria (post 2003) (4 years)	New South Wales (8 v. 4 years)
Western Australia (4 years)	South Australia (8 v. 4 years)
	Tasmania (6 v. 4 years)
	Senate (6 v. 3 years)
	Victoria (pre 2003) (8 v. 4 years)

The simplification, or elimination, of rotation and the tying of upper house terms of election to lower house terms have facilitated a fourth change of importance: conjoint upper and lower house elections. In the early elective upper houses, elections for the two houses were frequently held in different years and always on different days. That is now true only for the Tasmanian Legislative Council, whose membership is renewed over six years in annual elections.<sup>17</sup> Western Australia is slightly anomalous among mainland states (but similar to the Commonwealth) in basing the practice of conjoint elections on the willingness of the government of the day, in the absence of any constitutional constraint on its ability to call early elections for the Legislative Assembly, to fall into line with the requirement that Legislative Council elections occur within a year prior to the expiry of Council members' fixed terms. The government of the day has proved quite willing, in accordance with its electoral self-interest, to comply with this requirement, as have Commonwealth governments with regard to the electoral requirements of the fixed-term Senate. Since rotation of the Western Australian Legislative Council was simplified, from election of a third of the Council every two years to a half every three years (matching the maximum term of the Legislative Assembly) for the 1965 election, all lower and upper house elections in Western Australia have been held simultaneously.

In order to evaluate the varied practice over time and across states outlined above, it is necessary to identify justifications for the differing approaches and scrutinise these against contemporary norms. On the issue of term

length, longer terms for members of upper houses were designed to insulate them from short-term changes in popular opinion. It is worth noticing that this justification requires not only longer terms but also rotation; otherwise, in the last several years of their term, members seeking re-election would be just as near as their lower house counterparts to their next election and the need to answer to the voters.

In fact, reduced responsiveness to short-term public pressure can be gained, to a degree, through rotation alone. In the past, longer terms dovetailed neatly with other features of upper houses designed to make them exclusive institutions, representing the permanent interests of property owners against the threat potentially posed by democratic lower houses. But, today, a reduction in term lengths to equivalence, or near equivalence, with those of lower houses seems consistent with the long-term democratisation of upper houses.

A second issue identified above is whether it is desirable for the terms of upper houses to be dependent on the terms of lower houses. The rationale for the original design principle of independence, retained in Western Australia and the Commonwealth, would seem to have been twofold. First, upper houses lacked a need for early elections since they were not involved in the establishment of governments, whereas this possibility was required for lower houses in case a government should lose support and support could not be found for another. Second, since the upper house was supposed to be a strong check on the lower house, it should not be able to be cowed by the threat of an early election. It might be argued that the latter threat has been weakened or eliminated now that discretion about dissolution of lower houses has been greatly reduced by constitutional change, introducing semi-fixed terms, in New South Wales, Victoria and South Australia. However, the first point would seem as relevant as ever. While early dissolutions due to lack of support for a government on the floor of a lower house are rare, they are far from impossible in contemporary politics. Making the term of an upper house dependent on that of a lower house is justifiable only on the grounds that it is desirable for elections always to be conjoint. But whether conjoint elections are desirable, as opposed to simply expedient for governments, is debatable. This issue may be considered in conjunction with the remaining one, that of rotation of members.

Separate elections for upper and lower houses were once the norm in the Australian states. Substantial separation was a necessary consequence

of complex rotations<sup>18</sup> of members. In turn, as in present-day Tasmania, complex rotations would have greatly weakened governments' incentive to run elections concurrently even in years when upper and lower house cycles overlapped, since only a small proportion of upper house seats would have been at stake. The rationale for complex rotations was that they ensured that change in the composition, and hence political outlook, of upper houses would necessarily be gradual. The longer terms traditionally possessed by upper houses made such change even more gradual. In practice, very gradual change helped to maintain a politically conservative outlook in institutions with conservative biases in their electoral arrangements and, in earlier times, in their rules for membership.

The question is whether complex rotations and separate elections are intrinsically connected to the old, pre-democratic upper houses, or whether there might be a case for them as part of the design of contemporary democratic upper houses. Part of the difficulty in contemplating such a case is simply that these phenomena have been consigned to history in mainland Australia and that the Tasmanian upper house may be viewed as too comprehensively different—with its single member districts and its very small membership, dominated by independents—to constitute a model for other states.

Although it is part of an even more exotic political system, the US Senate is a prestigious, contemporary upper house which operates a relatively complex rotation. Admittedly, elections for the US Senate and House of Representatives are held concurrently. But, importantly, elections for the legislature and the executive are partly separated. While this is not a requirement for a formal separation of executive and legislative power, it does assist in sustaining a sense of differentiated governmental institutions.

The problem with mainland Australian practice is that every upper house election occurs in conjunction not only with a lower house election but also, and most importantly, with a *de facto* election contest for government. It is the latter contest which dominates everything else. This is particularly harmful to upper houses whose identity, unlike that of lower houses, is not inevitably (and not desirably) bound up with the formation of, and competition for, government. A complex rotation, with a significant number of upper house elections necessarily held separately from lower house elections, would allow the distinctive role of the upper house to be a focus of attention at election time. In turn, this would arguably have an important educative effect in

the community and also assist upper house members to differentiate their roles from those of members of the lower house. Rotation is, of course, also useful—and more complex rotation, more useful—in helping to prevent flow through to the upper house of a large lower house swing in composition, and the consequent possibility of duplicate partisan majorities in the two houses.

It is worth emphasising that complex rotation is thoroughly compatible with democratic principles, since it does not require longer terms of election than would otherwise be the case and has the virtue of facilitating a more frequent sampling of electoral opinion than a one-shot election. Four-year terms, with either an election for a quarter of the seats (on average) every year or perhaps a simple rotation with an election for half the seats every two years, would be beneficial in separating upper and lower house elections. Ideally, especially for the second option just outlined, even where elections for the two houses fell in the same year, they should be held on separate dates.<sup>19</sup>

### Electoral systems

The Tasmanian Legislative Council retains the system of preferential voting, with elections returning one member per electoral district, which for much of the twentieth century typified all elective Australian state upper houses.<sup>20</sup> In contrast, the mainland upper houses have undergone major electoral system change, engineered by the Labor Party and modelled on the Senate's shift to proportional representation in the late 1940s. This process has finally been completed with the adoption in Victoria of the Bracks Labor Government's reforms in 2003. All mainland upper houses now have a similar voting method—PR-STV, with an 'above the line,' or party list, option. The only cross-state differences are the number of electoral districts and the district magnitudes, that is, the number of members returned from each district. The details for the several states are as follows: eight districts returning five members each for Victoria (quota, 16.7 per cent); six districts returning six members each for Western Australia (14.3 per cent; altered in 2005 from a combination of five and seven member districts); one district returning eleven members (half the total membership) in South Australia (8.3 per cent); and one district returning twenty-one members (half the total membership) in New South Wales (4.55 per cent).

The change to proportional representation has been beneficial because it has frequently produced the incongruence in composition necessary for

strong bicameralism. That is to say, it has produced an upper house with a different partisan balance from the lower house. Just as importantly, by facilitating representation of minor parties, it has denied upper-house majorities to both governing and Opposition parties (or party blocs). This has enabled upper houses to avoid being cast as either 'rubber stamps' for government or vehicles for the Opposition to destabilise government.

The most recent state upper house to adopt proportional representation, the Victorian Legislative Council, conformed to the trend around the mainland states when its first proportional representation election in 2006 produced a minor party balance of power. This should not have been a surprise. Five-member districts have at times returned minor party representatives in the Western Australian upper house and they did so with some regularity in the Senate before 1984. The relatively high quota in Victoria, combined with the absence of rotation, may nevertheless be thought to create a risk of major party—and, in particular, governing party—majorities (blocking or absolute).

A district magnitude larger than that chosen for Victoria and/or rotation of members may therefore be desirable to ensure an appropriate partisan balance. For the same reason, where district magnitudes are reasonably low, even numbers should be avoided.<sup>21</sup> The recent change to six-member districts in Western Australia will make it easier for a major party to control at least half the seats in the Legislative Council and is therefore an undesirable model for other jurisdictions. Again, this outcome is probably more likely in Western Australia than it was for the Senate, where it was finally delivered (with interest) in 2005, because, in the absence of rotation, it does not require consecutive election results favourable to a particular party.

On the other hand, it could be argued that the quota for the New South Wales Legislative Council is too small because it facilitates representation of very small communities of opinion, with representatives overly focused upon advocacy of a narrow policy agenda. Seven or nine member districts may be adequate to achieve the benefits of proportional representation without the deleterious consequences of hyper-representativeness. Clearly, it is a matter of judgment how small and narrow bodies of opinion must be before their presence is unwelcome, or how many such representatives of this sort an upper house can contain before it becomes a soapbox rather than a house of review.

Suffice it to say that Victoria's choice of district magnitude is probably a greater risk to the effectiveness of its upper house than is that of NSW.<sup>22</sup>

As noted, there is great uniformity in the voting method utilised by mainland upper houses. Since I, along with many other commentators, have emphasised the benefits of the shift to proportional representation, it might be assumed that the voting method is the least problematic aspect of the institutional design of Australia's upper houses. But that is far from the case. PR-STV is described in the textbooks as a candidate-based voting system, in a separate category from party-based, or list, systems. From the time of its adoption by the Senate in 1948, however, proportional representation in mainland upper houses has had a strongly party-oriented character. This is not surprising since it was introduced by a parliament completely dominated by disciplined major parties. As Sharman has shown, the rules adopted—grouping candidates by party on the ballot paper, excluding party labels from the ballot paper, requiring voters to place a number alongside every candidate on the ballot, and permitting the use of 'how to vote cards' by parties—worked neatly in combination to institutionalise a voting method with substantial party list characteristics.<sup>23</sup> The insertion of the 'above the line' option into the Senate's electoral rules in 1983, and its subsequent adoption for all mainland upper houses, was the last step in the transformation of a candidate-based system into something close to a *de facto* list system of the most party-dominated kind, a 'closed list' system.<sup>24</sup>

This voting method has given parties a very high level of control over upper-house members of parliament. Major party lists, the higher-ranked candidates on which are certain to be elected, are often a vehicle for people with party machine backgrounds to enter parliament.<sup>25</sup> Because of their backgrounds and as a result of their extreme dependence on party, members of upper houses adopt highly party-oriented role perceptions.<sup>26</sup> This affects the performance of their parliamentary roles. Further, there is evidence from the Senate that upper house members are induced to concentrate heavily on extra-parliamentary activities within, or in the service of, the party. In particular, senators and their resource entitlements are increasingly harnessed to the major parties' electioneering activities in marginal House of Representatives electorates.<sup>27</sup>

Upper houses are not justifiable as additional platforms and supplementary resource pools to assist governing and opposition parties to campaign for executive office. To play their key roles of legislative review and scrutiny of the executive as effectively as possible, they require members with role

orientations quite different from the slavish devotion to major party electoral imperatives which current electoral rules seem to encourage. In particular, members should be strongly focused on intra-parliamentary activities and they should be more rather than less independently-minded than members of lower houses.

Most members of upper houses are, and will continue to be, elected under major party banners. Multi-member districts are less conducive to the election of independents than single-member districts and the representation of minor parties is limited by their modest levels of support, if not by district magnitudes. Even if it were possible to create chambers of independents along the lines of the Tasmanian Legislative Council, it is debatable whether the parochialism which is inevitable in representatives of single member districts is desirable in a chamber with a broad review function. What is arguably needed is an incentive for parties to seek out suitable candidates for distinctive upper house roles and, further, a greater capacity on the part of members to use their talents independently of party.

An argument along these lines was made some years ago by the Western Australian Commission on Government,<sup>28</sup> as part of its wide-ranging review of the machinery of governmental accountability in Western Australia. The Commission recommended that the WA Legislative Council adopt the Hare-Clark voting method. This would mean doing away with the party list option on the ballot paper and restoring a better balance of emphases between candidates/members and parties in the electoral/parliamentary process. Candidates would be grouped by party, as at present, but their order within party lists would be rotated across ballots so that each would occupy any given position in the order on the same number of ballot papers as any other candidate. Election to an upper house would no longer be the gift of a major party, as it is currently for top-ranked candidates, but would reflect, to a significant extent, voters' judgments about individual candidates. Unlike the Senate's electoral rules before 1983, however, party labels would appear on the ballot. Under Hare-Clark, however, 'how to vote' cards would not be permitted. Thus voters would be informed about the party association of candidates but not about the party's ranking of candidates. Finally, the task of filling out the ballot would be made manageable for voters by making the allocation of preferences optional beyond a number equal to the number of candidates to be elected. Optional preferences would also prevent established parties



from automatically benefiting from a 'trickle down' of votes where voters would prefer not to preference them.

Under this set of rules, party would continue to be important, but less so. Moreover, the influence of party would be less likely to skew the roles and role perceptions of members away from those required for an effective upper house. There would be greater scope in the electoral process for the personal characteristics of candidates to affect outcomes, parties would have a greater incentive to seek out candidates with high voter appeal, and candidates may well see value in appealing to voters on the basis of their suitability for specialised upper house functions. Further, major party representatives in upper houses may be less available to be deployed as resources for lower house campaigns, not only because they would be somewhat less dependent on party but also because they would have to campaign for their own re-election, something that is not currently necessary for members assured of a high position on the party list.

### **A comment on procedure**

This chapter is mainly concerned with the fundamental rules shaping upper houses, whether these are constitutional rules or statutory rules about electoral arrangements. Despite their importance, procedural rules are often a response to needs and possibilities created by more fundamental rule change or by changes in voter behaviour. For instance, adoption of proportional representation, making minor party representation possible in mainland upper houses, has stimulated procedural innovation to facilitate the participation of minor party representatives in the work of upper houses.<sup>29</sup> But procedural evolution is not wholly determined by more basic changes; in the example just referred to, there are differences between jurisdictions in the extent to which minor parties' interests are accommodated. Moreover, some procedures have special importance for upper houses. Committee systems are worth brief attention here because they are widely regarded as central to effective performance of review and scrutiny functions in modern parliaments. Only one issue will be examined—whether upper house members should participate alongside lower house members in a joint committee system or operate their own, separate committee system.

Joint committees are so widely utilised in Australian upper houses that the casual observer might be forgiven for thinking that they represent a best-practice norm. Also, they may very likely be seen by those interested in

reforming upper houses, or establishing a new one, as a way of economising on numbers of politicians. Why have two parallel systems of committees, it might reasonably be asked, if one joint system will do the job just as well?

There is an equally reasonable reply to this question. Joint committees are typically used to undermine bicameralism and are therefore undesirable for upper houses.<sup>30</sup> In some Australian cases, the upper house contribution to committee activity is diluted due to the fact that joint committees contain more members of lower houses than upper houses. More importantly, wherever joint committees are used in Australia there is a tendency for the lower house complement of members to be selected to ensure that the governing party has the capacity to control, or at least to prevent other parties from controlling, the joint committee. Where, as is often the case, the governing party lacks a majority in the upper house, a major source of institutional strength in that house is sacrificed if it participates in such arrangements. A less important weakness of joint committees is that it can be difficult to arrange work programs because of the very different constituency demands on members of the two houses. It is not appropriate for upper house committee activity, which should be a primary *raison d'être* of a contemporary upper house, to be limited by the priorities of members of lower houses.

The incidence of joint committee systems in Australian parliaments appears to be a product of weakness in the upper houses concerned. In the cases of Tasmania and South Australia, the small size of the upper house is probably part of the explanation for a heavy reliance on joint committees. Joint committees have also been prominent in the Victorian Parliament where the upper house, prior to introduction of proportional representation, was incapable of developing long-term autonomy *vis-à-vis* the lower house due to domination by governing or Opposition party majorities.<sup>31</sup> The other state upper houses, being larger or more autonomous (or both), have been less locked into joint committee systems. The Western Australian Legislative Council has largely avoided them. The New South Wales Legislative Council does participate in a number of joint committees, and is additionally shackled with several single-chamber committees which have governing party majorities.<sup>32</sup> However, its size and its autonomy, derived from the absence of major party majorities, have permitted it also to develop a parallel single-chamber committee system, the composition of whose committees reflects that of the upper house.

## Conclusion

Australian parliaments are generally small, usually possess single-party majorities in their lower houses, and are dominated by political parties which are among the free world's most disciplined. Unless they are prepared to contemplate radical electoral reform of their lower (or sole) houses, these parliaments can do more than provide a power base for government and a platform for an alternative government only if they incorporate strong upper houses. Australian state upper houses have a chequered history and even today make patchy contributions in the key areas of review of legislation and scrutiny of the executive. Nevertheless, adopting the best design features of the nation's upper houses and addressing common design weaknesses in the reform of existing upper houses—or, in the case of Queensland, creation of a new one—seems the most promising way to improve the quality of parliamentary democracy in Australia.

- 1 The Clerk of the Senate, Harry Evans, has noted the relevance of the doctrine of the separation of powers to parliamentary government in Australia in several of his writings. See, for instance, 'Parliamentary Reform: New Directions and Possibilities for Reform of Parliamentary Processes', *Papers on Parliament: Parliamentary Perspectives 1991*, Department of the Senate, Canberra, 1992.
- 2 This paragraph draws on Stone, B., 'Bicameralism and Democracy: The Transformation of Australian State Upper Houses', *Australian Journal of Political Science*, vol. 37(2), 2002, pp. 267–81.
- 3 This paragraph draws on Stone, B., 'Changing Roles, Changing Rules: Procedural Development and Difference in Australian State Upper Houses', *Australian Journal of Political Science*, vol. 40(4), 2005, pp. 33–50.
- 4 The chapter does not deal with the politics of getting a proposal for reform adopted, nor are the design features it recommends chosen with particular regard to likely support from politicians.
- 5 Stone, 'Changing Roles'.
- 6 Bach, S., *Platypus and Parliament: The Australian Senate in Theory and Practice*, Department of the Senate, Canberra, 2003, pp. 305–10.
- 7 State upper houses on the mainland often include four or five ministers.
- 8 Bach, *Platypus and Parliament*, pp. 276–99.
- 9 *Ibid.*, pp. 303–5.
- 10 Evans, H., '1975 Revisited: Lost Causes and Lost Remedies', *Quadrant*, vol. 39(12), 1995, pp. 53–6.
- 11 It is referred to in the *Constitution of Victoria* (s. 65B) as a Dispute Resolution Committee.
- 12 However, provision for a conference of managers was removed from the Standing Orders of the Tasmanian House of Assembly in the mid-1990s.
- 13 This point has been made for the Senate by Bach, *Platypus and Parliament*, pp. 267–73.
- 14 Such superiority is probably made more likely by the new, proportional representation electoral system for the Victorian Legislative Council, which should ensure that the

numbers of members representing the governing and opposition parties are not greatly different.

- 15 There is a difference in the way the duration of the veto is determined, but the effect of this is indeterminate. In order for a Lords' veto to be overridden in the UK, there must be at least a year between first and second passage of a bill, in consecutive parliamentary sessions, by the House of Commons. In Victoria's case, the veto may last beyond four years where a bill is first introduced early in a new parliament. But it may seemingly be less than a year for a bill introduced late in a parliamentary term; a bill can become 'deadlocked' in three months, and, once introduced to a new parliament, may become 'disputed' and thus available for a joint sitting in two months.
- 16 But note that the South Australian Constitution from 1881 provided for the possibility of a double dissolution as a means of breaking deadlocks, an innovation subsequently incorporated in the Commonwealth Constitution.
- 17 Three members one year, two the next, and so on in this pattern until, in the sixth year, the final pair of members is replaced.
- 18 Rotations are held here to be complex when more than two elections are needed to renew a chamber's membership.
- 19 It has been suggested to me that separate election dates for upper and lower house elections would exacerbate the tendency I point to below for the time and energy of upper house representatives to be channelled by parties into campaign activity in lower house constituencies. I admit that is possible. However, if upper house representatives had to campaign separately in an upper house election they would probably be less available for other campaigning duties. Further, the electoral rule changes advocated below would mean that upper house representatives would need to pay more attention to their own campaigns and also would be less purely creatures of their parties than is currently the case.
- 20 Mainland upper houses had multi-member districts, but seats for each district were filled one at a time in staggered elections.
- 21 Sharman, C., 'The Senate, Small Parties and the Balance of Power', *Politics*, vol. 21(2), 1986, pp. 20-3; Stone, B., 'Small Parties and the Senate Revisited: The Consequences of the Enlargement of the Senate in 1984', *Australian Journal of Political Science*, vol. 33(2), 1998, pp. 211-18.
- 22 At the 2006 Victorian election, Labor (the governing party) won 19 of the 40 Legislative Council seats, one short of a blocking majority which would seriously reduce the capacity of the chamber to inquire and to legislate.
- 23 Sharman, C., 'Diversity, Constitutionalism and Proportional Representation', in James, M. (ed.), *The Constitutional Challenge*, Centre for Independent Studies, St Leonards, 1982.
- 24 Bennett, S., *Winning and Losing: Australian National Elections*, Melbourne University Press, Carlton, 1996, p. 56.
- 25 Farrell, D., and McAllister, I., 'Legislative Recruitment to Upper Houses: The Australian Senate and House of Representatives Compared', *Journal of Legislative Studies*, vol. 1(2), 1995, pp. 243-63; van Onselen, P., 'Pre-Parliamentary Backgrounds of Australian Major Party MPs: Effects on Representation', *Journal of Legislative Studies*, vol. 10(4), 2004, pp. 84-106.
- 26 Studlar D., and McAllister, I., 'Constituency Activity and Representational Roles among Australian Legislators', *Journal of Politics*, vol. 58(1), 1996, pp. 69-90.
- 27 van Onselen P., and Errington, W., 'Shock Troops: The Emerging Role of Senators in House of Representatives Campaigns', *Australian Journal of Political Science*, vol. 40(3), 2005, pp. 357-71. The extent to which state upper houses reflect this trend is uncertain.
- 28 Western Australian Commission on Government, *Report No. 1*, Perth, 1995.

- 29 Stone, 'Changing Roles', pp. 46–7.  
30 *Ibid.*, pp. 43–4.  
31 The Victorian Legislative Council had governing party majorities for over three-fifths of the time between 1972 and 2006, and approaching three-quarters of the decade and a half to 2006.  
32 Griffith, G. and Srinivasan, S., *State Upper Houses in Australia*, NSW Parliamentary Library Research Service: Background Paper No. 1, 2001, pp. 105–6.