Do free conferences have a place in the present-day NSW Parliament?

'This is the twenty-first century; it is not the seventeenth, eighteenth or nineteenth century'[1]

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I INTRODUCTION

Conferences are one means by which the houses of a bicameral parliament may communicate with each other. A distinction is usually drawn between ordinary conferences, at which written messages are exchanged but there is no debate, and free conferences where the members appointed by each House as 'managers' are able to discuss the matter at hand. The conference procedure has fallen largely into disuse in New South Wales (NSW), where there have only been two free conferences since 1916.[2] Nonetheless, despite their lack of use in practice, conferences remain a feature of the formal procedure for resolving disputes over bills as set out not only in the standing orders for each House, but also in the *Constitution Act 1902* (NSW) (Constitution).[3]

In 2011, during a dispute that arose between the Houses over the Graffiti Legislation Amendment Bill 2011, the NSW Upper House, the Legislative Council, took the very rare step of requesting a free conference with the Lower House, the Legislative Assembly. After a delay of almost a year, the Assembly refused the request. The Bill was ultimately passed with amendments negotiated outside the conference process, in keeping with more usual practice. During proceedings in the Assembly following the request, the free conference mechanism was described variously as 'archaic'[4], 'inappropriate in the modern environment'[5] and a 'completely redundant concept.'[6] Given the infrequent use of the conference method, these views are unsurprising. However, this paper will seek to explore whether or not there is still a role for conferences to play in NSW.

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Since 1978, the Council has been elected using a system of proportional representation. This has resulted in a situation in which it is now rare for Governments to control it. In noting that the frequency of conferences has varied between the Australian jurisdictions, John Waugh observed that, while direct negotiation has 'probably been a better option' in jurisdictions where governments have typically also held a majority in the Upper House, conferences are a 'more promising' form of communications between the Houses in jurisdictions where proportional representation has 'weakened the hold of major parties on the Upper Houses.' However, the procedure has not been used in NSW when disagreements between the Houses have arisen. Rather, successive NSW Governments have preferred to engage in direct negotiation with particular members of the Council when necessary to get their legislation through. Conversely, in South Australia, where, as a result of proportional representation, no government has controlled the Upper House since 1975, conferences are routinely used to resolve disputes between the Houses over bills.[7]

Although direct negotiation between government and non-government members has long been a feature of the parliamentary process, and not just in NSW, it can lead to outcomes that might seem opaque to observers. In the late 1990s, an unprecedented number of minor and micro parties held the balance of power in the Upper House. According to Clune and Griffith, these crossbench members were able to successfully carry amendments that were 'in the key areas of interest to their own constituencies, be it children's rights, law and order, the environment, or the rights of animals.'[8] However, they also comment that it 'cannot be said definitely' whether or not in some cases these amendments were 'the result of a deal with the Government, for example, in return for support for a key piece of [its] legislation.'[9]

While it is common practice, a number of issues arise from negotiations being conducted 'behind the scenes'[10] by members of the government with one or two members of the Upper House. The most obvious one is that agreements reached in this way lack transparency. In addition, there is a risk that the genuine consideration of the policy implications of legislation by parliaments is undermined where members of minor parties who represent specific interest groups are prepared to either block or pass a bill depending upon whether the government is prepared to make concessions regarding issues that are unrelated to the subject matter of that particular bill. It is often suggested that Upper Houses that are not controlled by the government are more effective as 'Houses of review.'

However, this cannot truly be the case in a situation where many of the members are, in effect, left out of deliberative processes.

By contrast, conferences may offer the opportunity for a more complete engagement of both Houses in the deliberative process. Each House, for example, must agree to the managers selected to represent it. Although the actual proceedings of conferences are usually not recorded and are regarded as confidential, the Houses have the chance to scrutinise the resolution that is reached by the conference.

This paper will begin by providing an overview of the provision made for the staging of free conferences in NSW. It will then outline the events surrounding the passage of the Graffiti Bill, before moving on to a consideration of how the conference procedure operates in South Australia and then finally considering whether there are benefits associated with its use.

II PROVISION FOR, AND USE OF, FREE CONFERENCES IN NEW SOUTH WALES

A. *Free conferences and the constitutional deadlock provisions*

New South Wales is one of only four Australian jurisdictions, including the Commonwealth and three States, which have constitutional provisions providing for the resolution of deadlocks between the two Houses of Parliament. Section 5B of the *Constitution Act 1902* (NSW) refers to deadlocks that arise in relation to bills other than money bills.[11] Section 5B(1) provides that, where the Legislative Council fails to pass a bill, or passes it with amendments that the Assembly does not agree to, and does the same again after three months, or simply fails to return it to the Assembly within two months, a free conference between managers may be held.[12]

If, following the free conference, there is still no agreement between the two Houses, the Governor may convene a joint sitting of Parliament, which may discuss, but, curiously, not vote on the issue.[13] If these procedures are all exhausted and there is still no agreement between the Houses, in accordance with section 5B(2) the Assembly may resolve that the bill 'as last proposed by the Legislative Assembly and either with or without any amendment subsequently agreed to by the Legislative Council and the Legislative Assembly' should be put to referendum 'at any time during the life of the Parliament or at the next general election

of Members of the Legislative Assembly.'[14] The NSW Constitution is unique amongst those of other Australian jurisdictions with deadlock provisions in that the process facilitates the resolution of the deadlock without requiring the dissolution of the Lower House.[15]

It is clear from section 5B that the first step towards putting the cumbersome wheels of the deadlock procedure in motion is the request of a free conference, a step that may only be taken by the Legislative Assembly.[16] As Evatt CJ and Sugerman J observed in *Clayton v Heffron*, the machinery of section 5B can only be activated 'by the Legislative Assembly, and the taking of each subsequent step in the procedure prescribed is left to the initiative of that House.'[17] *Clayton v Heffron* is also authority for the proposition that it is not the actual staging of a free conference that sets the process in train, but rather the request for one[18], meaning that it is not possible for the Council to obstruct the commencement of the dispute resolution process by simply refusing to participate in the free conference.[19] It also means that when the Council requested a free conference in relation to the Graffiti Legislation Amendment Bill in 2011, it was not a free conference within the meaning of section 5B.

B. *Standing orders*

The Standing Orders of both Houses provide that they may communicate with each other by free or ordinary conference.[20] The same Standing Orders also specifically provide that where a disagreement arises between them over a bill, one way of attempting to address it is by requesting a conference.[21] Consequently, it is clear that while the Upper House cannot request a section 5B free conference, it is otherwise within its capacity to do so in an attempt to resolve a dispute over a bill.

Both the Assembly and Council Standing Orders set out some procedural requirements for the staging of conferences. Messages requesting conferences must state both the 'general objects' of the conference and the managers appointed by the House making the request.[22] Motions requesting conferences must contain the names of the managers proposed to represent the House.[23] The Assembly's Orders provide that a ballot may be required to select a replacement manager if one of the members proposed declines to serve, while the Council's orders state that a ballot may be held to select all the managers who will represent it, if the House so desires.[24] The number of members selected as managers by each House must be at least five for an ordinary conference and at least ten for a free conference.[25] Where a conference is requested by the Assembly, the Council's orders specify that it is to

appoint the same number of managers as that appointed by the Assembly.[26] When one House requests a conference, the other is to appoint the time and place for holding it.[27] The sitting of both Houses is to be suspended while any conference is taking place.[28] Managers are to report back to their respective Houses following a conference.[29]

Conferences may not be requested by one House on a bill or motion that is in the possession of the other at the time of the request.[30] There is an exception to this for the Assembly, which may request a conference in circumstances 'where the Council has rejected a bill transmitted by the Assembly to the Council, or has failed within the meaning of section 5B of the Constitution Act 1902, to pass it', or has passed it with amendments to which the Assembly does not agree.[31] Where the Assembly requests a section 5B free conference, the Council must agree to it 'being held without delay.'[32]

At ordinary conferences, the managers representing each House are only able to communicate the 'reasons and resolutions' of their House in writing.[33] In addition, the Assembly's Orders state that at free conferences, Assembly managers 'may confer verbally and without restriction' with those of the Council.[34] Aside from this, however, as noted by Lovelock and Evans, 'there are no standing rules or orders regulating the conduct of managers during a conference.'[35] Given that no official record of conference proceedings is taken, they further note that there is 'scant information available regarding the conduct of past conferences.'[36]

C. *(Dis)use of the conference mechanism in New South Wales*

Since the defeat of the Unsworth Government in 1988, no NSW Government has had a majority in the Upper House. With the exception of appropriations bills, both Houses of the NSW Parliament have equal powers in relation to bills. The combination of these two factors would suggest the need for mechanisms to resolve disputes between the Houses. Yet, free conferences are proposed rarely. The last free conference to be held commenced on 31 January 1978.[37] However, between 1857 and 1927, when the last conference prior to that of 1978 was held, 23 free conferences were conducted, on bills covering a wide range of topics.[38] The reasons for the decline in the use of the conference procedure are not clear. As Bach has stated, while attempting to explain the Commonwealth Parliament's failure to utilise its own conference procedures, it 'is always difficult to account for a non-event.'[39]

It may be related to the fact that free conferences are referred to in section 5B, meaning that they are automatically associated with the formal deadlock procedure set out in the Constitution, the triggering of which most governments would generally want to avoid. The section 5B procedure is unwieldy and characterised by legal quirks.[40] It is unlikely to result in a timely resolution to a dispute. However, this cannot be the sole explanation for the failure to use the conference. Parliaments in other jurisdictions, where there is no equivalent of section 5B (at least insofar as it refers to conferences) also do not use the procedure.

These jurisdictions include the Commonwealth, where there have only ever been two formal conferences,[41] and the United Kingdom, where the last free conference between the Lords and the Commons was in 1836, and the one before that was in 1740; the last ordinary conference was in 1860.[42] The relevant authorities submit differing reasons as to why both of these Parliaments do not use the conference procedure. In regard to Westminster, *Erskine May's Treatise on The Law, Privileges, Proceedings and Usage of Parliament* states that the conference procedure is considered 'obsolete' because the central function of conferences, that of enabling communications between the Houses regarding disagreements over bills, 'has been taken over by the modern practice of sending messages'.[43] In relation to the Commonwealth Parliament, *Odgers' Australian Senate Practice* states that the 'main reason' is the way in which the 'rigidity of ministerial control over the House of Representatives' renders it 'more efficient for senators involved with legislation to negotiate directly with the ministers who control what the House does with the legislation.'[44] However, as in NSW, although conferences have fallen out of favour as a means of communication between the Houses, it still remains possible for either House to request a conference to discuss disagreements over bills.[45]

While it is possible to accept that ordinary conferences have been rendered obsolete by the practice of exchanging messages, this seems to be a less plausible explanation for the decline in the use of free conferences. One aspect to the free conference may be that, as noted by both Stone and Bach, where the balance of power in the Upper House is held by a minor party, governments appear to find it preferable to 'negotiate directly and exclusively' with the minor party members in order to gain approval for their legislative agenda.[46] While this view is persuasive, it is hard to accept that it is the only contributing factor, given that, at least in NSW, the free conference fell from favour long before the adoption of proportional representation for the Upper House.

III THE GOVERNMENT'S GRAFFITI POLICY AND THE UPPER HOUSE

A. *Graffiti Proposal*

Prior to the NSW State election in March 2011, the Coalition, then in opposition, promised that, if elected, it would implement a plan to tackle graffiti in local communities. Entitled *Graffiti Crackdown: You Spray, You Pay*, the proposed plan stated that a Coalition Government would:

> - Require juvenile graffiti vandals to appear before the court for a graffiti offence [rather than being dealt with via one of the diversionary options under the *Young Offenders Act 1997* (NSW)];
> - Empower courts to suspend convicted graffiti vandals' drivers' licences or extend the time spend on Learners and Provisional licences;
> - Legislate for courts to impose Community Service Orders on offenders to make recompense and clean up the graffiti;
> - Establish a single state-wide hotline for the public to report graffiti in their community and get it removed; and
> - Encourage the formation of voluntary graffiti removal squads in local areas, in partnerships with local government and local communities.[47]

The implementation of this plan would require amendments to several Acts, including the *Young Offenders Act 1997* (NSW), which provides for young offenders to be dealt with by way of warnings, cautions or Youth Justice Conferencing, instead of by a court,[48] and also the *Graffiti Control Act 2008* (NSW), which makes it an offence to 'intentionally damage or deface any premises or other property by means of any graffiti implement',[49] for which the maximum penalty is a fine of $2,200 or imprisonment for 12 months.[50]

At the March 2011 election, the Labor Party, which had been in power for 16 years, was defeated in a landslide that delivered the Coalition an unprecedented majority in the Lower House.[51] However, in keeping with the pattern of recent decades, the Coalition did not gain a majority in the Upper House. The balance of power in the 42-member Upper House is held by minority parties, namely The Greens, the Christian Democratic Party (Fred Nile Group) and, crucially in the case of the Government's graffiti proposal, the Shooters and Fishers Party.

B. *Graffiti Amendment Bill 2011*

The 55th Parliament commenced on 3 May 2011. On 1 June 2011, the new Government introduced the Graffiti Legislation Amendment Bill 2011, which contained amendments necessary to implement the changes proposed prior to the election. It passed the Assembly without amendment, and was introduced into the Council on 5 August 2012.[52]

In the Council, the Deputy Leader of the Opposition in the Upper House, Adam Searle, moved amendments to the Bill that would have removed the proposed licence sanctions to ensure that police and courts could still issue warnings and cautions, or refer a young person to conferencing, in relation to the *first* graffiti offence that had been committed by a young person.[53] This would have meant that the requirement that offenders attend court would only be applicable where the offence was a second or subsequent graffiti offence. The Opposition members indicated that while they otherwise supported the Bill, they did not believe that the licence sanctions or the removal of the diversionary options for graffiti offences would lead to a reduction of graffiti offending.[54] The Greens and the Shooters and Fishers voted with Labor in support of these amendments.[55] No members from the Shooters and Fishers Party spoke during the debate regarding the Bill.

The Bill was returned to the Assembly on 25 August 2011 with a message seeking the support of that house for the amendments that had been made to the Bill. The Assembly sent a message back to the Council rejecting its amendments. The message stated in part:

> The amendments seek to trivialise what the community regards as a very serious issue. Requiring juveniles to appear before a court and increasing sentencing options in relation to graffiti offences constitute essential components of the Government's approach to combating graffiti which was overwhelmingly endorsed by the community at the 26 March 2011 election.[56]

Premier Barry O'Farrell subsequently issued a statement criticising Labor, the Greens and the Shooters and Fishers for 'ignoring the will of 2.1 million voters in this State.' The Premier indicated that his Government's 'mandate on this issue couldn't be clearer – local Liberal and Nationals candidates campaigned hard on graffiti in all 93 electorates across NSW.'[57] The Premier also reportedly said that the refusal by these parties to support the legislation was a 'reckless misuse of their power', and described the failure of the Shooters and Fishers Party members to contribute to the debate on the Bill as 'the greatest act of cowardice around.'[58] In response, the Shooters and Fishers Party released a statement that said that for 'about the last 20 years, no Premier has had a majority in the Legislative

Council' and added '[i]f Mr O'Farrell doesn't want to negotiate, or even talk to us about our legislative agenda, he cannot really expect our support.'[59]

On 13 September 2011, the Council considered this message and voted to request a free conference with the Assembly. With the last free conference held in 1978, and the one before that in 1927, this request was highly unusual.[60] It is even more unusual for the Council to be the chamber that makes a request for a conference; it has only ever requested a free or ordinary conference on three occasions, all of which occurred in the nineteenth century.[61]

In moving that the Council vote to request a free conference Adam Searle said that the two Houses 'could bat it backwards and forwards, each House disagreeing with the other, with no end in sight', but that, to avoid this, 'a free conference of both Houses, comprising persons selected by each House, should be convened to see whether any accord can be reached.'[62] In supporting the motion, the Greens MLC David Shoebridge noted the Council's role as a house of review, and indicated that he was of the view that a free conference provided 'a way for the Upper House to engage with the Lower House.'[63]

C. *2012 – Passage of the Bill*

The message seeking a free conference was not considered by the Assembly until August 2012, when the request for a free conference was refused. This is only the third time in the history of the NSW parliament that a request for a free conference made by one House has been refused by the other.[64]

The Shooters and Fishers Party subsequently proposed a number of amendments to the Bill, the main effect of which would be to remove the suspension of an individual's licence as a potential penalty for a graffiti offence. The other licence sanctions contained in the Bill were left intact, as were the provisions exempting those who had committed graffiti offences from the diversionary options (warnings, cautions and Youth Justice Conferences) in the *Young Offenders Act 1997* (NSW). Robert Brown, of the Shooters and Fishers Party, explained that the 'biggest hurdle to the Shooters and Fishers Party agreeing to this legislation in the first place' was that if 'a young person's licence is taken away he or she may not be able to perform his or her employment and we will then have idle hands. I am sure the members remember the saying, "The devil finds work for idle hands."'[65] Both Houses agreed to these amendments, and the amended Bill was assented to on 28 August 2012.[66]

The Assembly's reluctance to participate in a free conference is unsurprising, given how unusual they are in NSW. However, to secure the passage of the Bill, the Government was required to make a concession regarding a key aspect of its *You Spray, You Pay* policy. It is possible (although of course not certain), the holding of a free conference would have resulted in a different outcome.

Although it has fallen into disuse in many jurisdictions comparable to NSW, the free conference remains a feature of dispute resolution in the South Australian Parliament. The procedures used South Australia are examined below in an attempt to discover whether the contemporary use of the free conference in that State provides any guidance as to whether the revival of the procedure is possible or desirable in NSW.

IV SOUTH AUSTRALIA (& VICTORIA)

In an article published in 2007, Rick Crump, now a Deputy Clerk with the South Australian Parliament, recorded that, at the time he was writing, there had been 362 conferences on disputed bills since 1903. This represents an average of ten conferences per Parliament.[67] The success rate of these conferences in resolving disputes is quite high, with 85.7% resulting in an agreement between the Houses, usually because Parliament adopted the recommendations of the conference.[68] Crump considers that, in South Australia, the conference 'has established itself as a valuable parliamentary procedure for resolving disputes between the two Houses.'[69] This use of conferences continues in the current Parliament.[70] The form of conferences used is the free conference. Crump explains that ordinary conferences were abandoned in 1903 in favour of messages.[71]

The free conference is not always used to resolve disputes over bills that occur between the Houses of the South Australian. For example, it was not used in the recent dispute over aspects of the Independent Commissioner Against Corruption Bill 2012. Consensus regarding this Bill was ultimately reached via a process of direct negotiation between the Attorney General and members of the various parties that hold the balance of power in the Upper House. The issue of whether or not there should have been a conference appears to have been somewhat controversial.[72] However, while it is not used in every case, conferences are certainly a much more familiar feature of the contemporary South Australian Parliament than they are of other jurisdictions.

It is unclear why the conference procedure is used in South Australia, but not in NSW. The Parliaments are comparable, at least to the extent that, due to the proportional representation system, it has been many years since a government controlled both Houses in either State. Crump suggests that one reason for the continued use of conferences is that South Australia's constitution does not 'provide a useful mechanism for settling deadlocks between the two Houses.'[73] South Australia, like NSW, has a constitutional mechanism for the resolution of deadlocks between the Houses.[74] South Australia's deadlock provisions are similar to those of NSW in that they too are unlikely to result in a timely resolution to a disagreement over a bill. However, unlike those of NSW and those more recently adopted by Victoria[75], South Australia's deadlock procedure does not necessarily result in an ultimate resolution of the dispute between the Houses. This is because the procedure set out in section 41 of the *Constitution Act 1934* (SA) leads to either a double dissolution election or the appointment of more members to the Upper House, neither of which actually guarantees the resolution of the deadlock.[76]

While it is easy to accept that governments would find the conference procedure more palatable than the deadlock resolution options provided by the *Constitution Act 1934*, this does not entirely explain why direct negotiation is not used all of the time in South Australia, as it is in other Parliaments. From a distance, it seems that the conference mechanism is regularly used in South Australia because it generally, although not always, produces results that are acceptable to participants in the process.[77] Conferences appear to provide an opportunity for the representatives of both Houses to come together in a genuine attempt to reconcile disputes over bills.

In his article, Crump outlines some of the features of the South Australian free conference procedure that might be regarded as contributing to its success. Crump states that part of the 'underlying theory' of the conference process is that 'the delegates from each House accurately represent the opinion of that House, and their action at the Conference will be upheld on report.'[78] One of the ways in which this theory plays out in practice is the way that managers are selected to represent each House. According to Crump, while only the Legislative Council Standing Orders make any specification as to the number of managers to be appointed, it is common practice for each House to appoint five managers.[79] The Minister in charge of the bill in a particular House will nominate the managers for that House. The managers nominated will usually be selected following consultation between the Minister

'and other Members and party representatives' prior to the moving of the motion containing the managers names.[80] This means that the members of a House are less likely to seek a ballot on the selection of managers. It also means that the managers selected are likely to be 'representative of the opinions' of their respective House.[81]

Another way in which the 'underlying theory' is reflected in practice is in the way that decisions are reached by the conference. The managers appointed by a House participate in the conference as members of that House. Decisions are not made by a majority vote. Rather, the managers from each House, as a whole group, must agree or disagree with whatever proposals are put forward by managers of the other House. As Crump notes '[w]here the Houses are controlled by different majorities, any agreement is thus a genuine compromise between the groups.'[82] It also means that the respective Houses are more likely to support the resolution of the conference when it is reported.[83]

As Crump observes, this approach may be contrasted with that taken by the Dispute Resolution Committee of the Victorian Parliament. This Committee was established following the recommendation of the Constitution Commission of Victoria in 2002, which found that there was no effective mechanism for the resolution of disputes between the Houses.[84] The method proposed by the Commission for the resolution of deadlocks was the re-establishment of a Committee of Managers, which had formerly existed in Victoria, but had 'fallen into disuse.'[85] As noted by Greg Taylor, the procedure adopted at the recommendation of the Commission is, therefore, 'an updated form of the old "free conference of managers."'[86]

Amendments were subsequently made to the *Constitution Act 1975* (Vic) to make provision for the Committee, which is known as the Dispute Resolution Committee (DRC). It is comprised of seven members from the Lower House and five from the Upper House.[87] In the event of a tied vote, the Chair's voice is decisive.[88] Crump writes that the problem associated with allowing issues to be determined by a simple majority vote is that, '[g]iven the strong party discipline that currently pervades contemporary politics, central to the outcome of the joint committee's deliberations will be the political balance of Members on the Committee.'[89] This means that there is a risk that reports of such a joint committee are less likely to be supported by 'the House whose political balance or attitudes are not accurately reflected in the political balance of the joint committee' itself.[90]

At the time Crump was writing, the DRC had yet to be used.[91] Yet his observations have proved somewhat prescient. Only three bills have ever been referred to the DRC. The strength of the representation of the Lower House on the Committee has meant that the process attracted some strident criticism from members of the then Opposition in the Upper House.[92] Phillip Davis, a member of the Upper House and the DRC, has written that the DRC procedure has been weighted too much in favour of the Assembly, with the result that the 'executive can now be confident that virtually any legislative proposal will receive royal assent.'[93]

Davis is also critical of the fact that the DRC is required to meet in private. In his view, this approach is likely to 'contradict our history of accountable process' and is an offence to 'our democratic principles.'[94] In South Australia, the conference proceedings also take place in private, and there is no requirement to either record what takes place in writing, or 'sign the [c]onference report.'[95] Crump notes that while this aspect of the process might be open to the charge that it is not transparent, in his opinion maintaining the confidence of the discussions encourages a frank exchange between members regarding what are usually very controversial matters.[96] As he concludes on the transparency point:

> Adoption of the [c]onference report and consideration of the recommendations as to amendments in the Committee of the whole House is no different to the scrutiny a Bill, clause or amendment would encounter when passing through the legislative process.

Crump adds that it must be borne in mind that 'deals reached in corridor discussions are even less transparent and accountable.'[97]

V CONCLUSION – IS THERE A ROLE FOR FREE CONFERENCES IN NSW?

Speaking in the Assembly on 16 August 2012, the NSW Minister for Planning and Infrastructure said of the request made by the Upper House for a free conference:

> We are well aware that this is the twenty-first century; it is not the seventeenth, eighteenth or nineteenth century . . . The upper House, the Legislative Council, has a certain balance to it that requires an extraordinary degree of energy in negotiating legislation through it. We are up for it. But let us do it without the archaic measure of a free conference.[98]

Given the length of time that has passed since free conferences were used regularly in NSW, it is not surprising to hear the procedure described as obsolete. But that is not to say that the free conference method may not have its benefits. As this paper has sought to demonstrate,

the use of the conference in South Australia suggests that the procedure can still play a role in contemporary parliaments.

While direct negotiation is commonly used to reach compromises in all political contexts, one difficulty with this approach is that it can lead to outcomes that can seem opaque. This in turn can lead to suggestions that the legislative process is being manipulated to achieve concessions regarding issues that are potentially unrelated to the subject under consideration. Media reports of the dispute over the Graffiti Bill contained speculation that the Shooters and Fishers Party's opposition to it was a 'warning shot', intended to demonstrate the Government's reliance upon its support to get legislation through the Upper House, and signal that this support would only be provided on a quid pro quo basis.[99] Similar speculation has appeared in relation to other issues, such as the sale of electricity generators.[100] A feature published in *The Weekend Australian Magazine* in November 2012 stated, in relation to the Shooters and Fishers Party, that:

> The party's operating principle has never changed: in the tightly held NSW Legislative Council, it supports government legislation in exchange for pushing though looser gun laws.[101]

As demonstrated by the comments of Clune and Griffith, noted in the introduction to this paper, this kind of speculation is not isolated to compromises reached in the current Parliament.

A further difficulty with direct negotiation was noted by Crump, who stated that while it may be the 'most pragmatic way to negotiate an outcome, it has far greater potential to exclude some members from the process' of deliberation.[102] This can have consequences for the capacity of Upper Houses to perform their review functions effectively.

The NSW Upper House has changed significantly since it was first established in the mid-nineteenth century, from a House in which the Members were appointed by the Governor, to one where they were indirectly elected, and finally to the present situation, in which members are elected by a system of proportional representation. Similar evolutions have occurred in other Australian jurisdictions. The perception of Upper Houses has also altered, along with their composition, calling into question the old dichotomy drawn by Abbe Seiyes regarding Upper Houses, that they are either superfluous or mischievous.[103] Rather, Upper Houses are now more likely to be regarded as playing an important role in the scrutiny of the executive.[104] Proportional representation, which is used in the election of the Senate

and the Upper Houses of four other States, has given rise to a situation in which it is less likely that the Upper House will be controlled by the government of the day, with the result that second chambers are considered 'more likely to function as effective Houses of Review.'[105]

Rendering this accountability role of Upper Houses even more important is the emergence of the trend that Lord Hailsham described in the 1970s as 'elective dictatorship' – that is, a situation in which 'the government controls Parliament, and not Parliament the government.'[106] At the most fundamental level, this is not how the Westminster System, which was developed as a response to the once absolute power of the Crown, is supposed to function. Much ink has been spilt on the reasons for, and consequences of this, including in relation to the role of party discipline, which has always been particularly strong in Australia.[107] It is beyond the scope of this paper to attempt a summary of these debates. For present purposes, it is enough to note that the rise of executive power over Parliament has brought with it the shift in the attitude towards Upper Houses observed above. There is likewise a wealth of literature on the important role that can be played by Upper Houses in holding the executive to account.[108] As Aroney observes, split-ticket voting, which occurs at both federal and state elections, is evidence that this view of the role of Upper Houses has currency with the electorate as well.[109]

This belief in the capacity of Upper Houses to function as effective Houses of Review is predicated to some extent upon the emergence of proportional electoral systems. Aroney writes that when Upper Houses are 'elected on a system of multi-member districts and proportional representation' they 'enhance the democratic credentials of parliaments.'[110] This is in part because proportional representation gives recognition to both the fact that the concept of 'the people' is not unitary, and also to the consensus model of democracy, as opposed to simple majoritarianism.[111] But, in this, as in all things, balance is required. While it is possible to accept that it is important that minority perspectives be heard in a democracy, the question as to what extent the will of the minority should be capable of binding that of the majority is more vexed.

Bach acknowledges, pragmatically, that when negotiations over legislation are necessary, they are more effectively carried out between the Ministers, who are subject matter experts, and the members of the Upper House.[112] In Bach's formulation, the Lower House is only a 'minor player' in these negotiations. Therefore, one reason he gives for the

failure of the Commonwealth Parliament to use conferences between the Houses is that they would involve negotiations between the Senate and the House, rather than the Senate and the relevant members of the executive.[113] Although, from a practical perspective, Bach's observation is correct, as a matter of basic principle, legislation should be made by parliament as a whole. The free conference procedure appears to provide an opportunity for a wider range of perspectives to be heard in the deliberative process, rather than simply those of the government and perhaps one or two other members.

The conference procedure, as used in South Australia, appears to be a means of putting Parliament back in the picture by facilitating negotiation between the Houses when disagreements arise over bills. It can be flexible enough to allow minor parties to be represented amongst the managers selected to represent the Houses. The way in which the managers from a particular House must, as a block, agree to the proposals put forward by those of the other assists to ensure that the views of a minority are not entirely swamped by those of the executive. The holding of deliberations in secret enables full and frank discussion. However, given that conference resolutions must then be tabled, Parliament has an opportunity to scrutinise its outcomes. Such an opportunity is not available in respect to 'deals reached in corridor discussions.'[114] As a consequence, it is tempting to conclude that any compromises reached are less opaque.

There would undoubtedly be difficulties associated with an attempt to revive the conference procedure in NSW. As Crump notes, the conduct of conferences in the South Australian Parliament 'is governed by past practice and tradition.'[115] Given the length of time since conferences were a regular occurrence in the NSW Parliament, it seems possible to infer that, although the necessary procedural rules remain in place, the actual 'practice and tradition' for the conduct of conferences has been lost to the past. This might detract from the legitimacy of the process. It may also mean that governments, in particular, are reluctant to participate in it. The Victorian experience tends to show that the level of commitment and satisfaction that members have with the procedure will has an impact on its use and also on how its outcomes are regarded. Balanced against such considerations is the observation of Jeckeln, a former Clerk of the Parliaments in NSW, who considered that the last free conference held in NSW, that of 1978, showed that the procedure 'cast aside in Great Britain since 1836 as obsolete, could still be utilised as a valuable parliamentary procedure for resolving differences between two Houses.'[116]

The aim of this paper has not been to suggest that the use of the free conference is a perfect answer to the challenge of resolving conflicts between the Houses. It is also not intended to imply that that free conferences would lead to agreements in relation to all disputes that occur or even replace direct negotiation as a means of obtaining compromise. Rather, it has only sought to suggest that the procedure may not be as redundant as it might seem, and that it could potentially provide a greater opportunity for all members to fully participate in the legislative process in a legitimately parliamentary setting. As such, it may be worth some reconsideration.

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[1] *NSW Legislative Assembly Debates*, 16 August 2012, pp 13987-13988 (Mr Hazzard).
[2] Free conferences were held in 1927 and 1978. The Legislative Assembly requested a free conference in 1960, but the Legislative Council refused to participate in it – see Twomey, Anne. 2004. *The Constitution of New South Wales*. Sydney: Federation Press, pp 261-262.
[3] *Constitution Act 1902* (NSW), section 5B.
[4] *NSW Legislative Assembly Debates*, 16 August 2012, p 13988 (Mr Hazzard).
[5] *NSW Legislative Assembly Debates*, 22 August 2012, p 14225 (Mr Hazzard).
[6] *NSW Legislative Assembly Debates*, 22 August 2012, p 4243 (Mr Smith).
[7] Crump, Rick. 2007. 'Why the Conference Procedure Remains the Preferred Method for Resolving Disputes Between the Two Houses of the South Australian Parliament.' 22(2) *Australian Parliamentary Review* pp 121-136, 125.
[8] Clune, David and Gareth Griffith. 2006. *Decision and Deliberation: The Parliament of New South Wales 1856-2003*. Sydney: Federation Press, p 639.
[9] Ibid.
[10] Ibid, p 640.
[11] For the procedure relating to appropriation Bills, see *Constitution Act 1902* (NSW), section 5A, which effectively provides that the Legislative Council is unable to obstruct such bills.
[12] *Constitution Act 1902* (NSW), ss 5B(1) and 5B(4).
[13] *Constitution Act 1902* (NSW), ss 5B(1).
[14] *Constitution Act 1902* (NSW), section 5B(2).
[15] Carney, Gerard. 2006. *The Constitutional Systems of the Australian States and Territories*. Cambridge: Cambridge University Press, p 91.
[16] Lovelock, Lynn and Evans, John. 2008. *New South Wales Legislative Council Practice*. Sydney: Federation Press, p 600.
[17] *Clayton v Heffron* [1961] SR (NSW) 768, p 814 (Evatt CJ and Sugerman J).
[18] *Clayton v Heffron* [1961] SR (NSW) 768, affirmed by the High Court in *Clayton v Heffron* (1960) 105 CLR 214.
[19] *Clayton v Heffron* (1960) 105 CLR 214.
[20] NSW, LA SO 341, LC SO 123.
[21] NSW, LA SO 226, LC SO 153.
[22] NSW, LA SOs 345(1) and (2), LC SO128(2).
[23] NSW, LA SO 344(1), LC SO 129(1).
[24] NSW, LA SO 347, LC SO 129(2).
[25] NSW, LA SOs 342(1) and 343(1), LC SO 128(3).
[26] NSW, LA SO 129(3).
[27] NSW, LA SO 348, LC SO 128(4).
[28] NSW, LA SO 349, LC SO 130.
[29] NSW, LA SO 350, LC SO 134.
[30] NSW, LA SO 346, LC SO 129(2).
[31] NSW, LA SO 346.
[32] NSW, LA SO 133.
[33] NSW, LA SO 342(3), LC SOs 132(1) and (2).
[34] NSW, LA SO 343.
[35] Lovelock and Evans, above n 16, p 605.

[36] Ibid, p 605.
[37] Twomey, above n 2, p 261.
[38] Ibid.
[39] Stanley Bach. 2003. *Platypus and Parliament: The Australian Senate in Theory and Practice*. Canberra: Department of the Senate, p 270.
[40] For example the joint sitting at which no vote can be taken, which seems to add nothing in terms of bringing the dispute to a resolution – for a discussion of this aspect of the section 5B procedure see Twomey, above n 2, p 252.
[41] Evans, Harry (ed). 2004. *Odgers Australian Senate Practice* (11th ed) Canberra, Department of the Senate, p 537.
[42] Sir William McKay et al (eds). (2004). *Erskine May's Treatise on The Law, Privileges, Proceedings and Usage of Parliament* 23rd ed. LexisNexis UK: London, p 715, fn 5
[43] Ibid.
[44] Evans (ed), above n 41, p 540.
[45] McKay, Sir William, et al (eds), above n 42, p 715, fn 5.
[46] Stone, Bruce. 2008. 'State Legislative Councils – Designing for Accountability' in Nicholas Aroney, Scott Prasser and J R Nethercote (eds), *Restraining Elective Dictatorship: The Upper House Solution*. Perth: University of Western Australia Press, pp 175-195, p 182, Bach, above n 39, p 272.
[47] NSW Liberals & Nationals, election policy, *Tackling the graffiti cycle in local communities; Graffiti Crackdown: You Spray, You Pay* (2011).
[48] A restorative justice process whereby the young person participates in a conference with police and, where possible, the victim of their offence, as well as any others. The conference must agree to an outcome plan for the young person, which might require them to do a number of things, including make an apology to the victim and/or make other reparations for their offence – see *Young Offenders Act 1997* (NSW) Part 5.
[49] *Graffiti Control Act 2008* (NSW), s 4(1).
[50] *Graffiti Control Act 2008* (NSW), s 4(1). The *Graffiti Control Act 2008* also renders it an offence to be in the possession of a 'graffiti implement', defined as spray paint, a marker pen, or 'any implement designed or modified to produce a mark that is not readily removable by wiping or by use of water or detergent', which carries a maximum penalty of a fine of $1100 or imprisonment for six months – *Graffiti Control Act 2008* (NSW), section 5(1) and also section 3(definitions).
[51] The Coalition holds 69 seats in the 93-member Legislative Assembly.
[52] *NSW Legislative Council Debates*, 5 August 2011, p 3764.
[53] *NSW Legislative Council Debates*, 25 August 2011, p 4693.
[54] *NSW Legislative Council Debates*, 10 August 2011, p 4075 (Mr Secord), 11 August 2011, pp 4193-5 (Ms Fazio).
[55] *NSW Legislative Council Debates*, 25 August 2011, p 4697.
[56] *NSW Legislative Council Debates,* 26 August 2011, p 4834.
[57] Premier of New South Wales, 'Commuters Suffer as Upper House Derails Graffiti Crackdown', media release, 28 August 2011.
[58] Tovey, Josephine, 'O'Farrell livid over Shooters' graffiti move', *Sydney Morning Herald*, 27 August 2011.
[59] Shooters and Fishers Party, 'Facts about the Graffiti Bill and Barry's Hissy Fit', media release, 29 August 2011, viewed at http://www.shootersandfishers.org.au/press/facts-about-the-graffiti-bill-and-barrys-hissy-fit, on 6 December 2012.
[60] Twomey, above n 2, p 261.
[61] Lovelock, above n 16, p 601.
[62] *NSW Legislative Council* Debates, 13 September 2011, p 5470.
[63] Ibid.
[64] The other two occasions were in 1898 and in 1960 – see Twomey, above n 2, pp 261-262.
[65] *NSW Legislative Council* Debates, 21 August 2012, p 14017.
[66] The Act was still awaiting proclamation at 6 December 2012, and has therefore not commenced.
[67] Crump, above n 7, p 123.
[68] Ibid. Crump indicates that in 83% of cases, the conference recommendations were adopted, while in the remaining 2.7% of the cases, one House decided not to insist upon its disagreement with the other following the conference.
[69] Crump, above n 7, p 123.
[70] For example, in 2012, conferences were held in relation to several bills, including the Statutes Amendment (National Energy Retail Law Implementation) Bill, the Graffiti Control (Miscellaneous) Amendment Bill, Statutes Amendment and Repeal (TAFE SA Consequential Provisions) Bill – see *SA Legislative Council Debates*, 17 October 2012, p 2345.

[71] Crump, above n 7, p 123.
[72] Hunt, Nigel. 'South Australian Government accused Opposition Leader Isobel Redmond of sabotaging ICAC legislation deadlock', *The Australian* (online), 13 November 2012 at http://www.theaustralian.com.au/news/south-australian-government-accused-opposition-leader-isobel-redmond-of-sabotaging-icac-legislation-deadlock/story-e6frg6n6-1226516199162, see also *SA Legislative Council Debates*, 27 November 2012, pp 2804-2822 and 28 November 2012, pp 2853-2859 for relevant debate.
[73] Crump, above n 7, p 120.
[74] *Constitution Act 1934* (SA), s 41.
[75] *Constitution Act 1975* (Vic), Div 9A.
[76] *Constitution Act 1934* (SA), ss 41(1)(f) and (g), see also Carney, Gerard. *The Constitutional Systems of the Australian States and Territories* (Cambridge University Press, 2006), p 92. A Bill which would have provided for referendums was introduced in 2009, but it was withdrawn – see Constitution (Reform of Legislative Council and Settlement of Deadlocks on Legislation) Amendment Bill 2009.
[77] See for example in relation to the Correctional Services (Miscellaneous) Amendment Bill 2012, *SA Legislative Council Debates*, 31 May 2012, p 1377.
[78] Crump, above n 7, p 126, quoting EG Blackmore, *Manual of the Practices, Procedures and Usage of the Legislative Council of South Australia*, 2nd edn, 1915, Government Printer, p 225.
[79] Crump, above n 7 p 125.
[80] Ibid, p 125.
[81] Ibid, p 126.
[82] Ibid, p 127.
[83] Ibid, p 128.
[84] Victoria, Constitution Commission. 2002. *A House For Our Future* (Final Report), p 57
[85] Ibid, p 58.
[86] Taylor, Greg. 2006. *The Constitution of Victoria*. Sydney, Federation Press, p 334.
[87] *Constitution Act 1975* (Vic), ss 65B(3)(a) and (b).
[88] *Constitution Act 1975* (Vic), ss 65B(6) and (8).
[89] Crump, above n 7, p 128.
[90] Ibid.
[91] Ibid.
[92] For example, during the debate over one Bill referred to the Committee, a member of the Legislative Council stated '[t]o have an unelected committee, appointed with a majority of government members, trump a house of review is an absolutely ludicrous notion of democracy' - see *Vic Legislative Council Debates*, 10 November 2009, p 5240 (Mrs Pulich).
[93] Phillip Davis. 2012. 'Victoria's Dispute Resolution Committee and its implications for an effective bicameral system' 27(1) *Australian Parliamentary Review* pp 158-172, p 158.
[94] Ibid.
[95] Crump, above n 7, p 131.
[96] Ibid.
[97] Ibid.
[98] *NSW Legislative Assembly Debates*, 16 August 2012, p 13988.
[99] ABC News Online, 'Shooters fired up against NSW Government' 26 August 2011, http://www.abc.net.au/news/2011-08-26/shooters-fired-up-against-nsw-government/2856606 , viewed on 6 December 2012.
[100] Wood, Alicia. 'Shooters' pay-off for backing O'Farrell', *Sydney Morning Herald*, 16 November 2012, p 7.
[101] Guilliatt, Richard. 'Calling the Shots' *The Weekend Australian Magazine* 24-25 November 2012 pp 10-14, p 12.
[102] Crump, above n 7, p 127.
[103] Sieyes, E, as quoted by Aroney, Nicholas. 2008. 'Bicameralism and Representations of Democracy' in Nicholas Aroney, Scott Prasser and J R Nethercote (eds), *Restraining Elective Dictatorship: The Upper House Solution*. Perth: University of Western Australia Press, pp 28-43, p 28.
[104] Aroney, Nicholas. 'Four Reasons for An Upper House: Representative Democracy, Public Deliberation, Legislative Outputs and Executive Accountability' 29 (2008) *Adelaide Law Review* pp 205-246, p 237.
[105] Sawer, Marian, Norman Abjorensen and Phil Larkin. 2009. *Australia: The State of Democracy*. Sydney: The Federation Press, p 130.
[106] Lord Hailsham. 'Elective Dictatorship' *The Listener*, 21 October 1976, pp 496-500, p 496.
[107] Stone, above n 46, p 175.
[108] See for example Aroney, Nicholas, Scott Prasser and J R Nethercote (eds). 2008. *Restraining Elective Dictatorship: The Upper House Solution*. Perth: University of Western Australia Press.

[109] Aroney, above n 104, p 242.
[110] Aroney, above n 103, p 39.
[111] Ibid, pp 28-43, p 31 and pp 33-38.
[112] Bach, above n 39, p 272.
[113] Ibid.
[114] Crump, above n 7, p 133.
[115] Ibid, p 121.
[116] Jeckeln, L A. 1979. 'Reform of the Legislative Council of New South Wales', 47 *The Table* pp 72-83, p 83.