

3. Prorogation as a tool of the Executive in intercameral conflict

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Prorogation – the temporary suspension of parliamentary activity – is routinely used in Westminster-style parliamentary systems when the governing party/coalition has largely completed its legislative agenda, as proposed in a Throne Speech, and wishes to set out a new legislative programme for a parliament. However, its essential features – the suspension of all parliamentary activity, and the ‘death’ of all legislation that has not yet completed the legislative process – mean that it can be used for other purposes as well. In bicameral parliaments, one of the purposes prorogation can be put to by the ministry, which normally has control both of the lower house of parliament via its majority and of the timing of prorogations via its advice to the Crown’s representative, is as a tool to be used against the upper house of parliament when the two chambers are in conflict.

The purpose of this paper is two-fold. First, it will set out a typology of prorogation as it is used in cases of intercameral conflict. It will show that prorogation can be deployed by the executive as either an offensive or a defensive tactic, and utilised in a way that exploits either of the two essential features of prorogation noted above. Second, it will show that a particular type of use – defensive prorogation for the purpose of suspending proceedings – has increased in frequency in Australian state parliaments.

The use of prorogation as a device in cases of intercameral conflict, relative to the use of other devices, is rather uncommon. Therefore, in order to aggregate sufficient cases to allow patterns of use to be determined, the paper considers the entire period of responsible government in Australia. It does not follow, however, that this paper is of primarily historical interest. Rather, it is that the study of the patterns within the earlier cases provides the context in which the recent cases – as recent as 2010 – may properly be understood.

The paper proceeds in the following manner: first, it considers briefly the history and composition of Australian state parliaments, showing why they are particularly useful sites for the exploration of devices to manage intercameral conflict. Second, it notes the most relevant literature on such devices. Next, the paper focuses on prorogation itself, disaggregating its features and establishing the essence of a typology. Fourth, it examines a series of cases drawn from Australian state parliaments that demonstrate the different ways that prorogation may be used in intercameral disputes. Finally, it discusses the reasons why some types of prorogation, inspired by intercameral conflict, may be in decline while others are on the increase and provides some conclusions that may be drawn from this research.

Introduction

Bicameralism in the Australian States

Bicameralism was a ubiquitous feature of the six Australian state parliaments when these were constituted as sites of ‘responsible government’ on the Westminster model, in the latter half of the 19th century. With the exception of Queensland, which abolished its second chamber in 1922, they remain bicameral.² The second chambers were commonly designed to complement the first chambers: while the latter were normally constituted on principles of majoritarian democracy, the former were usually constituted on some variant of a non-majoritarian principle.

A variety of methods were used – appointment, restricted franchises, malapportionment among constituencies, etc. – to establish and maintain second chambers as a site for the representation of the more conservative elements of society. At the time of their institution, the House of Lords at Westminster was still selected primarily on the hereditary principle, and had not yet been subjugated to the House of Commons. As a result, whether the members of these upper houses were selected via nomination, or via election on a restricted franchise, they considered themselves to be legitimate rivals to the members of the lower chambers. Therefore, given both the differing compositions between the corresponding upper and lower chambers, and each chamber’s sense of its own legitimacy, frequent conflict between the chambers was inevitable: as Waugh notes, they were ‘designed to disagree’ (Waugh 2006, p. 185).

As Stone has shown, while the state upper houses were democratised in the latter half of the 20th century, shedding their roles as conservative checks on the lower chambers, they did not evolve as replicas of their corresponding lower chambers (Stone 2002; Stone 2008). As a result, not only have they enhanced their own legitimacy, but they have ‘become increasingly active and credible’ as legislative institutions (Stone 2008, p. 176). While there continues to be a degree of diversity among the upper chambers, as a group they exhibit features that qualify them as examples of ‘strong bicameralism’, as defined by Lijphart (Stone 2002).³ As such, they are particularly apt sites for the study of intercameral conflict.

Conflict Resolution Mechanisms

Given that conflict between the chambers was anticipated to be a normal feature of their parliaments’ operations, some states adopted mechanisms from the beginning to avoid ‘deadlocks’⁴ in their parliaments, while others adopted such measures later (Waugh 2006, p. 187ff). For the nominated upper houses of New South Wales (NSW) and Queensland, the solution was the appointment of sufficient new members to the house to bring it into line with the lower chamber. Western Australia (WA) was an outlier initially, inasmuch as its nominated second chamber was instituted with a fixed-size membership in 1890. For the elected upper chambers of South Australia (SA), Victoria (VIC), and Tasmania (TAS), and for WA after nomination was replaced in 1893 by election, only the gradual replacement of the membership via election could alleviate an irresolvable dispute.

Beyond the ‘swamping’ of nominated upper chambers, Waugh documents the use of a variety of mechanisms that have been, and in many cases still are, used at both the state and federal orders of government to resolve, or at least attempt to resolve,

deadlocks (Waugh 2006, pp. 187–197). These include: restrictions on the upper chambers' powers in relation to money bills; dissolutions and new elections for all or part of one or both houses; joint sittings of both houses; referenda; and conferences, either constitutionally mandated or permitted by Standing Orders, between representatives of the two chambers.

The spread of these mechanisms among the state parliaments, and in particular the restriction on upper chambers' powers regarding money bills in several states, has reduced the likelihood of true 'deadlocks', i.e., the bringing of government to a standstill (Waugh 2006, p. 210). This likelihood has been further reduced by changes to the electoral systems for the upper chambers, with proportional representation (PR) now being used in all states except Tasmania. The result of the adoption of PR for upper chamber elections has been that it is less likely that upper and lower chambers of the same parliament will have opposing partisan majorities: the balance of power in the upper chambers is often held by minor parties and/or independents (Waugh 2006, p. 210; Stone 2008, pp. 187–188). However, it is in part precisely this change in the makeup of the upper chambers that has led to their re-invigoration, and an upper chamber that has democratic legitimacy and that takes its legislative and scrutiny roles seriously, may still find itself in significant conflict with a lower chamber dominated by a partisan majority.

Absent from Waugh's survey is one additional mechanism that was used quite commonly in the 19th and early 20th centuries, sometimes alone, sometimes in combination with one of the others, in an attempt to break deadlocks: prorogation of a parliament. It is to this mechanism that this paper now turns.

The practice of proroguing state parliaments is inherited from Westminster. Historically a prerogative power of the monarch, it became a subject of ministerial advice by the 18th century.⁵ By the mid-19th century, when responsible government was beginning to be established in the Australian colonies, the essential features of prorogation were well-established.⁶ The classic formulation appears in the first edition of Erskine May, published in 1844:

The effect of a prorogation is at once to suspend all business until Parliament shall be summoned again. Not only are the sittings of Parliament at an end, but all proceedings pending at the time, except impeachments by the commons (sic), are quashed. A bill must be renewed after a prorogation, as if it had never been introduced, though the prorogation be for no more than a day...As it is a rule that a bill cannot be passed in either house twice in the same session, a prorogation has been resorted to...to enable a second bill to be brought in. (May 1844, p. 35)

Here we have the essence of one axis of the typology outlined below in Table 1. One effect of prorogation is to suspend all the business of a parliament; a second is that proposed legislation that has not yet completed the legislative process 'dies'. As a consequence of the former, prorogation can be used by the ministry temporarily to shut down a parliament; as a consequence of the latter, the ministry can allow itself to re-introduce proposed legislation that has previously been rejected by one of the chambers of parliament.

The other axis of the typology deals with the ministry's motivation for prorogation. These can be many, and vary from the utterly straight-forward – the ministry has exhausted its legislative agenda as proposed in a Throne Speech, and wishes to set out

a new legislative programme – to the entirely partisan: the ministry knows it is about to be defeated on a confidence vote, and shuts down parliament to delay such a vote.⁷ However, this paper is focussed solely on motivations relating to cases of intercameral conflict.⁸ Thus, it is argued here that these motivations may be characterised, broadly, as either ‘offensive’ or ‘defensive’. ‘Offensive’ denotes a situation in which the ministry prorogues in order to attempt to force the upper chamber to do something it has expressed, through word and/or action, that it does not want to do. In parallel fashion, ‘defensive’ denotes a situation in which the ministry prorogues in order to attempt to prevent the upper chamber from doing something it has expressed, through word and/or action, that it wants to do.

The classification of cases as offensive or defensive requires very careful study of the circumstances for two reasons. First, the attribution of motivations to political actors will always be the subject of some disagreement: even outright statements by the actors themselves as to their motivations will not often be taken at face value. Second, some intercameral conflicts involve considerable ‘back and forth’ between the chambers, so there may be some difference of opinion among observers as to whether a ministry is acting offensively or defensively. Notwithstanding these difficulties, the belief upon which this paper is based is that detailed study of the cases can lead to reasonable conclusions as to their character.

The simple typology outlined above is set out in Table 1.

1. Typology of Intercameral Conflict Related Prorogation

Motivation	Aspect of Prorogation Emphasised	
	Re-introduction	Suspension
Offensive	X	X
Defensive	—	X

2. Cases are found in three of the four possible categories. Whether a prorogation for re-introduction with a defensive motivation is possible seems highly unlikely, but certainly no cases have been discovered to date.
3. The next section of the paper provides typical illustrative examples of cases for three of the four quadrants in Table 1.

4. Cases

5. Offensive/Re-introduction: Tasmania 1875

6. A bicameral parliament was established in Tasmania in 1856 (Tasmania 1854). The Legislative Council was elected from the beginning, although on a restricted franchise; the latter was slowly widened over time, with full adult suffrage arriving in 1968 (Griffith and Srinivasan 2001, pp. 39–40). The Council, however, and uniquely in the Australian state context, did not develop as a party-dominated house, and remains to the present as a chamber overwhelmingly populated by members who style themselves as ‘Independents’ (Chapman 1983, pp. 71, 73; Griffith and Srinivasan 2001, pp. 38–39; Stone 2002, p. 279). Meanwhile, party politics did not emerge in the Assembly until the early 20th century; as a consequence, the early years of responsible government in Tasmania were marked by factionalism and instability (Townsend 1956, p. 11).
7. Thus it was that when Alfred Kennerley became Premier in August, 1873, he was the third person to hold the office since the last Assembly elections of September, 1872. On the opening of Parliament in July, 1875, Kennerley introduced a series of public

works measures – the building of railways, roads, and bridges – similar to ones previously rejected under ministries of which he had been a member (Mercury 1877, p. 2). These measures were passed in the Assembly by a wide margin – only four dissenters in an Assembly of thirty-two – and sent on to the Legislative Council (Mercury ‘Oct. 4’ 1875, p. 2).

8. The first of the measures was defeated in the Council on Tuesday, September 21. On the 23rd, a minister rose in the Council and announced that the government would proceed with no new business in the session, and that it intended to prorogue as soon as practicable (Mercury ‘Parliament’ 1875, p. 3). Parliament was to be recalled shortly, with a view to re-submitting the public works measures.
9. The prorogation took place on September 30, with the recall set for October 26 (Mercury ‘Gazette’ 1875, p. 3). The schemes again passed through the Assembly with strong support; however, on November 2, the Council voted the legislation supporting the schemes down once more, the loss coming by one vote (Launceston Examiner 1875, p. 3). On the following day Parliament was prorogued once more, and the Kennerley ministry never met Parliament again.

10. Offensive/Suspension

11. As there are only two cases in this category, and they are idiosyncratic, both are presented.

12. Tasmania 1876

13. The ministry of Thomas Reibey took over from the Kennerley ministry on July 20, 1876. On the evening of Thursday, November 16, Reibey’s Treasurer, Charles Meredith, made an inflammatory speech in the Assembly on the subject of a railway contract bill (Cornwall Chronicle 1876, p. 2). In effect, he accused the President of the Council of having not followed proper procedure in having the bill printed. The Speaker called Meredith to order, and the words used by Meredith did not become part of the official record; however, they were reported in a newspaper the following morning (Mercury ‘Friday’ 1876, p. 2).
14. Taking the reported words as ‘insulting and depreciatory’, the Council on Friday November 17 sent a message to the Assembly requesting that it deal with the matter ‘as it may think fit’ (Cornwall Chronicle 1876, p. 2). The Assembly took up the matter immediately; during the course of the debate, Meredith withdrew any unparliamentary language, but not the central accusation (Mercury ‘Parliament’ 1876, pp. 2–3). However, the Assembly resolved to send a message to the Council expressing its regret at the use of such language by a member of that House. Receiving the message early on Friday evening, the Council was not satisfied, and returned a further message demanding a direct apology from the Treasurer through the Assembly to the Council President. The Assembly was not able to agree on such an apology. Consequently, it being nearly midnight, the Assembly agreed to adjourn the debate until its next meeting, the following Tuesday. Receiving the information that the Assembly had adjourned, the Council considered that it had been affronted; as a token of its pique, at about 1.00am on November 18 it adjourned itself for three months.
15. Consequently, on November 21 the Parliament was prorogued (Mercury ‘Prorogation’ 1876, p. 2). The ministry did, however, assert some semblance of its authority, inasmuch as it had Parliament recalled for February 9, 1877, nine days prior to the date set by the Council.

16. New South Wales 1926

17. The New South Wales Constitution Act 1855 provided for the first bicameral Parliament in the state (UK 1855). Initially selected by appointment, selection for the Legislative Council was converted to indirect election in 1933, and finally to direct election in 1978 (Griffith and Srinivasan 2001, pp. 89, 93). The 1855 Act only specified a minimum size for the Council – 21 members – but no maximum size, a

condition that continued until 1933. Over this period the size of the Council expanded, with Governors, who retained discretion regarding proposed appointments, generally acceding to additions to the Council when it was clear that measures for which an administration had an electoral mandate were being blocked by the upper chamber.

18. The Labor Party under leader Jack Lang won a narrow, two-seat majority in the Assembly elections of May, 1925. The conservative majority in the Legislative Council, however, not enamoured of Labor's programme of social reform, generally opposed legislation proposed to effect it (Hogan 2006, pp. 186–188). By November of 1925, Lang had decided that the Party's long-standing policy of abolition of the Council needed to be acted upon.
19. The difficulty Lang faced was that the Council would have to agree to a constitutional amendment bill to abolish itself. While the total membership of the Council was known – seventy-seven – the true voting membership was less certain: as appointments were made for life, some infirm members did not attend. Of the approximately seventy to seventy-four voting members, only about twenty-six were reliable Labor members, some other Labor appointees being estranged (Clune and Griffith 2006, pp. 280–281).
20. Lang's first gambit was to add reliable members to the Council. While he was unhappy with the degree of 'swamping' requested – twenty-five new Labor appointees – in mid-December the Governor did agree to the requested number (1925, pp. 228–229). Despite this, when the Council re-convened in January, 1926, with the new members in their seats, the government continued to lose some divisions as the numbers in the chamber remained closely balanced (Clune and Griffith 2006, pp. 283–284). The government did win a narrow vote to introduce the bill to abolish the Council, but Lang wanted to be more confident of the outcome of future votes.
21. One of the causes for the continuing loss of divisions in the Council was that some Labor members had made pairing agreements with Opposition members who were absent from the country (Twomey 2009, p. 465). Given the structure of such agreements, Lang saw an opening: as the pairings were made on a sessional basis, he would end the current session and recall Parliament for a new session while the Opposition members were still abroad. This gambit was carried out, the prorogation running from January 25 to February 9 (Sydney Morning Herald 1926, p. 7).
22. Even some Labor members, however, found this manipulation of Parliament unpalatable. As a result, the government lost a vote to re-introduce the abolition bill in the new session, a consequence of which was the expulsion of seven Labor defectors from the Party (Clune and Griffith 2006, pp. 284–285). The Governor subsequently refused Lang's request for ten more appointments, and Lang's ensuing appeal for a reversal of the Governor's decision was denied by the Dominions Office.
- 23. Defensive/Suspension: Western Australia 1985**
24. The Western Australia Constitution Act 1890 provided for the first bicameral Parliament in the state (UK 1890). While the Act prescribed a nominated Council, it also provided for a future elected Council which, as noted above, was realised in 1893 (UK 1890, schedule 1, ss.2, 6, 42–53). While the elected Council did initially have a restricted franchise, this was fully liberalised in 1964.
25. The Labor Party, under the leadership of Brian Burke, had defeated the previous Liberal-National Country Party coalition in the elections of February 19, 1983 (University of Western Australia 2014). Labor held a comfortable seven-seat (32–25) majority in the fifty-seven seat Assembly. However, the opposition parties still held a majority in the thirty-four seat Legislative Council (University of Western Australia 2014).
26. The third session of the Parliament began on August 15, 1985 (1986, pp. 294–295). The expectation that the latter half of the year would be dominated by the parties

jockeying for position in anticipation of a February 1986 election were fulfilled, with the Opposition using its majority in the Council to embarrass the government whenever possible. Government legislative proposals on electoral reform were heavily amended in the Council, and had to be abandoned when no agreement between the Houses could be reached. In October, legislation based on a Royal Commission report on the resolution of deadlocks between the Houses was defeated in the Council. In the same month, Opposition cooperation in the normal parliamentary practice of ‘pairing’ of members was withdrawn as a protest over the government’s parliamentary tactics in the Assembly.

27. Matters came to a head in November 1985. Under threat of being found in contempt of the House, the government leader in the Council tabled documents relating to an Aboriginal Land Rights inquiry (Canberra Times ‘Irregularities’ 1985, p. 21; 1986, pp. 295–296). The documents indicated that public funds allocated to assist Aboriginal groups with their submissions had not been subject to scrutiny by the Auditor-General, and that some allocations had either been over-spent or spent after the inquiry had been completed. The Council established a Select Committee to look into the detail of the allocation of the grants. However, the Committee’s work was cut short when, unexpectedly, the Parliament was prorogued on November 27 1985 (Peachment 1986, p. 156). While the Premier claimed this action had been taken because the Council had refused to focus on the government’s priorities, the Opposition accused Burke’s administration of being ‘terrified by the truth’ (Quoted in ‘Premier’ 1985, p. 3; 1986, p. 296) Parliament did not re-convene until June, 1986.

28. Results and Discussion

29. A summary of all the cases, indicating how each may be characterised according to the typology, and arranged by state, is presented in Table 2.
30. Intercameral Conflict Related Prorogations

	DEFENSIVE	OFFENSIVE	RE-INTRO.	SUSPENSION
NSW 1899	O	R		
NSW 1926	O			S
NSW 1996 D				S
NSW 2010 D				S
SA 1875	O	R		
SA 1887	O	R		
SA 2005 D				S
TAS 1875	O	R		
TAS 1876	O			S
TAS 1879 D				S
TAS 1880 D				S
TAS 1883	O	R		
TAS 1902	O	R		
TAS 1904	O	R		
TAS 1938	O	R		
TAS 1943	O	R		
VIC 1867	O	R		
WA 1907	O	R		
WA 1951	O	R		
WA 1954a	O	R		

DEFENSIVE OFFENSIVE RE-INTRO. SUSPENSION

WA 1954b	O	R	
WA 1985 D			S
WA 1991 D			S
Totals 7	16	14	9

31. Several facts about the distribution of cases are immediately obvious. First, prorogation has been used more than twice as often as an offensive tool than as a defensive tool in intercameral conflict. Second, prorogation has been used more often to allow the re-introduction of legislation than it has for the purpose of suspending parliamentary activity. Third, Tasmania is the state having the most cases.
32. The frequency of the types set out in Table 1 is shown in Table 3. This table highlights the fact that Offensive/Re-introduction prorogations are the most common type, double the number of the next most frequent type, Defensive/Suspensions.
33. Frequency of Types

Motivation	Aspect of Prorogation Emphasised	
	Re-introduction	Suspension
Offensive	14	2
Defensive	0	7

34. Table 4 provides the results in chronological order, with the addition of information indicating the proximate issue that sparked the prorogation. The latter data provides the basis for much of the explanation for the differences in frequency among the types.
35. Intercameral Conflict Related Prorogations

	DEFENSIVE	OFFENSIVE	RE-INTRO.	SUSPENSION	ISSUE
VIC 1867	O	R			F
SA 1875	O	R			F
TAS 1875	O	R			F
TAS 1876	O			S	OI
TAS 1879 D				S	F
TAS 1880 D				S	F
TAS 1883	O	R			F
SA 1887	O	R			F
NSW 1899	O	R			C
TAS 1902	O	R			F
TAS 1904	O	R			C
WA 1907	O	R			F
NSW 1926	O			S	C
TAS 1938	O	R			F
TAS 1943	O	R			C
WA 1951	O	R			OI
WA 1954a	O	R			OI
WA 1954b	O	R			OI

DEFENSIVE OFFENSIVE RE-INTRO. SUSPENSION ISSUE

WA	1985	D	S	LC CI
WA	1991	D	S	LC CI
NSW	1996	D	S	C
SA	2005	D	S	LC CI
NSW	2010	D	S	LC CI

36. F=Financial; C=Constitutional; OI=Other Issue; LCCI=Legislative Council Committee Investigation
37. The early years after the establishment of responsible government in the states featured frequent intercameral conflict over taxation and the appropriation of funds, what are referred to here collectively as financial issues (Waugh 2006, pp. 190–191, 199ff). Given the fundamental importance of the issue – control of the public purse – it is unsurprising that finance was the most common proximate issue involved in prorogations arising from intercameral conflicts in the late 19th century. Indeed, financial issues figure in more than half of the total number of Offensive/Re-introduction prorogations, and both of the 19th century Defensive/Suspension prorogations.
38. It seems likely that the steep decline in the occurrence of finance-related prorogations by the mid-20th century may substantially be explained by two factors. First, the powers of second chambers regarding money bills were, in several states, the subject of restriction, either by informal agreement or formal constitutional amendment, over the period from the late 19th to the early 20th centuries (Waugh 2006, pp. 190–191). Second, Stone notes that the upper chambers’ role as conservative checks on lower chambers, buttressed by mal-apportionment and restricted franchises, was by the mid-20th century ‘under strain’, as it seemed increasingly out of step with contemporary democratic values (Stone 2002, pp. 273–274). This may have made them less eager to use the powers they did still possess.
39. Constitutional issues are the next most common matters of intercameral contention that lead to prorogation. Of the five cases, two Offensive/Re-introduction cases – in NSW in 1899 and Tasmania in 1943 – involved state-federal relations; one Offensive/Re-introduction and one Offensive/Suspension – in Tasmania in 1904 and NSW in 1926 – involved proposed changes to the status of the second chambers themselves; while the fifth, a Defensive/Suspension in NSW in 1996, concerned changes to the office of Governor.
40. The lack of offensive cases involving constitutional issues since 1943 may reflect experience. Of the four offensive uses in this context, only the first – the 1899 prorogation to allow re-introduction of legislation allowing a referendum on the federation proposal – was successful.
41. Indeed, given that there has not been an Offensive/Re-introduction case since the 1950s, and that the three 1950s cases in WA were all related to one issue, i.e., rent controls, it is clear that prorogation for the purpose of coercing the second chamber to change its stance is much less likely than in the past. Given the re-invigoration of the second chambers as described by Stone, it would seem quite probable that ministries realise that Legislative Councillors, who now regard themselves as having democratic legitimacy equal to that of the members of the lower chambers, are not likely to be cowed simply by the insistence of the ministry that they ‘think again’.
42. This brings us, however, to perhaps the most striking finding of this study. While ministries may not be as likely to use prorogation as an offensive tool in their contests with second chambers, the data show that, if anything, they are more likely to use it as a defensive tool. If we set aside the two 19th century cases involving financial issues,

given what we have said above about the decline of such issues as causes of prorogations, all five of the remaining defensive cases have taken place since 1985. Moreover, all five are Defensive/Suspension cases, and four of the five were for the purpose of obstructing an ongoing or prospective Legislative Council committee investigation likely to prove embarrassing to the ministry.

43. As the elaboration of the first of the five recent cases, in WA in 1985, indicated, it was part of an openly partisan struggle between opposing majorities in the two chambers in advance of a looming election. The 1991 WA case was, however, less clear-cut: while the two chambers did have differing partisan majorities, the issues into which the Legislative Council committees were intending to inquire had been acknowledged by the executive as being so serious that it had already appointed a Royal Commission investigation of them.⁹ For all three of the remaining cases, the balance of power in the second chambers was held by minor parties or minor parties and independents.
44. How can we explain the increased frequency of Defensive/Suspension cases in the late 20th and early 21st centuries? For the sake of clarity, it will be useful to disaggregate this question into two parts: first, why the increased frequency of this type of case? Second, why did it occur when it did? This paper suggests related answers to the two questions, both involving evolution of the state second chambers, but the latter answer also involving developments in the Commonwealth parliament.
45. As has been noted, there was a long period of adjustment of the state Councils to the new reality of bicameralism in the late 19th century, when these bodies had to come to terms with the fact that the lower chambers would have primary responsibility for finance. The decline of financial issues as a cause of prorogations during the early years of the 20th century is an indication of the fact that the adjustment was essentially complete. What Stone has shown is that the Councils have, as a group, reformed over the second half of the 20th century, to become more sophisticated in their internal operations, more democratic in their selection processes, and thus more assertive of their role as a legitimate element in a more consensual democratic system (Stone 2002, pp. 274–279; Stone ‘Changing’ 2005). So, by the late 20th century, it was the lower chambers, or, more specifically, the executives in control of those lower chambers, who were being forced to adjust to a new reality. Clearly, they were finding the adjustment challenging: the relatively frequent use of Defensive/Suspension prorogations by executives to shut down second chambers that they could not control may be seen as a symptom of their frustration at this new reality.
46. Why did this increased frequency begin in the mid-1980s? The first and obvious answer is that it took time for the combined developments in the state second chambers to result in institutions sufficiently confident in their legitimacy to feel able to challenge democratically chosen executives, and that this came to fruition beginning in the mid-1980s. There is an additional element to this, however, and for that element this discussion must briefly leave the state sphere, and turn to the Commonwealth parliament, and specifically to developments in the Senate.¹⁰
47. Proportional representation was adopted for Senate elections in 1949, which opened the door for minor parties and independents to gain seats. As a result, neither the Labor Party nor the Liberal/National coalition held a majority in the Senate for extended periods during the 1960s and 1970s, which allowed the minor parties and independents to use their influence to develop gradually the ‘house of review’ role of the Senate (Mulgan 1996). Then, however, the constitutional crisis of 1975 intervened, in which the Senate was implicated by denying Supply, which raised serious questions about the role of assertive second chambers.
48. Nevertheless, during the following period of Liberal/National control of the Senate, between 1975–1981, a new party, the Australian Democrats, emerged.¹¹ Unusually,

this party had as its explicit goal exerting policy influence not by winning control of the lower chamber, but rather by gaining the balance of power in the Senate, and thereby operating as a moderating force on governments controlled by the major parties (Sharman 1999, p. 358). Beginning in 1981, the Australian Democrats held the balance of power in the Senate, either alone or in combination with other minor parties and independents, until 2005.¹² Under the collective influence of these actors, the Senate further developed its internal processes for scrutinizing executive actions, and reasserted itself as a counterweight to a majoritarian lower house (Uhr 1999, pp. 109–110, 115–116).

49. To the question of why Defensive/Suspension prorogations began to appear in the mid-1980s and beyond, then, the answer provided here has three parts. First, the state second chambers, evolving in tandem with the Senate, but with the latter often in the lead, had developed a level of confidence sufficient to allow them to begin to challenge executives. Second, to the degree that such challenge might have happened a few years earlier, it may have been delayed as second chamber assertiveness in the mid- to late-1970s was ‘out of fashion’, due to the crisis in 1975. Third, by the mid-1980s, developments in the Senate had a demonstration effect on the state Councils, providing them with a working model of a second chamber acknowledged as both assertive and legitimate (Sharman 1999, p. 360; Stone 2002, p. 268).
50. The argument that the increase in Defensive/Suspension prorogations is part of an executive reaction to changes in the state Legislative Councils is bolstered by the fact that executives in some states, in addition to using prorogation as a tactical response to second chamber assertiveness, have in addition been responding with more strategic manoeuvres. The most obvious of these were the proposals made by the executive in SA during the conflict that led to the 2005 prorogation, and pursued vigorously thereafter, for either the abolition of the SA Legislative Council, or for reforms that would reduce both the number of members and the length of their terms of office.¹³ The SA second chamber is not alone, however, in facing ‘reforms’ that have had, or would have, the effect of weakening it: Western Australia (1987), NSW (1991) and Victoria (2003) have shortened the term length of their Councils; NSW (1991) and Victoria (2003) have reduced the size of their Councils; and Victoria (2003) has limited its Council’s power regarding money bills. Commenting in 2005 on ‘the currently dominant reform agenda for Australian bicameralism’, Stone characterised it as an ‘executive-inspired’ project ‘focussed on inter-house relations and the difficulties experienced by governments, faced with upper houses over which they lack control’ (Stone ‘Constitutional’ 2005, p. 98).¹⁴
51. Still, there has been some response from the upper chambers, albeit primarily at the tactical level. Both in SA in 2005 and in NSW in 2010, the upper chambers disputed the assertion that prorogation prohibited their committees from sitting (Davis 2010; Bastoni 2011, pp. 4–6; Horgan ‘New South Wales’ 2012, p. 182; McMichael 2012; Horgan 2013, pp. 151–152). In addition, in response to the 2010 NSW instance, a constitutional amendment was pushed through by the incoming government which effectively prevents an early prorogation in advance of an election (New South Wales 2011).

52. Conclusion

53. The purpose of this paper has been two-fold. First, it has set out a typology of prorogation as it is used in cases of intercameral conflict. It has shown that prorogation can be deployed by the executive as part of either an offensive or a defensive strategy, and utilised in a way that exploits either of its two essential features, i.e., the ‘death’ of all pending legislation at prorogation thus clearing the way for its re-introduction, or simply the suspension of all parliamentary activity. Second, it has shown that a particular type of use – defensive prorogation for the purpose of

suspending proceedings – has increased in frequency in the Australian states, and suggested this has occurred as executives have been forced to come to terms with second chambers re-invigorated by reforms that took place over the second half of the 20th century.

54. In the context of the remaining bicameral state parliaments, these findings highlight the importance of the debate concerning the effect of prorogation on second chambers' committee work. That is, it would seem rather optimistic to conclude that executives have now fully adjusted to their reformed second chambers, and that therefore the risk of second chamber committees having their work deliberately obstructed by prorogation has passed.
55. In a wider context, these results provide yet another example of the tension between the executive and parliament in Westminster-inspired systems. Those who support the enhancement of the influence of parliament in such systems must be aware that the executive can be expected to react both tactically and strategically, utilizing whatever devices it finds available, no matter how arcane.

56. Endnotes

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2. For a discussion of the Queensland Parliament, including the abolition of the Legislative Council and calls for its re-introduction, see the chapters by McPherson, Ransley, Carney, and Hughes in (Aroney, Prasser and Nethercote 2008).
3. For Lijphart's original specification of the model see: (Lijphart 1999).
4. As Waugh notes, the term 'deadlock' is used rather loosely, inasmuch as it may be applied to an intractable disagreement over a single bill, rather than a irresolvable dispute over Supply that might bring the entire parliamentary process to a standstill (Waugh 2006, p. 198). Beyond its use in this section on the literature, this paper avoids the use of the term, referring instead to intercameral conflict.
5. Whether the Crown, in the form of the state Governors, retains a reserve power to act independent of advice in relation to prorogation is a matter of debate. See, for example: (Winterton 1992, p. 293ff; Winterton 1993, p. 257; Taylor 2006, pp. 121, 131; Evans 2008, p. 504; Twomey 2011, p. 354; Olivier 2012, pp. 82–87).
6. For early descriptions of the features of prorogation see: (Coke 1648; Hatsell 1818; Blackstone 1979 [1765])
7. For examples of partisan use of prorogation in some of the Australian states see: (Horgan 'New South Wales' 2012; Horgan 2013).
8. Prorogation often occurs in conjunction with the dissolution of a lower chamber. It could be that intercameral conflict is implicated in the dissolution. However, such cases are excluded from this study, because the goal is to focus on the utility of the features unique to prorogation in cases of intercameral conflict, distinct from those of dissolution.
9. For more detail on all five cases see: (Bastoni 2011; Horgan 'New South Wales' 2012; Horgan 'Western Australia' 2012; Horgan 2013).
10. A comprehensive account of these developments lies outside the purview of this article. For such an account, covering the period of interest for this article, see: (Uhr 1999).
11. For an evaluation of the Australian Democrats' contribution to Australian politics see: (Gauja 2010).
12. After a short period of major party control of the Senate between 2005–2008, other minor parties and independents again gained the balance of power in the Senate, a situation that persists to the present day.

13. For details on the episode and its aftermath see: (Bastoni 2011, pp. 3–6; Bastoni 2012, pp. 229–230; Horgan 2013, pp. 150–152).
14. It is worth noting in passing that, again, there are parallels here between executive reactions at the state and Commonwealth levels; see: (Stone ‘Constitutional’ 2005, pp. 98–101).

References

“Despatch by Admiral Sir Dudley Rawson Stratford de Chair to the Secretary of State, 7 December 1925.” 202–231: TNA: PRO, 1925.

1986. ‘Australian Political Chronicle: July-December 1985’, *Australian Journal of Politics and History* 32 (2), pp. 263–307.

Aroney, N., S. Prasser and J. R. Nethercote (eds). 2008. *Restraining Elective Dictatorship: The Upper House Solution?* Crawley, W.A.: University of Western Australia Press.

Bastoni, J. 2011. ‘The Executive versus the Legislative Council: A Case Study from the South Australian Parliament’. Paper presented at the Australasian Study of Parliament Group Annual Conference, Melbourne, October 6–8.

Bastoni, J. 2012. ‘The South Australian Legislative Council: Possibilities for Reform’, *Australian Journal of Political Science* 47 (2), pp. 227–238.

Blackstone, W. 1979 [1765]. *Commentaries on the Laws of England: A Facsimile of the First Edition of 1765–69*. Vol. I. Chicago: University of Chicago Press.

Canberra Times. 1985. ‘Irregularities Revealed in WA Aboriginal Funding.’ *Canberra Times*, 27 November, 21.

Canberra Times. 1985. ‘Premier Prorogues WA Parliament.’ *Canberra Times*, 28 November, 3.

Chapman, R. J. K. 1983. ‘The Legislative Council’, in D. N. Allen (ed.) *Tasmanian Year Book 1983*. Hobart: Australian Bureau of Statistics Tasmania Office, pp. 67–77.

Clune, D. and G. Griffith. 2006. *Decision and Deliberation: The Parliament of New South Wales 1856–2003*. Sydney: Federation Press.

Coke, E. 1648. *The Fourth Part of the Institutes of the Laws of England*. London: M. Flesher for W. Lee and D. Pakeman. Available from Early English Books Online Database at <http://eebo.chadwyck.com/home>.

Cornwall Chronicle. 1876. ‘Monday, November 20th, 1876.’ *The Cornwall Chronicle*, 20 November, 2.

Davis, J. 2010. ‘Matters Concerning the Effect of Prorogation: ‘An Argument of Convenience’’. Paper presented at the 41st Conference of Presiding Officers and Clerks of Australia and the Pacific Regions, Darwin, July 5–8.

- Evans, H. (ed.). 2008. *Odgers' Australian Senate Practice*. 12th ed. Canberra: Department of the Senate.
- Gauja, A. 2010. 'Evaluating the Success and Contribution of a Minor Party: the Case of the Australian Democrats', *Parliamentary Affairs* 63 (3), pp. 486–503.
- Griffith, G. and S. Srinivasan. 2001. *State Upper Houses in Australia*. Sydney: NSW Parliamentary Library Research Service.
- Hatsell, J. 1818. *Precedents of Proceedings in the House of Commons*. 4th ed. Vol. II. London: Hansard & Sons.
- Hogan, M. 2006. 'John Thomas Lang', in D. Clune and K. Turner (eds), *The Premiers of New South Wales: Volume Two 1901–2005*. Sydney: Federation Press, pp. 179–199.
- Horgan, G. W. 2012. 'Prorogation as Partisan Political Tool: The New South Wales Experience', *Journal of Parliamentary and Political Law* 6 (1), pp. 161–194.
- Horgan, G. W. 2012. 'Prorogation as Partisan Political Tool: The Western Australia Experience'. Paper presented at the Atlantic Provinces Political Science Association Annual Conference, Fredericton, N.B., Canada, September 28–30.
- Horgan, G. W. 2013. 'Prorogation and Partisanship in Tasmania and South Australia', *Parliaments, Estates and Representation* 33 (2), pp. 140–155.
- Launceston Examiner. 1875. 'Parliament.' *Launceston Examiner*, 4 November, 2–3.
- Lijphart, A. 1999. *Patterns of Democracy: Government Forms and Performance in Thirty-six Countries*. New Haven, Conn.; London: Yale University Press.
- May, T. E. 1844. *A Treatise Upon The Law, Privileges, Proceedings and Usage of Parliament*. London: Charles Knight & Co.
- McMichael, T. 2012. 'Prorogation and Principle: The Gentrader Inquiry, Government Accountability and the Shutdown of Parliament', *Australasian Parliamentary Review* 27 (1), pp. 196–206.
- Mercury. 1875. 'Gazette Extraordinary.' *The Mercury*, 1 October, 3.
- Mercury. 1875. 'Monday Morning, October 4, 1875.' *The Mercury*, 4 October, 2.
- Mercury. 1875. 'Parliament of Tasmania – Thursday 23rd September, 1875.' *The Mercury*, 24 September, 3.
- Mercury. 1876. 'Friday, November 17th, 1876.' *The Mercury*, 17 November, 2.
- Mercury. 1876. 'Parliament of Tasmania – Friday 17th November, 1876.' *The Mercury*, 18 November, 2–4.
- Mercury. 1876. 'Prorogation of Parliament.' *The Mercury*, 21 November, 2.

- Mercury. 1877. 'Tuesday Morning, December 18, 1877.' *The Mercury*, 18 December, 2.
- Mulgan, R. 1996. 'The Australian Senate as a 'House of Review'', *Australian Journal of Political Science* 31 (2), pp. 191–204.
- New South Wales. Constitution Amendment (Prorogation of Parliament) Act 2011. 16 May 2011. [cited July 28 2014]. Available from <http://www.legislation.nsw.gov.au/sessionalview/sessional/act/2011-3.pdf>.
- Olivier, E. 2012. 'Proroguing the Parliament of Australia: The Effect on the Senate and the Conventions that Constrain the Prerogative Power', *Federal Law Review* 40 (1), pp. 69–88.
- Peachment, A. 1986. 'Administrative Chronicle – Western Australia', *Australian Journal of Public Administration* 45 (2), pp. 156–162.
- Sharman, C. 1999. 'The Representation of Small Parties and Independents in the Senate', *Australian Journal of Political Science* 34 (3), pp. 353–361.
- Stone, B. 2002. 'Bicameralism and Democracy: The Transformation of Australian State Upper Houses', *Australian Journal of Political Science* 37 (2), pp. 267–281.
- Stone, B. 2005. 'Changing Roles, Changing Rules: Procedural Development and Difference in Australian State Upper Houses', *Australian Journal of Political Science* 40 (1), pp. 33–50.
- Stone, B. 2005. 'Constitutional Change and Bicameralism in Australia: the Perversity of 'Reform'', *Australasian Parliamentary Review* 20 (1), pp. 89–102.
- Stone, B. 2008. 'State Legislative Councils – Designing for Accountability', in N. Aroney, S. Prasser and J. R. Nethercote (eds), *Restraining Elective Dictatorship: The Upper House Solution?* Perth: University of Western Australia Press, pp. 175–195.
- Sydney Morning Herald. 1926. 'Prorogued.' *Sydney Morning Herald*, 26 January, 7.
- Tasmania. Constitutional Act 1854. 1 November 1854. [cited 8 February 2013]. Available from <http://foundingdocs.gov.au/item-sdid-34.html>.
- Taylor, G. 2006. *The Constitution of Victoria*. Sydney: Federation Press.
- Townsley, W. A. 1956. 'The Parliament of Tasmania', in F. C. Green (ed.) *A Century of Responsible Government 1856–1956*. Hobart: LG Shea, Govt. Printer, pp. 1–55.
- Twomey, A. 2009. 'Sir Dudley Rawson Stratford de Chair', in D. Clune and K. Turner (eds), *The Governors of New South Wales 1788–2010*. Sydney: Federation Press, pp. 457–472.
- Twomey, A. 2011. 'Changing the Leader – The Constitutional Conventions Concerning the Resignation of Prime Minister and Premiers', *Federal Law Review* 39 (3), pp. 329–360.

Uhr, J. 1999. 'Generating Divided Government: The Australian Senate', in S. C. Patterson and A. Mughan (eds), *Senates: Bicameralism in the Contemporary World*. Columbus: Ohio State University Press.

UK. New South Wales Constitution Act 1855. 18 & 19 Vic. No. 183. 16 July 1855. [cited 21 January 2013]. Available from <http://foundingdocs.gov.au/item-sdid-78.html>.

UK. Western Australia Constitution Act 1890. 25 July 1890. [cited January 21 2013]. Available from <http://foundingdocs.gov.au/item-sdid-12.html>.

University of Western Australia. Australian Politics and Elections Database. [cited 1 August 2014]. Available from <http://elections.uwa.edu.au/elecdetail.lasso?keyvalue=1566>.

Waugh, J. 2006. 'Deadlocks in State Parliaments', in G. Winterton (ed.) *State Constitutional Landmarks*. Sydney: Federation Press, pp. 185–210.

Winterton, G. 1992. 'The Constitutional Position of Australian State Governors', in H. p. Lee and G. Winterton (eds), *Australian Constitutional Perspectives*. Sydney: Law Book Company Ltd., pp. 274–335.

Winterton, G. 1993. 'Reserve Powers in an Australian Republic', *University of Tasmania Law Review* 12 (2), pp. 249–262.