Constitutional Change and Bicameralism in Australia: the Perversity of 'Reform'

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It is desirable for a constitution, as a power-limiting device, to possess significant rigidity or, in other words, to be entrenched. In the Australian states, with the exception of Queensland, the upper houses of parliament have an increasingly important role to play in providing that rigidity. The democratisation of state upper houses and the adoption of electoral systems which ensure incongruent partisan representation between houses in Australia's bicameral parliaments mean that upper houses have the political capacity to ensure that important legislation, including proposals for constitutional change, is properly debated in parliament and, to an extent, in the wider community. In this context, it seems perverse that much so called 'reform' of upper houses in Australia continues to focus on various means of subordinating these chambers to the will of the lower house majority. This article argues that reform should be directed at enhancing, rather than weakening, the role of Australia's unique upper houses.

This article[1]examines the relationship between bicameralism and constitutional change in Australia from two quite different perspectives. The first section considers the role of upper houses, with particular reference to the Australian states, in the process of constitutional change. Then, in the second and third sections, alternative agendas for the reform of Australian bicameralism are compared and an argument is made about their relative worth for improving parliamentary democracy. I want to suggest that there are important connections between the two different topics: if the role discussed in the first section is valued, along with more widely acknowledged roles of upper houses, certain sorts of reforms are indicated and certain others, including those which have been promoted in recent years by the current Commonwealth government, are clearly undesirable.

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I

The central proposition of modern constitutionalism is that the basic rules of a governmental system — specifying, in particular, the nature and powers of relevant offices — should be relatively 'rigid', or difficult to change. Even in Britain, long the bastion of the 'unfixed' constitution, the tide of opinion seems to be turning in this direction. The most important function of such 'entrenchment' is to limit the power of all offices in order to prevent arbitrary government. A rigid, or 'higher law', constitution also helps to inculcate the liberal idea of the rule of law in the society at large by demonstrably subordinating lawmakers to a body of law they cannot freely change. Further, a higher law constitution assists civic education by underlining the constitutional rules, while making more visible, and thus encouraging, public debate about, efforts to change those rules.

From this point of view, Australian constitutions are deficient in several ways. All of our constitutional texts fail to specify certain key institutions (such as prime minister/premier and cabinet) and leave certain key relationships (e.g. between governor/governor-general and the prime minister/premier and ministers; and between the parliament and prime minister/premier and ministry) to be regulated by un-codified, non-legal 'conventions'. State constitutions have two additional weaknesses. First, while all of the federal constitution is entrenched, at the state level the constitutional texts are only partly entrenched.[2] Where state constitutions are not entrenched, they can by definition be changed by ordinary parliamentary majorities. Second, those parts of state constitutions that are entrenched are often more weakly entrenched than is the federal constitution through the absolute parliamentary majority and referendum requirements specified in s 128.

Those parts of state constitutions that are entrenched, and these vary somewhat between jurisdictions, utilize special parliamentary majorities or popular referendums, or both of these devices together, to achieve a measure of constitutional rigidity.[3] The historical trend has been towards widening the range of matters entrenched and also, under the influence of s 128 of the federal constitution, towards deeper entrenchment, with growth in the use of a referendum requirement

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[2] There is uncertainty about the range of matters in state constitutions upon which manner and form limitations can be imposed with regard to future change (see Lumb 1991, 116–33). Contemporary authority for manner and form limitations is provided by s 6 of the *Australia Acts*, but only for those parts of state constitutions dealing with 'the constitution, powers or procedure of the parliament'. Most, but not all (e.g. position of governor, the Supreme Court and electoral matters), of the entrenched provisions of state constitutions clearly fall into this category. But it is arguable (Lumb 1991, 129–30) that manner and form limitations may also be applied to a wider range of matters.

[2] The situation, as of 1996, is set out in Commission on Government Discussion Paper No. 15 (Western Australia 1996, 6). The information on Victoria presented in that document needs updating in light of the *Constitution (Parliamentary Reform) Act* 2003.

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for changes to some basic features of state political systems. But the changes have occurred incrementally and the state constitutions tend to contain a rather unsatisfactory patchwork of different forms of entrenchment.

In WA, the 1994–96 Commission on Government (COG) argued strongly for these various deficiencies to be eliminated. It recommended that the State's constitution should be consolidated in a single document; that the constitutional document should fully specify the basic rules of the system of government; and that the whole constitution should be strongly entrenched through a requirement for all constitutional change to be approved by the electorate at a referendum (Western Australia 1996a).

Comprehensive reform of this kind is yet to occur in any Australian state. However, constitutions can be entrenched *politically* as well as legally. There is an important sense in which the entrenchment of state constitutions has been strengthened across the board in recent times, without any formal change in the mechanisms of entrenchment. This is so because, in a number of jurisdictions, the need for absolute parliamentary majorities is a more effective mechanism of entrenchment than it was in the past. Moreover, even where only ordinary majorities are required to change the constitution, these are more difficult to obtain than was often the case previously.

The reason for these higher hurdles is that Australia's upper houses, state as well as federal, have been strengthened very significantly by electoral system change over the past half century. The case of the Senate is well known: the adoption of PR in 1948 was responsible, over time, for a loss of control over the Senate by the major parties and the development of the Senate as an autonomous check on government (Uhr 1999; Sharman 1999). But the state upper houses have undergone an equally important evolution, partly different from and partly similar to that of the Senate (Stone 2002). Unlike the Senate, state upper houses were created as checks on the democratic impulse as expressed in the lower houses of colonial parliaments, and this weakened their legitimacy in the parliamentary process for much of their history. Reforms to their franchises, culminating in their adoption of universal suffrage in the second half of the 20th century, gave them democratic legitimacy and recast their role as that of check within, rather than check upon, the system of parliamentary democracy.[4] Additionally, the adoption by the state upper houses of PR electoral systems along Senate lines, a process completed only in 2003 with electoral reform of the Victorian Legislative Council, has strengthened the ability of upper houses to check executives and the lower house majorities upon which they are based. Electoral reform in mainland Australia has made it very difficult for a major party to control a majority in an upper house. This means that upper houses

[4] The evolution of those upper houses, in Queensland and New South Wales, which were originally nominated, rather than elected, was more problematic. The NSW Council made the transition to indirect election in 1933, followed by direct election in 1978, whereas the Queensland Council was abolished in 1922

can no longer be taken for granted by Australian executives, nor are they now merely vehicles for the opposition to continue its warfare with the government of the day.[5] The same is true for Tasmania, which has traditionally had different electoral systems for its two houses of parliament and has an upper house that is always controlled by independents. All state upper houses have used their enhanced status and autonomy to become increasingly active and credible in the performance of the parliamentary functions of scrutiny of the executive and review of legislation.[6]

What is true for the review of ordinary legislation is also true for legislation to change the constitution, the more so where an absolute majority is required. Outside of Victoria, now likely to be a short-lived exception, a state executive proposing constitutional change now always needs to do more than convince its own partisan supporters in parliament of the merits of the case. This, for COG was the whole point of entrenchment:

> … if the constitution is to be an effective check on the government, it must be beyond the ability of the government of the day to change the constitution without reference to a broader political constituency than members of the government and its supporters in parliament (Western Australia 1996a, 87)

A state executive now must always convince either its partisan opponents in the upper house, or components of the cross-benches — whether or not an absolute or an ordinary majority is required for constitutional change. This is, in practice, a much more difficult task than many governments have been faced with in the past, when with similar electoral systems in upper and lower houses government majorities were often replicated in upper houses.

In fact, there was often a bias at work in the states until recent decades, with most mainland upper houses having a history of unbroken domination by conservative parties. So Labor governments tended in practice to face a more strongly 'entrenched' constitution than their conservative opponents, despite the difficulties conservative governments sometimes had with conservative majorities in upper houses. This advantage on the conservative side has been overcome by re-apportionment and the adoption of PR; so in recent times the requirement of a majority (absolute or ordinary) in each house of parliament has become a reliably significant hurdle for state constitutional change for the first time since disciplined parties gained control of Australian parliaments.

In the case of WA, since the shift to PR in 1987, governments of both persuasions have faced an upper house in which they could not muster an absolute majority from their own partisan supporters. Further, in order to achieve an absolute majority

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[5] No major party has controlled the SA Legislative Council since 1975, the NSW Legislative Council since 1988, or the WA Legislative Council since 1996.

[6] But the capacity for the performance of these functions has developed to different extents across the state upper houses (see Stone 2005).

in the Legislative Council, an alliance encompassing much of the ideological spectrum of WA politics has been necessary since 1996. In parliament prior to the February 2005 election, Labor and Greens MLCs were insufficient, as was underlined by a controversial attempt to amend the Electoral Act. Support from at least one MLC from the One Nation, Liberal or National party groups was also needed. Similarly, before the 2001 election, the Coalition government required, in addition to the support of Liberal and National MLCs, two votes from at least one of three groups (Australian Democrats, Greens, and Independents who had formerly been Labor representatives) at some ideological remove from the governing parties.

None of this means that it might not be worth further entrenching state constitutions legally, by adopting a referendum requirement for all changes to the constitution, as advocated by COG. Indeed, COG canvassed some good reasons for supporting such a move. But, even if a referendum requirement were to be more widely adopted in Australia, it is arguable that our upper houses would continue to have an important role to play in the process of constitutional change. First, as has been discussed, they are important to ensure that proposed changes have a broad base of partisan support. Second, they have a superior capacity to undertake parliamentary review of proposed constitutional change, as they do with regard to ordinary legislation. The procedures of upper houses are better adapted to ensure that legislation is reviewed more thoroughly on the floor of the parliament. Moreover, they have a greater capacity than lower houses to undertake, either within the framework of a committee system or by select committee[7], review that is not weakened by the dominance of the governing party's perspective. Third, through their more independent and developed committees, they are well placed, through public hearings, to play the role of linking the deliberative process of parliament with opinion-formation in the community. Upper house committee inquiry, which is less likely to be dominated by a single perspective, is well suited to stimulate interest and assist education about constitutional issues in the community, as well as to sample community opinion to inform the initiation and refinement of proposals for constitutional change.

It might also be suggested that an upper house committee is a more appropriate vehicle for the conduct of public inquiries to develop proposals for constitutional change than the executive-appointed bodies favoured by governments. As a parliamentary entity, an upper house committee has an intimate and ongoing connection to the institution which must formally initiate constitutional change, and at state level often ratify it as well. Further, the membership of such a committee might be expected to have a somewhat different perspective from the front

[7] In some state parliaments (Victoria, South Australia and Tasmania), the advantages of strong bicameralism for review of legislation or scrutiny of the executive tend to be undermined by the existence of joint committee systems (Stone 2005). In these cases, committee review free of control by the governing party would generally require the establishment of a select committee in the upper house.

benches.[8] A major problem with proposals for constitutional change in Australia is that they have a strong tendency to be initiatives of the executive — not merely in the sense that they emerge from the executive, but also that they seek to promote the institutional interests of the executive.[9] The history of federal constitutional politics in Australia is thus essentially one of the executive proposing, and the Australian public disposing of, constitutional changes designed to advantage the interests of the Commonwealth executive. If, in recent decades, the Senate had been able to play the lead role in generating proposals for constitutional change, the latter may well have been less narrow in the interests embodied and, consequently, better able to overcome the referendum hurdle.

II

If one values a genuinely deliberative parliament; if one wishes to enhance parliament's capacity to perform its traditional functions of legislative review and scrutiny of government; if one seeks a role for parliament in constitutional change along the lines articulated above, what sort of constitutional reform agenda should one advocate? If one also believed in enhancing the favourable aspects of an existing tradition rather than tearing everything down and starting from scratch, I think it is clear that one would be interested in strengthening our upper houses — that is, enhancing their *autonomy* vis-à-vis the lower houses; enhancing their *incentives* to focus on scrutiny of government and review of legislation; and enhancing their *capacities* in these areas, perhaps especially by strengthening their committee systems.

A number of reforms, directed at these purposes, have been given currency by academic commentators, individuals associated with the upper houses, and the occasional public inquiry (in WA, most notably, COG). I will list several reasonably well-known suggestions and relate these to the objectives mentioned above.

1. *Autonomy*. With regard to autonomy, quite a lot has been achieved, as already discussed, as a result of electoral system change which has produced incongruence in the partisan composition of our bicameral parliaments. With the exception of the transitional case of Victoria, the upper houses are now largely free of control by the

[8] However, as discussed below, PR in Australia's upper houses tends to produce highly disciplined major party representatives. In these circumstances, it might be argued that major party dominance of upper house committees would most likely ensure that proposals for constitutional reform would continue to reflect the executive orientation of the front benches.

[9] In the case of the Commonwealth government, s 128 doesn't help matters in this regard by permitting the executive, via its control of a majority in the House of Representatives, to have its proposals put to referendum in disregard of Senate opposition.

governing party, and hence the executive.[10] Equally importantly, they are also largely free of control by the opposition party. As a result of these developments, the operation of Australian upper houses is not completely dominated by the government-opposition dialectic, as is the case in lower houses.

However, strong party discipline in upper houses means that lower house competition for government *does* influence the operation of upper houses, and arguably to an excessive extent. After all, except for the case of Tasmania, representatives of the major parties occupy the overwhelming majority of seats in these houses. Party discipline has various supports, including the lure of office to be discussed below. However, electoral arrangements are especially important. The shift to conjoint elections (Stone 2002, 276) and the introduction of de facto list systems of proportional representation in the upper houses of mainland states in the second half of the 20th century made a major difference. Until at least the middle of the 20th century, independent and elongated electoral cycles, the long terms of members and a high incidence of uncontested seats, helped to sustain amongst upper house members (especially on the conservative side) a sense of independence vis-à-vis lower house parties and party leaders. But this was probably all but dead by the time party-friendly versions of PR were adopted in SA, NSW and WA in the 1970s and 1980s. The shift to 'above the line' voting, following the Senate's creation of that option in 1983, has strengthened discipline even further. The overall effect of upper house electoral arrangements, as Studlar and McAllister (1996) have shown for the Senate, is to produce members with an even stronger sense of partisanship than their lower house counterparts.

It is probably not possible to envisage a return to separate electoral cycles for upper and lower houses in Australia, as desirable as that might be. In its effort to address the problem of excessive party discipline in the WA Legislative Council, COG recommended the adoption of aspects of the Tasmanian Hare Clark electoral system — no 'above the line' option, 'Robson' rotation of party lists of candidates, optional preferences beyond a number equal to the number of seats to be filled in the relevant electoral district (Western Australia, 1995). COG might also have suggested following Tasmania in banning 'how to vote' cards, as this recommendation would have reinforced the others. The result of these changes would be not only to reduce party discipline but also to influence the sorts of people elected to the house because the parties would be less able to ensure the election of their most preferred candidates as at present. In the necessary competition with fellow party candidates, as well as candidates from other parties, the preferred

[10] However, the 2004 Federal election demonstrated that it is still possible for a governing party or party bloc to win control of the Senate. The Liberal-National Coalition achieved a Senate majority due to a fortunate result in Queensland, which saw both the National and Liberal parties receive flows of preferences sufficient respectively to turn 0.46 of a quota into a full quota and 2.68 quotas into three quotas. Note also the argument later in the article that the Senate's current electoral arrangements are excessively generous to major parties, the Coalition parties having been consistent beneficiaries in recent elections.

choices of the party organization — who can currently be parachuted into upper houses as a result of having the top positions on the party ticket — would not necessarily appeal to voters. There might even develop a tendency for candidates to appeal to voters on the basis of their suitability for specialised upper house functions.

2. *Incentives*. Two means of redirecting the motivations of members of upper houses are frequently suggested (see Bach 2003, 306-8). One is to remove ministers, or to retain only a single minister as is the practice of the Tasmanian Legislative Council. In our small parliaments, the ease of access to ministerial office powerfully shapes the role perceptions of able members of parliament in both houses. In these circumstances, parliamentary performance is to a large extent a means to the end of joining the executive. Arguably, that end, and the requirement of loyalty to party it entails, limits the zeal with which members (especially those from the governing party) approach their parliamentary work. Hence the suggestion that this limitation be removed by largely confining ministers to the lower house. While this reform proposal presents some difficulties[11] and would thus require more analysis than can be provided here, it would seem to be worthy of serious attention.

The second suggestion, complementing the first and rendering it more palatable, is that chairs of committees, within upper house committee systems, be given ministerial-level remuneration. The rationale is that members of upper houses would thereby have a positive incentive to build careers in the performance of specialised upper house functions. Again, this is a proposal which probably requires more extensive analysis than it has received to date. But it has appeal as a means of enlisting talented representatives in the service of the parliament, as distinct from the executive.

3. *Capacity*. The capacity of an upper house to perform the roles of scrutiny and review is related not only to the incentives facing members but also to their abilities. However, the above reforms targeted at incentives might also do something to ensure that individuals with relevant abilities were interested in becoming candidates for upper houses; and the electoral system reforms canvassed above would make it less unlikely that such individuals would be preselected by parties.[12]

[11] For instance, given the small size of state lower houses, it would further diminish the already narrow base for the recruitment of ministers. Further, Bach (2003, 308–9) has noted that it would greatly exacerbate the difficulty upper houses already face in getting ministers to appear before their committees.

[12] It is also possible that, under the modified electoral arrangements, upper house representatives would be less constrained to perform electoral work for lower house members at the expense of their other roles, as is presently the case with Senators. Robson rotation and the absence of 'above the line' voting would mean that they would have to work harder for their own re-election, making them less available for such deployment. Further, being no longer reliant on top ballot positions for election, they would perhaps be harder to persuade to act as servants of the party organization

With regard to the capacity of upper house committee systems, a fundamental constraint in a number of jurisdictions is the small size of the house membership. It has been argued elsewhere (Stone 2005) that at least the three smallest Australian upper houses (WA, 34 members; SA, 22 members; Tasmania, 15 members) show the adverse effects of a lack of members in the range of functions undertaken by their committee systems, the two smallest houses being severely constrained in this respect. Size would also seem to be part of the explanation for the fatal attraction of joint committees to a number of state upper houses, since participation in joint committees expands the range of committee activity in which upper house members can be involved. All state upper houses, except that of WA, have a substantial commitment to joint committees; and in all cases the joint committees operate to undermine a distinctive upper house contribution to committee activity. In the typical case, an upper house balanced against the governing party in its composition is deprived of this source of strength in a joint committee because the participation of the lower house results in a governing party majority on the committee (Stone 2005). The Victorian and NSW Councils (40 members, reduced from 44 in 2003; and 42 members) are probably around the minimum size which would permit a system of upper house committees to perform adequately the core functions of legislative review (including constitutional matters) and scrutiny of the executive. The unfortunate dominance of joint committees in Victoria is probably less a function of the size of that Council than of its failure over the long term to develop significant autonomy vis-à-vis the lower house and the parties of government and opposition. In short, then, at least some of our state upper houses arguably need to be substantially larger than they are.

Though not strictly related to capacity, an important prerequisite for an effective committee system is that it should concentrate on core upper house functions. Australian upper house committees seem to devote large amounts of time to the arguably non-core function of policy development.[13] A suggestion that upper houses need to revise their priorities has been made by at least one Australian MLC (see Griffith and Srinivasan 2001, 118). Also, a respected commentator on the UK Parliament has made a similar point with reference to the UK House of Commons committee system (Riddell 1998, 208-9; 213–14). Riddell argued that a large part of the problem lies with what is seen to be a major strength of the UK committees: their broad mandates and their ability to choose their own subjects for inquiry. Since most Australian committee systems are developing along similar lines, Riddell's case for restricted and prescriptive mandates deserves attention in Australia.

[13] The WA Legislative Council is a notable exception, as its committees have quite strongly prioritised legislative review and scrutiny of administrative processes over the evaluation and development of policy.

III

Needless to say, the currently dominant reform agenda for Australian bicameralism is entirely different to that outlined above. That current, well publicised, executive-inspired agenda is focussed on inter-house relations and the difficulties experienced by governments, faced with upper houses over which they lack control, in carrying through (unaltered) the legislative programs for which they claim an electoral mandate. Its proponents argue that existing constitutional mechanisms for dealing with inter-house disagreements are inadequate and that, as a result, new institutional solutions must be provided.

This has been a longstanding issue on the Labor side of Australian politics. Labor's ingrained attitudes about bicameralism were in part a pragmatic response to historical circumstances. Until relatively recently, state Labor governments typically suffered a good deal of frustration in dealing with upper houses which were almost permanently in hostile, conservative hands.[14] But, Labor partisans have traditionally also been majoritarian democrats by conviction, and thus in favour of institutional arrangements which create and empower single party, lower house majorities. These influences sometimes come together to generate highly irrational views about upper houses — as in the case of a senior Labor MP who, in conversation, suggested that his state's Legislative Council deserved to be abolished, if for no other reason, for its unconscionable stances on issues of policy in the past. It is doubtful that the same individual would have made a similar suggestion about, say, the office of Queensland Premier even if he had been similarly repelled, as he would probably have been, by Jo Bjelke-Petersen's policy stances.

So Labor antipathy is perhaps to be expected, despite the democratisation of Australian upper houses in recent decades and their freedom from conservative control as a result of new electoral systems introduced by Labor governments. But we now see the old Labor arguments articulated by conservatives: the period of the Howard government has probably witnessed the most sustained and strident attack on an upper house by a conservative government in Australian history. Over its term of office, the Howard government has tested the waters with two main prescriptions for overcoming determined upper house disagreement with its legislative proposals: electoral reform to permit the governing party to win a majority in the Senate (Coonan 2000) and, more recently, alteration of the constitutional mechanism, in s 57, for breaking a deadlock between the houses, to make it easier for the executive to enact its legislation in the form it favours (Prime Minister 2003).

Given that the present paper covers a range of matters, the government's various proposals cannot be examined in detail. Instead, I will merely highlight two major weaknesses of the Prime Minister's document. But, before doing this, it is worth

[14] Not all upper houses were like this. The NSW Legislative Council, elected in a distinctively different manner from the other Councils between 1933 and 1978, was an exception, experiencing a substantial period of Labor Party control during the 20th century.

noting the irony that something similar to the less radical of the Howard government's two options for breaking deadlocks was introduced into the Victorian Constitution in 2003 by the current state Labor government. The Victorian changes allow 'deadlocked' bills to be stockpiled over the course of a parliament and then introduced, following an ordinary state election, to a joint sitting of parliament. Such a change may turn out not to be as useful to governments as they may think, as it would seem to provide an opposition with wonderful ammunition in an election campaign where a government has deadlocked legislation which is unpopular with significant sections of the public.[15] Nevertheless, this sort of change probably weakens bicameralism; so the key question is, 'is it justified?' The answer, for all Australian jurisdictions, is 'no'.

The Howard government's preoccupation with inter-house relations rests on two fallacies — one conceptual and one historical and mechanical. The first is that perennial favourite of governments, the idea of an electoral mandate.[16] The flaws in the logic of the mandate are so obvious and serious that it is a wonder governments are able to make use of it at all. Quite simply, no government ever has an electoral mandate to enact any policy — no matter how many times a particular policy is referred to in an election campaign, no matter how prominent the policy in the campaign, no matter how detailed the policy. Elections are not designed to allow citizens to express a collective preference for particular policies; they are about electing representatives and, under Australian electoral systems, governments. Certainly citizens are very interested in policy, and some or many may cast their votes exclusively on policy grounds. But the results of an election, as distinct from a referendum or even an opinion poll, can never tell us reliably about collective policy preferences. The idea that the Howard government ever received electoral mandates to implement its stated policies to sell Telstra or to give Australia a GST would have been fanciful even without information about voters' attitudes to these policies — what we know about the popularity of the latter makes it preposterous.

If electoral success does not confer an electoral mandate, it does give several entitlements to the leadership of the party winning a lower house majority. As the executive, they are entitled to direct state agencies within the framework of the law; they have a privileged position in the budgetary process; and they have an ability to set the legislative agenda.[17] But our system is intended to be one of parliamentary

[15] It used to be said that upper house obstructiveness was useful to Labor governments under pressure from party members to introduce legislation they would prefer not to see pass. Governments will presumably now lack this easy option.

[16] As a result of the reform package of 2003, the rhetoric of the 'mandate' now appears, bizarrely, in the Victorian Constitution.

[17] There is no legal impediment to an upper house developing a legislative program that it could attempt to impose on the lower house. There would be practical difficulties, given the novel parliamentary alliances that would be required. But the main reason this does not happen would seem to be that it is in the interests of the parties of government and opposition (i.e. the alternative government), which together dominate the Senate and other Australian upper houses, to concede the legislative initiative to the government of the day (note Bach 2003, 360-61).

democracy, not plebiscitary democracy. This means that parliament is supposed to play a genuine role in governing; that legislation is to be enacted through a truly deliberative process in the representative assembly. Given that the disciplined party majority underpinning the executive of the day completely undermines the autonomy of the lower house in contemporary government, upper houses have a major responsibility to uphold that deliberative process. Parliamentary democracy in Australia requires upper houses able to say 'no'.[18]

The second fallacy embraced by the Coalition, which undoubtedly provides comfort for parties which once prided themselves on defending Australia's constitutional arrangements, is that it was Labor's enlargement of the Senate in 1983 which has led to the current problem. By lowering the quota for election, it is argued, the change from 5 Senator to 6 Senator half-Senate elections in each state made it more difficult, indeed impossible, for the coalition or Labor to win a majority in the Senate. With 5 Senators to be elected, a party gaining 50 per cent of the vote would win 3 seats; but with 6 Senators, to win 4 seats would require an impossible 57.1 per cent of the vote. Further, it is argued that '[t]he principal beneficiaries [of] … the increases to the size of the Senate have been the minor parties and independents' (Prime Minister 2003, 29).

It is true that minor parties and independents have increased their share of seats in the Senate since 1984 and that the lower quota (14.3 per cent instead of 16.7 per cent) has assisted a little in this. But the main reasons for the improved representation of minors and independents are the decline in voter support of the major parties, especially the Labor Party, and the corresponding increase in support for the minors (Stone 1998). It seems to be poorly understood that the change from 5 to 6 Senator contests, by itself, was *advantageous* to the major parties and *harmful*, rather than beneficial, to the interests of the minors and independents (Sharman 1986; Stone 1998). When Sharman (1986) examined the change shortly after it had occurred, his reasonable prediction, based on the average electoral performance of the major parties since 1949, was that the two major party blocs would each win half the total number of seats, squeezing the minors and independents out of the Senate altogether. This outcome would also have weakened the capacity of the Senate to act as a check on government.

While the sustained drop in the Labor Senate vote prevented that party from taking advantage of the new opportunity, the Liberal-National bloc went close to realizing Sharman's prediction well before the 2004 election. In the 30 six Senator contests

[18] Having this power doesn't mean that it needs to be deployed to its limit. It seems that Australian upper houses very rarely say 'no' in the sense that they ultimately prevent a government bill from being enacted. Lees (2000, 31-32) pointed out, in response to the first wave of Howard government proposals to 'reform' the Senate, that the scorecard for the period 1996-98 was 427 bills passed to two rejected by the Senate. One of the major themes of Bach's (2003) study of the Senate is the high level of cooperation in the Senate's legislative process, especially between government and opposition parties.

around the states, over 5 elections to 2001, following the enlargement of the Senate, the Liberal-National bloc won half the seats on 25 occasions. With an average state vote over those 30 contests of 41.9 per cent, those parties have won 47.2 per cent of the seats. This compares favourably with their relative seat and vote shares in 1980 (48.4 per cent of seats, with a higher average state vote of 44.2 per cent), the last half Senate election before the enlargement. The electoral system, as amended in 1983, has been generous to the Coalition. The idea that the continuation of 5 Senator elections might have seen the Coalition win a majority of seats in the Senate is fantasy. From the enlargement of the Senate to 2001, the Coalition parties won 50 per cent of a state Senate vote (three quotas in a five Senator election) in only one of the 30 state half-Senate contests (Queensland in 1996); and they did better than 45 per cent in a state half-Senate contest on only four other occasions.

The 2004 Federal election, which delivered a Senate majority to the Liberal-National Coalition, has made manifest the major party bias in the current electoral arrangements. The Coalition parties polled very strongly, winning slightly in excess of 50 per cent of the state vote in WA and in excess of 45 per cent of the vote in Queensland, SA and Tasmania. The electoral system took them the rest of the way, translating their average state vote of 46.3 per cent into 52.5 per cent of the seats (21 of 40).

What the Coalition seems to have been really complaining about, prior to its recent triumph, is that the Senate's electoral system doesn't confer a winner's bonus as large as that produced by the House of Representatives' electoral system. But that's the nature of PR; it's designed to distribute seats fairly between parties, whereas a single member constituency system is not. It is true that the enlargement of the Senate and growing minor party support in the electorate has increased the costs to major parties of a double dissolution election. In that sense, s 57 is a less available option than it was previously for breaking deadlocks between the houses. But s 57 has rarely been used with this purpose truly in mind; whereas double dissolutions became a regular event in the in the late 1970s and 1980s, presumably called in an effort to maximize the representation of the governing party. It is arguably no bad thing — and probably not at all harmful to the use of s 57 to break a deadlock over a matter of genuine importance — that governing parties now perceive double dissolutions to be generally not in their interest.

In summary, then, disagreement between the houses of our parliaments is an inevitable consequence of a parliamentary system with genuine deliberative capacity. It is certainly not evidence of dysfunction in the system of government. There is no need for 'reform' of the constitutional provisions relating to relations between the houses of any Australian parliament to be made a priority; on the contrary, no change is called for in this area. Reform worthy of the name would be directed at enhancing, rather than weakening, the role of our unique upper houses.

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