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Victoria's dispute resolution committee and its implications for an effective bicameral system

Philip Davis

As a result of the constitutional reforms of 2003, the Victorian Parliament now fails to meet the most basic tests expected of all Commonwealth nations including developing countries. In 2003, Commonwealth Heads of Government fully endorsed the Latimer House principles on governance relating to accountability and the relationship between the three branches of government, of which Secretary-General of the Commonwealth Don McKinnon said:

I have stated earlier that the Commonwealth commitment to democratic principles is more than rhetoric since it seeks to ensure that all of a country's democratic institutions reinforce one another. These institutions, whether legislative, judicial or executive, must always have the confidence of their people in that they must be transparent in their deliberations and accountable for their decisions.¹

The introduction of a new procedure to manage the legislative process in the Victorian Parliament which deals with disputes between the two houses has led to questions arising about the relevance of the upper house in its capacity to properly hold the executive to account. The procedures which were not tested until 2009 and are unlikely to be tested again before 2014, depending on the fixed term election result, taken with surprising rulings by the Speaker of the Legislative Assembly in the 56th Parliament have significantly restrained the capacity of the Council to function as an independent legislative chamber. In particular, the rulings of the Speaker appeared to serve the will of the executive in a manner which has effectively overturned the basic understanding of the equal but independent roles of chambers in a bicameral system. That is, the effect of these matters taken together have denied the legislative authority of the Victorian upper house, to the extent that it is apparent that the executive can now be confident that virtually any legislative proposal will receive royal assent. Further, the electors and more than 90% of all

¹ Commonwealth Principles on the Accountability of and the Relationship between the Three Branches of Government, as agreed by Law Ministers and endorsed by the Commonwealth Heads of Government Meeting, Abuju, Nigeria, 2003, Introduction excerpt, H.E. Rt Hon. Don McKinnon, Commonwealth Secretary-General pp. 1, 2.

parliamentarians will be left in the dark, as any discussion or negotiation within the Dispute Resolution Committee (DRC), a joint committee of the two houses, will be secret, as the committee will meet in private and other than a take-it-or-leave-it recommendation, provided in a report to the houses, there will be no discussion about the details of the negotiations within the committee.

The DRC was established as part of the raft of changes to the *Constitution Act 1975* by amendments moved early in 2003, when the Victorian Parliament passed changes that amended Parliamentary terms, the number of members, and the electoral system, including establishing a proportional representation in the Upper House. The DRC was formed to resolve 'disputes concerning the passage of legislation between the Legislative Assembly and the Legislative Council'.²

This particular amendment was given little consideration during the parliamentary proceedings, as presumably most members thought it was of less account than the more substantive reforms to the electoral system, number of members and fixed four year terms. However, the underlying assumption seemed to be that this was just reinstating a formal mechanism reflecting the earlier arrangements relating to managers conferences which have fallen into disuse, but were taken to be given a new life under the new constitutional arrangements. The other changes were much more in focus and it is likely this was because these changes were indeed the most significant reforms since the passage of the Victorian Constitution through the House of Commons in 1855.³

It must be noted that the Constitutional Commission, in its consideration, concluded that the Committee of Managers, which had fallen into disuse, was a viable mechanism to resolve disputes or deadlocks on particular bills between the houses. It was a solution which was proposed in recognition of the inevitability that future parliaments would comprise of diverse parliamentary representation elected under the new arrangements. So therefore, establishing the DRC was a recommendation by the Commission to ensure that any dispute on a bill between houses could be resolved outside the chambers, avoiding the potential for bills to pass endlessly back and forward between houses. In the event that no agreement could be achieved in terms of resolving a dispute, then a dissolution mechanism was proposed similar to other Australian parliaments, allowing the Premier to advise the Governor to dissolve both houses, so that an early election could be achieved, but notwithstanding, a bill which has become a deadlocked bill, a solution having failed to be reached by the DRC, which was acceptable to both houses would be able to be put to a joint sitting of the parliament following an election, whether or not an early election were obtained.

² *Constitution Commission, A House for Our Future*, Constitution Commission, Melbourne, 2002, p. 57.

³ B. Costar, 'Reformed Bicameralism', in N. Aroney, S. Prasser & J.R Nethercote (eds), *Restraining Elective Dictatorship*, University of Western Australia Press, Crawley WA, 2008, p. 196.

The dispute resolution committee process

The provisions of a DRC contained in s65B attached, *Appendix 1*, set out clearly that the committee will comprise of 12 members, of whom seven will be appointed by the Assembly, five by the Council, and the chair will have a casting vote. The effect of this is that the executive will have control of the committee. The committee meets in private, but otherwise determines its own rules of procedure, and the outcome of deliberations remain private and a resolution, once achieved, must be tabled in both chambers of parliament on the first available sitting day. That resolution should advise of the course of action to be taken to resolve the dispute, being to pass the bill unamended, suggest amendments, or suggest that the bill not be proceeded with. If either house fails to give effect to the resolution, the bill becomes known then as a deadlocked bill, and it may become the trigger for the premier to seek to dissolve the parliament, nevertheless, that deadlocked bill may be considered at a joint sitting of the parliament after an election, whether it be by way of a dissolution or a general election. In other words, the bill can be stored up if required, that is, if required by the premier, which gives the premier significant leverage potentially over the parliament, and it remains an underlying threat to the members of the upper house to be compliant with the will of the government.

Issues that have arisen regarding the operation of the DRC

In the 56th Parliament (2006–10), the Committee was used on three occasions. The procedures followed by the committee on these occasions have exposed a number of major concerns with the operation of the committee.

Defeated bills

Three bills were referred to the Council from the Assembly, which in turn were defeated by the Council, however, the Assembly insisted on returning them to the Council by reference to the DRC. The bills in turn were:

- The Planning Legislation Amendment Bill 2009, defeated in the Council on 11 June 2009;
- The Planning and Environment Amendment Growth Areas Infrastructure Contribution Bill 2009, defeated in the Council on 23 February 2010; and
- The Transport Legislation Amendment Ports Integration Bill 2010, defeated in the Council on 22 June 2010.

Without elaborating on the detail of the referrals and consideration of recommendations by the DRC, it suffices to say that the Assembly insisted upon the re-presentation of the bills in essentially the same form as the bills which had been defeated in the Council. The Speaker made her own position clear in a conference paper in 2010. It is best for her words to speak for themselves.

Disputing the dispute resolution process — challenges facing the speaker

In July 2009 ... an attempt was made to move a motion referring the Planning Legislation Amendment Bill 2009 to the Committee. ... [T]he Bill had passed the Assembly earlier in the year but the second reading had been defeated by the Council in June.

This time, as soon as the motion to refer the Bill to the Committee was called on, and before the Leader of the House even had a chance to move the motion, a point of order was taken. The Opposition argued that the motion was incompetent because the bill it sought to refer to the Committee no longer existed. Arguments put forward to support this claim included:

- The Bill had been defeated and was therefore dead.
- The Bill was not on the notice paper of either House.
- The meaning of a bill is 'The draft of an act of Parliament submitted to the legislature for discussion and adoption as an "act"'. One of the houses had refused to adopt the bill and therefore it was finished.
- The Premier had remarked that the Government planned to reintroduce the Bill unaltered, thereby admitting that the Bill no longer existed. The argument claimed that, as the Premier could not reintroduce the same bill due to the same question rule, he was attempting to use the dispute resolution process.
- A comparison with the Australian Constitution leads to the conclusion that the definition of a disputed bill in Victoria was not intended to include a defeated bill. The 'disagreement between the Houses' provisions of the Australian Constitution (s57) specifically refer to the Senate *rejecting* a proposed law. The omission of similar language in the Victorian provisions — no reference is made to a defeated bill — must therefore mean that there is a difference and the definition of disputed bill does not include a defeated bill.

The authorities of the Parliament do not canvass the concept of a defeated Bill and, in particular, the revival of a bill once it has been defeated. The *Constitution Act 1975* does not include the term defeated bill or any similar term. The standing orders do not contemplate the notion of a defeated bill. Finally, there are no speakers' rulings about how bills may be revived once they have been defeated; rather the rulings are about reintroducing bills and when this may happen.

Two weeks later, in the next sitting week, I gave my ruling. I ruled that the Planning Legislation Amendment Bill 2009 was still a bill and therefore was not precluded from being a disputed bill. I felt that rejection of a bill by an upper house was not necessarily fatal to its progress.

- *Odgers'* states that 'A bill can be revived at any stage and its consideration resumed by the Senate even if it has been negatived at any stage'.
- The *Parliament Act 1991* of the Westminster Parliament established procedures which are available to the House of Commons should the House of Lords reject a bill. The procedures provide for such a bill to be presented for royal assent despite its rejection by the House of Lords.
- The Victorian Constitution includes a process whereby the failure of the Council to pass an appropriation bill does not lead to the extinction of the bill. Section 65(5) sets out the circumstances where a bill remains a bill and can be presented for royal assent, even though the Council has rejected it.

I also ruled that a bill can exist even if it is not on the notice paper of either house — it could be that the bill is being transmitted between houses. My ruling having been given and the bill called-on, the opposition immediately took another point of order. This time the arguments were wide ranging but still proposed that the bill could not be competently referred to the committee. The issues raised included:

- There was no dispute between the Houses. The Planning Legislation Amendment Bill 2009 was only considered by each House once. When the constitutional changes were made the Minister for Finance indicated that the procedures would only be used when there was a genuine dispute between the Houses. Dispute resolution systems throughout the Westminster system involve the concept of a bill bouncing between the Houses over a long period of time giving both Houses an opportunity to revisit and perhaps modify their decisions before the dispute mechanisms come into play. This did not happen with the bill in question.
- Nor was there a dispute between the parties, even though the Bill had been rejected in the Council. Usually when there is a dispute about a bill it becomes the subject of ongoing and substantial discussions and remains on the notice paper until the dispute can be resolved.
- The definition of a disputed bill in the Constitution refers to the bill having been received by the Council not less than two months before the end of the session. There was some argument over the definition of the word session and whether or not the Bill had been transmitted and received within the session.
- A comparison was made with the provisions in the Constitution that deal with the passage of the appropriation bill. That section (s 65(4)(a)) refers to when the Council ‘rejects or fails to pass’ the appropriation bill. It specifically includes the rejection of a bill. The definition of a disputed bill, on the other hand, only states ‘not been passed by the Council’. The absence of the word ‘rejects’ in the definition of disputed bill should be taken to mean that it is not intended to include a defeated bill.
- The *Interpretation of Legislation Act 1985*, which sets out the principles and aids to interpretation, states that interpretation should be based on a construction that would promote the purpose or object underlying the Act. The purpose of the constitution reforms was to have fixed four-year terms unless extraordinary circumstances exist. These circumstances do not exist as there isn’t genuine dispute.

I did not uphold the point or order. I considered that the Planning Legislation Amendment Bill 2009 met the definition of a disputed bill under the Constitution, which is all that is required for a bill to be referred.⁴

The following year the President of the Legislative Council in the 57th Parliament made a significant contribution reflecting the Council’s concern. Again, his conference paper speaks for itself.

⁴ 41st Conference of Presiding Officers and Clerks of Australia and the Pacific, Darwin, Wednesday 7 July 2010, ‘Disputing the Dispute Resolution Process — Challenges Facing the Speaker’, paper presented by Hon Jenny Lindell, MP, Speaker of the Legislative Assembly, Parliament of Victoria.

Victoria's Dispute Resolution Committee — Referral of defeated Bills to the Committee

The Committee met for the first time in 2009 and has been used twice since. On each occasion the Committee has been used, it has been for the consideration of bills that have been defeated in the Legislative Council. This is a deeply concerning development and contradicts the principles that underpin the Westminster system. A basic function of a bi-cameral Parliament is the ability of the democratically elected Upper House to reject prospective legislation. This basic function has now been compromised.

In June 2009 the Legislative Council defeated the Planning Legislation Amendment Bill 2009, a bill that would create new committees comprised of state and local government representatives to make decisions on the issue of planning permits. The Opposition and Greens parties joined forces in the Council to defeat the bill at the second reading stage, both taking issue with the power over planning decisions being taken away from local government. The following month, the Legislative Assembly passed a motion to refer the Bill to the Dispute Resolution Committee, despite the bill being considered by most to be 'defeated'.

Debate in both Houses throughout this process became heated at times and highlighted the Government's defence of the dispute resolution process, and the staunch opposition to it by non-Government parties. The two opposing views held by each side appeared to be that on the one hand, the committee functioned and adhered to the provisions relating to it in the Constitution Act 1975, but on the other hand, that the Bill in question had been defeated, and therefore no longer existed and could not be referred to the Committee. This highlighted one of the main issues at the centre of the argument surrounding the operation of the Dispute Resolution Committee in Victoria, the term 'disputed bill'. The Constitution Act 1975 gives the term an ambiguous definition, principally a bill that 'has not passed the Council' within the required timeframe. Controversially, this wording does not explicitly exclude defeated bills from being referred to the Dispute Resolution Committee.

In light of the ambiguities posed by the definition of a 'disputed bill', the question can also be asked, what then is a defeated bill? What constitutes a defeated bill is not stipulated in the Constitution Act

1975, nor is it outlined in the Standing Orders of either House of Parliament. Traditionally it has been widely held that a defeated bill is a bill defeated in either house of parliament. Questions have been raised concerning whether or not a bill that has been defeated ceases to exist. And if the defeat of a bill in one House is not fatal to the progress of a bill, what is. Under new interpretations of what constitutes a defeated bill, traditional understandings of what a defeated bill is may no longer be accurate.

A Member of the Legislative Assembly called upon the Speaker to make a ruling in relation to the validity of the process of referring the Bill in question to the Committee. Numerous Members had raised concerns, questioning whether the bill, having been defeated, was actually in dispute and therefore if it could be referred to the Committee, another Member noting that the Bill did not appear on either Houses Notice Papers, evidence that the Bill no longer existed. It was also noted that the Bill had only been considered by each House once. A few Members pointed out in the parliamentary debates that they thought the term 'disputed bill'

would refer to a bill that had been bouncing back and forth between the two Houses in an attempt to pass it. This Bill had simply been defeated.

The Speaker informed the House that she had not been persuaded there was any reason why the Bill in question should not have been referred to the Committee. To support her decision, she noted that a Bill not listed on the Notice Paper does not in itself signify that the Bill no longer exists, sighting an earlier example in the Victorian Parliament in which a Bill passed the Legislative Council with amendments, however the message was not provided to the Legislative Assembly before the House rose on that day and as a consequence the Bill did not appear on the Notice Paper of either House, a tenuous example at best.

More significantly however, the Speaker defended the ability of the Assembly to revive a bill that had been defeated, sighting a practice in the Australian Senate in which a Bill can be revived after having been defeated, through the passing of a motion in the Senate. It should be noted however that this procedure as used in the Senate allows only the Senate to revive Bills that it itself has defeated. There is no practice that allows the House of Representative to revive Bills that have been defeated in the Senate, which would be more comparable to what the Legislative Assembly was doing.

The Speaker also made reference to the Parliament Act 1911 of the Westminster Parliament which allows the House of Commons to provide a Bill for royal assent regardless of it having been defeated by the House of Lords. This, she determined, was evidence that the defeat of a Bill in one house is not necessarily fatal to its progress. Of course though the Speaker failed to mention or comprehend that the relationship between the two Houses of Parliament in the United Kingdom are dramatically different from the two Houses in Australian bicameral parliaments, who retain equal powers to consider and pass legislation, with the exception of appropriation Bills. The powers of the House of Lords are substantially different to the powers of the Victorian Legislative Council, therefore it is problematical to compare the two.

Finally, the Speaker referred to section 65 of the Victorian Constitution Act 1975 which details that an annual appropriation bill can be provided for royal assent, regardless of it having been passed by the Legislative Council or not. The Speaker noted that the failure of an annual appropriation bill to pass the Legislative Council does not lead to the extinction of the bill, and therefore the bill remains a bill despite its failure to pass both houses. This was a final desperate attempt to justify the process the Government was proceeding with. It is well known that an annual appropriation bill is a specific and distinct type of bill that is constitutionally recognised in Victoria, it is incongruous to try and compare it with other types of legislation.

With these three pieces of evidence in mind, the Speaker claimed she had not been convinced that the defeat of the bill in the Upper House meant that the bill no longer existed, and therefore considered it a suitable bill to be referred to the Dispute Resolution Committee.

Clearly this situation demonstrates the fulfilled potential of the lower house for this system to be abused and stifle debate, furthermore in the future it is entirely possible to see a situation where a government could manipulate this process as an election trigger for a double dissolution election — not a hospitable situation for stable government, as this process is clearly open to manoeuvring and uncertainty.

The issue here is was this 'disputed bill' reference in the Constitution a result of poor drafting or was it deliberately written that way for a government to elect to use it as a double dissolution trigger.

Upper and Lower Houses hold equal powers in bicameral parliaments in Australia. Although the Assembly is clearly the House where Government is formed in Victoria, as in all bicameral parliaments, the Victorian Constitution provides no indication that this alone should assure passage of any Bill, with the exception of the Budget. The Dispute Resolution Committee however has expanded the power of the Legislative Assembly at the expense of the Legislative Council, and has undermined the ability of the Legislative Council to defeat legislation.⁵

Committee must meet in private

A further major and obvious concern is the lack of transparency the DRC process affords. To require a committee to conduct its proceedings entirely behind closed doors, added with the fact committee members can't speak about the proceedings, is deeply troublesome in a parliament that is based on openness and transparency. To add to this, the 'resolutions' that are tabled offer no insight whatsoever into the proceedings of the committee. For vital legislation to be decided upon behind closed doors contradicts our history of accountable process and is offensive to our democratic principles. Following the first use of the Committee in 2009, the non-government members raised these concerns in the Legislative Council, and the house ultimately agreed to the following motion:

That this house believes that as much of the proceedings of the DRC as possible should be conducted in a way that is transparent to both chambers of the Victorian Parliament and to the Victorian community and request that regular reports, including interim reports of the deliberations of the committee, be made public.⁶

Ultimately, such a resolution has little effect due to the Constitutional requirement for the committee to meet in private, nonetheless the concerns of members is clear.⁷

Constitution commission — terms of reference and recommendations

It is worthwhile noting that there is no consideration in the Terms of Reference, attached herewith, *Appendix 2*, requiring the Constitution Commission to propose any matter in relation to a restraint on legislative authority, other than reviewing powers in relation to Appropriation Bills, and of course, recommendations were

⁵ 42nd Conference of Presiding Officers and Clerks, Brisbane, Queensland, July 2011, 'Victoria's Dispute Resolution Committee' — paper presented by Hon Bruce Atkinson, MLC, President of the Legislative Council, Parliament of Victoria.

⁶ LC Minutes (Vic), no. 134, 2 September 2009, p. 781.

⁷ Victoria's Dispute Resolution Committee and Parliamentary Involvement in the Appointment of Independent Statutory Officers, 42nd Conference of Presiding Officers and Clerks Brisbane, Queensland July 2011, presented by Hon Bruce Atkinson MLC, President of the Legislative Council Parliament of Victoria pp 3, 4.

made and implemented in relation to ensuring that the executive can obtain parliamentary approval for its appropriations. The capacity to refer a bill to the DRC rests entirely with the Assembly, and it is important to note that the Council has no capacity to refer any bill to the DRC, even bills which are initiated in the Council.

It is clearly argued in commission's report that while the creation of the DRC was significant, it was not deemed to be a mechanism by which the executive should obtain and wrest legislative control from the Council.

The commission observed:

Upper houses have only one hold over governments — their ability to withhold assent from government legislation. This is the only reason for governments complying with accountability measures of upper houses. A reviewing house without power over legislation would be ineffective. The Commission favours the reintroduction of a mechanism that would assist resolution of deadlocks between the two houses. The method proposed is the revival of procedure similar to the Committee of Managers that existed in the past but has fallen into disuse. ... It should meet in private and its charter should be to find a sensible solution for the deadlock in the interests of Victoria and Victorians overall. ... The Commission believe that these processes would operate as powerful constraints and deterrents against forcing of an election for a short term Parliament, but that they do provide necessary safeguards and incentives for dispute resolution. ... It is recognised that this procedure would not guarantee passage of Government legislation. It would, however, give the electors an opportunity to voice an opinion on the Government and to indicate the voters' view as to a solution to the deadlock, either for or against the Government.⁸

This led to the **Major recommendation** 11. 'A system for resolution of "deadlocks" between the Legislative Council and the Legislative Assembly to be established',⁹ which was adopted in the government's response, *Appendix 3*, and the procedure, *Appendix 4*.

The executive and parliament

The former Clerk of the Senate, Harry Evans, had much to say on the reform of parliament, in particular he made the point that proposals for amendments to the operation of parliament were premised on an electoral college theory, which of course, is a view which inevitably most executives will hold, simply because of the desire to progress the policy agenda unimpeded.

These orthodox proposals for changing parliament are based on what might be kindly called the electoral college theory of parliament. According to this view, the electors elect a party (or a party leader) to govern. The government governs with the total power to change the law and virtually do what it likes between elections. The purpose of parliament is to register the voters' choice of a government, that is, to act

⁸ A House For Our Future, A Report, Constitution Commission Victoria 2002, pp 58, 59.

⁹ Op. cit., p 71.

as an electoral college. Parliament must not interfere with the government governing, as that would be a violation of the system. In particular, for an upper house with a different electoral basis and party composition to interfere with the government is a violation of democracy. In other words, to use a less kindly term, parliament should be a rubber stamp.

Evans goes on to say

... if we choose a government and give it absolute power, what is the purpose of having a parliament at all? It is a very expensive institution to keep, if it is only an electoral college. We could save a lot of money by dismissing all its members after the election, as with the American electoral college.

The concept which contemporary voters are familiar with, is informed largely by the media and dramatic portrayal of government through the eyes of the American model, where the executive in fact sits outside the parliament. It is something that most ordinary Australians would be more familiar with than the reality of the parliamentary system with which we are dealing. It is clear that the concept of executives being accountable to parliament is now not well understood in the public mind, but it will be well understood in the minds of parliamentary practitioners and observers.

Evans treats this discussion in the following manner:

Responsible government was a system which existed from the mid 19th century to the early 20th century, after which it disappeared. It involved a lower house of parliament with the ability to dismiss a government and appoint another between elections. This system has been replaced by one whereby the government of the day controls the lower house by a built-in, totally reliable and 'rusted on' majority. Not only is the government not responsible to, that is, removable by, the lower house, but it is also not accountable to it. The government's control of the parliamentary process means that it is never effectively called to account in the lower house.

Evans makes it clear, as concisely as can be made clear, by his following comment 'Upper houses have only one hold over governments, their ability to withhold assent from government legislation.' The effect of which is well understood that without a capacity to effectively challenge the executive's legislation, given the assumption that any legislation coming from the Assembly is a reflection of the executive's view, then upper houses will be ineffective. 'A reviewing house without power over legislation would be ineffective'.¹⁰

While the drafters of the provisions to amend the Constitution and establish the DRC may have been inspired, it is hard to determine whether the provisions are designed by co-mission or omission in their ambiguity, because it is evident that the provisions do not reflect the view of the Constitution Commission.

¹⁰ National Press Club Address 24 April 2002; The Australian Parliament: Time for Reformation Harry Evans, Clerk of the Senate.

In its report, the Constitution Commission ‘recognised that this procedure would not guarantee passage of government legislation.’ Nor should it! If the government were guaranteed passage of its legislation, we would not need an upper house. In fact we could dispense with parliament altogether and allow the government to legislate by decree.¹¹

Whether by design or by default, it is clear now that there is an incentive for executives to find a way of exploiting the Disputes Resolution Committee mechanism, to give premiers an advantage in relation to the calling of an early election, notwithstanding there are fixed four year terms in the state.

In Victoria, under the fixed term system adopted in 2003, the failure of the joint DRC to resolve a dispute between the house allows the calling of an early election at any time for the remaining life of the parliament. This gives the government an incentive to use the deadlock mechanism — but also, paradoxically, an incentive to fail to reach a compromise on at least one blocked bill during each term of parliament, in order to give the Premier a free hand with election timing.¹²

It was evident at the time of the drafting and passage of the constitutional amendments that the view of commentators and parliamentarians was that the mechanism for resolution was simply a facilitation to resolving policy differences in relation to the detail of bills. It is somewhat meaningful to consider the prospect of governments having their legislative program delayed. The commission intended utilising the DRC for the benefit of finding a compromise. Given that there are now extended parliamentary terms of fixed four years in Victoria, the DRC hypothetically provides a mechanism for coming to some agreement.

This was summed up in the assessment of Brian Costar (2008: 205):

The question then arises: have the powers of the Victorian Legislative Council been so reduced as to compromise its capacity for genuine review? Only time will tell, but the Council, while ceding its veto power, still retains legislative influence. First, the policy issue at stake would have to be substantial indeed to encourage a Premier to go to an early election over a single bill. Second, the delay power of the Council is much greater, say, than that of the House of Lords and it is unlikely that governments would be willing to have legislation held up for perhaps three years or more. Compromise would present a much more attractive option, as it has sometimes in the past.¹³

¹¹ *The Constitution of Victoria*, Greg Taylor, Federation Press, Sydney, 2006, pp 338–9.

¹² See John Waugh (2006: 196–7), ‘Deadlocks in State Parliaments’, in *State Constitutional Landmarks*, G. Winterton (ed.), Federation Press, Sydney.

¹³ ‘Reformed bicameralism? The Victorian Legislative Council in the twenty-first century’, in *Restraining Elective Dictatorship, The Upper House Solution?*, N. Aroney, S. Prasser & J.R Nethercote (eds), University of Western Australia Press, Crawley, WA.

Resolution of the intractable dispute

As can be seen below, the new section 65A defines a disputed bill:

Disputed Bill means a Bill which has passed the Assembly and having been transmitted to and received by the Council not less than 2 months before the end of the session has not been passed by the Council within 2 months after the Bill is so transmitted, either without amendment or with such amendments only as may be agreed to by both the Assembly and the Council.¹⁴

This fails to clarify what can be deemed by members of the Legislative Council to be a defeated bill rather than a disputed bill and how a defeated bill should be dealt with. This ambiguity should be resolved. To resolve the ambiguity in regard to defeated bills I propose a definition be inserted in the Constitution Act at Section 5 — Definitions, so as not to be in conflict with the entrenched provisions of Division 9A — Provisions, relating to disputes concerning Bills. Therefore, as a ‘bush’ lawyer and with apologies to Parliamentary Counsel, I propose the new definition to be something like:

Defeated Bill means a bill which has been proposed to either house and the question has been negatived and therefore the proposed law has been annulled or extinguished, i.e. has been put to an end (*Macquarie Dictionary 5th edn*).

Given that the Constitution Act may be amended by an absolute majority in both Houses, other than the entrenched provisions, this clarification may be achieved during the course of the 57th Parliament, relatively simply, and therefore resolve the extreme tension that occurred between the Houses in the 56th Parliament and inevitably which will reoccur in future parliaments. Perhaps this proposal will be received with favour by those who are committed to a bicameral parliament which can hold the executive to account. ▲

¹⁴ Constitution Act 1975, Victoria, p 74 — inserted 2003.

Appendix 1

65B Dispute Resolution Committee

- (1) A Dispute Resolution Committee is to be established as soon as conveniently practicable after the commencement of each Parliament.
- (2) The Dispute Resolution Committee holds office for the Parliament during which it is appointed until the dissolution or other lawful determination of the Assembly.
- (3) The Dispute Resolution Committee is to consist of 12 members of whom —
 - (a) 7 are to be members of, and appointed by, the Assembly; and
 - (b) 5 are to be members of, and appointed by, the Council.
- (4) When appointing members under subsection (3), each House of the Parliament must take into account the political composition of that House.
- (5) The Dispute Resolution Committee cannot meet until both the Assembly and the Council have made the appointments referred to in subsection (3).
- (6) A member of the Dispute Resolution Committee is to be appointed by the Dispute Resolution Committee as the Chair.
- (7) Each member of the Dispute Resolution Committee is entitled to 1 vote.
- (8) In the event of an equality of votes, the Chair also has a casting vote.
- (9) The Dispute Resolution Committee —
 - (a) must meet in private; and
 - (b) subject to this Division, may determine the rules to be adopted for the conduct of meetings.

Constitution Act S.65B, 1975 — inserted 2003

Appendix 2

II. Terms of Reference

Professor, the Hon George Hampel QC, the Hon Ian Macphie AO and the Hon Alan Hunt AM are appointed to comprise a Constitutional Commission, and Professor, the Hon George Hampel QC is appointed as Chairperson of that Commission.

The purpose of the Commission is to research, investigate, consult, report on and make recommendations concerning the following issues.

Whether the governance of Victoria would be improved by any, and, if so, what, reforms of and/or changes to the *Constitution Act 1975*, *The Constitution Act Amendment Act 1958* and associated legislation that:

- (a) Enable the Legislative Council to operate effectively as a genuine House of Review. In considering this term, the Commission is to consider:
 - (i) the responsiveness and responsibility of the Upper House to the Victorian people;
 - (ii) the role of and accountability of the Upper House in relation to Executive Government;
 - (iii) whether the Legislative Council should retain the power to reject appropriation bills, and, if so, whether any or what limitations should be placed on that power;
 - (iv) whether the Members of the Legislative Council should be elected one half at each election or should all be simultaneously elected;
 - (v) whether the Legislative Council should be elected on the basis of proportional representation and, if so, whether this should be on the basis of multi-member electorates or on any other and what basis.
- (b) Give effect to any, and, if so, what, of the following further measures:
 - (i) a fixed, four-year term of Parliament.
 - (ii) the reduction, to any and what extent, of the total number of Members of either House of Parliament.
 - (iii) the removal or modification in any way of the nexus between the Houses which is provided by sections 27 and 28 of the *Constitution Act*.

That nexus is comprised of the following elements:

- each Legislative Council province consists of four complete and contiguous Legislative Assembly districts;
- each Legislative Council province returns 2 members, elected on rotation, with a term equal to two Legislative Assembly terms; and
- requiring half of the Members of the Legislative Council to be elected at the same time as the Members of the Legislative Assembly.

In making the research and investigations referred to above, the Commission is to seek and consider submissions from the public in any manner it considers appropriate.

Appendix 3

[Rec 11] A system for the resolution of ‘deadlocks’ between the Legislative Council and the Legislative Assembly to be established.

26. The Government accepts this recommendation.
27. The method proposed by the Report involves a requirement that a Dispute Resolution Committee of 7 Assembly members and 5 Council members be established at the start of each Parliamentary session.
28. In the event of a deadlock between the Houses over a Bill, the committee will meet and attempt to develop a compromise resolution.
29. If any resolution of the committee is not acceptable to the Assembly the Bill in question then becomes a Deadlocked Bill. The Premier may advise the Governor to dissolve both Houses or the Bill(s) may be held over until the next election.
30. If the resolution is accepted by the Assembly and rejected by the Council it becomes a Deadlocked Bill and the procedure referred to above may be followed.
31. Following an election, either a normal electoral cycle or following a dissolution of both Houses, if the Assembly again passes the Deadlocked Bill(s) in either its original form, or in the Dispute Resolution Committee form if that is acceptable to the Government, and it is again rejected or not passed by the Council, the Premier may recommend to the Governor a joint sitting at which the Bill(s) will be dealt with. At the joint sitting an absolute majority would be required for ordinary bills, and a 3/5 majority for entrenched provisions (see below).
32. The Government accepts the Report’s recommendation to adopt the NSW model for dealing with a double dissolution in the context of a fixed four year term. This ensures if a double dissolution is called, the Government elected runs a full four year term.

