SENATE LECTURE

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ACCOUNTABILITY OR REPRESENTATION?
VICTORIAN BICAMERALISM

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SENATE LECTURE

Since the granting of responsible government to the then colony of Victoria in 1855 and the first meeting of the bicameral parliament in November 1856, two, sometimes intertwined, controversies dominated local politics. These were the desired balance between rural and metropolitan representation in the legislature and the power relationships between the Legislative Assembly and the Legislative Council. The first now seems settled with a consensus finally emerging in the early 1980s in favour of equality of enrolment across all Divisions and Provinces. The second has proved more intractable with the latest attempt at resolution currently before the parliament. Almost all prior successful and failed attempts to 'reform' the upper house have involved democratizing its electoral procedures to bring them into line with the Assembly's or to curb its powers over supply bills and general legislation. The latter remains central to the present reform agenda, but it is just possible that an even more important result may emerge in the form of an upper chamber committed to the advancement of more accountable government.

Now is not the time for lengthy historical digressions, but it is worth recalling that Victoria's Legislative Council shared the function of other nineteenth century Australian upper chambers to act as a restraint on 'radical' democratic initiatives likely to emanate from the more 'liberal ' lower houses. The original structure of the Council well matched its function: a very high property qualification to sit and vote; no payment of members; indissolubility; plural voting; high malaportionment favourable to rural interests; and terms not coterminous and twice as long as the

Assembly's; and so on…The consequence was a powerful chamber representative of wealth and property regularly engaged in often disruptive contests with successive governments.

Certainly since its establishment, the Council has undergone significant reform, especially in regard to its electoral procedures. Yet those reforms have often been resisted and have occurred later than equivalent changes to the Assembly-universal franchise did not arrive until 1950. In fact the Council has never adopted a single electoral initiative in advance of the Assembly.

The Council's capacity to force an unwanted election on the Assembly has been constrained by the negotiated passage of the *Constitution (Duration of Parliament) Bill 1984*, but the power to amend or reject general legislation, in ways which are final, remains intact. The absence of a S57 type double dissolution provision denies a government the capacity to override Council obduracy. Since their 1937 insertion, Section 66 and 67 of the Victorian have provided procedures to resolve deadlocks, but they are so favourable to the Council that no Premier has been foolhardy enough to invoke them. 'Review' in the 19th century meant review democracy; 'review' in the 21st century means to hold governments accountable. This must go beyond the scrutiny of individual Bills to embrace notions of sometimes restraining executive power in the interests of the citizenry and good governance. Despite many adjustments, Victorian bicameralism still retains some vestiges of political architecture from the 19th century which is obstructive to the full discharge of the desired review function of an upper house. The $64 question, of course, is will the current proposals do the job?

WHAT IS PROPOSED?

The Constitution (Parliamentary Reform) Bill 2003 Explanatory Memorandum states that:

- provides that the purpose of the Bill is to reform the parliament of Victoria based upon the recommendations made by the Constitution Commission Victoria—
- To provide for a fixed four year parliamentary term, unless the dissolution of the Assembly occurs sooner;
- To re-constitute the Council to consist of 40 members elected from 8 regions with each region returning 5 members;
- To provide for proportional representation with optional preferential voting for members of the Council;
- To provide for the filling of casual vacancies in the Council;
- To provide that the President of the Council has a deliberative, not a casting, vote
- To recognize the principle of Government mandate;
- To remove the ability of the Council to block supply (Annual Appropriation) Bills;
- To establish a dispute resolution process for deadlocked Bills;
- To provide for the entrenchment of certain legislative provisions.

Before commenting on the likely impact of these proposals, it is necessary to explain how we have arrived at this point.

Given that before the 2002 election the Labor Party has enjoyed a clear majority in the Council for only three months in its one hundred year history, it is hardly surprising that the party has been less than enthusiastic for the Victorian version of bicameralism. Prior to the late

1970s the ALP's policy was one of abolition replaced by one of reform through proportional representation (PR) in 1981. The Cain and Kirner governments (1982-92) made no fewer than six attempts to change the Council's voting system to PR, but all foundered. Following its surprise 'victory' in September 1999 the Bracks' moved on a promise made to the three Independents and introduced a broad-ranging *Constitution (Reform) Bill* on 24 November 1999, but encountered difficulties when the Independents expressed reservations about removing the Council's right to block supply and the geographical size of proposed rural Provinces. The bill was formally withdrawn in June 2000 and replaced by a *Constitution (Amendment) Bill*, which dealt with parliamentary terms and supply and a *Constitution (Proportional Representation) Bill* which concentrated on electoral and related matters. Both Bills were rejected in the Opposition controlled Council in October 2000.

Debate on the two bills was passionate but not of a particularly high standard, especially on the PR Bill where both sides over did it: its proponents accorded it almost magical powers of political transformation; whereas its opponents saw chicanery around every corner and depicted PR as a road to mayhem and even tyranny. Argument flowed on the erroneous assumption that PR was being proposed for ALL the parliament. There was scant appreciation of the *incongruence* contention that bicameralism works best when there are some dissimilarities in the functions and composition of the two chambers. Craig Ingram (Ind. Gippsland East) was one of the few who did when he argued that 'the local member really belongs in the Legislative Assembly. The role of the upper house is to act as a house of review' (VPD, A, 6 September 2000, 66).

- Other comments were less well considered:

- *'Reform is a euphemism for the Labor Party's ambition to completely abolish the upper house'*
- *'PR would give small, extremist parties the opportunity to be elected to parliament'*
- *'It is no coincidence that whenever proportional voting takes place unstable and poorly performing government takes place…do we really want to see some flash-in-the-pan fruitcake get elected?'*
- *'This is a political act to curry favour with the minor parties and the unions'*
- *'To introduce proportional representation is to castrate the vote of each and every Victorian.'* (Granted that this remark was made at 1.30am!)

Alas, it must be reported that rude things were said even about the Senate;

- *'The upper house will become full of intrigue, just like the Senate is…'*
- *'In Canberra we have the loopy brigade that controls the Senate…*

Confronted by such opposition the government adopted another tack and established the Constitution Commission Victoria (*www.constitution.vic.gov.au*) on 19 March 2001 and empowered it to make such recommendations as would 'enable the Legislative Council to operate effectively as a genuine House of Review '. The Commission was chaired by recently retired Supreme Court judge, George Hampel, assisted by former Liberal federal and state parliamentarians, Ian Macphee and Alan Hunt-the latter being President of the Council in the 1980s. The political credentials of Macphee and Hunt did not mollify the

Opposition which immediately rejected the Commission as ‘a blatant political con’ (Australian 20 March 2001).

Undeterred, the Commission issued a Discussion Paper in August 2001, conducted seminars, regional consultations and invited submissions from the public. A Consultation Paper containing a summary of the views received was released in December 2001 and the final report A House for our Future on 1 July 2002. The recommendations of the Commission were to form the basis of the government’s current legislation, but few predicted that it would be presented to a parliament which, as a result of the November 2002 election, would have Labor majorities in both chambers (62 of 88 in the Assembly and 25 of 44 in the Council). The government, however, has not taken up all of the Commission’s recommendations. Those omitted were:

- *The strengthening of the Council’s committee system;*
- *The establishment of regional committees comprising local MLCs;*
- *The phasing out of ministers from the Council;*
- *The development of a Code of Parliamentary Conduct;*
- *The Human Rights of Victoria’s citizens to be recognized as guiding principles in the Constitution.*

APPRAISAL OF PROPOSALS.

1. Fixed Terms.

The Council and Assembly will in future expire on the Tuesday 25 days before the last Saturday in November each four year electoral cycle. But, both houses may be dissolved earlier if the Assembly passes a vote of no confidence in the ‘Premier and other ministers or if the Premier,

following a failure to resolve a deadlocked Bill, advises the governor to dissolve the Assembly'. In the first instance the governor would retain the prerogative to decline a dissolution if he believed an alternative Premier could command confidence, but the second provision effectively creates a double dissolution (and joint sittings) option and has been criticized for undermining the integrity of fixed terms.

2. Council Provinces.

The Constitutional Commission offered four possible models of Council composition and indicated a preference for seven provinces each electing seven members. In opting for an eight by five model, the Bill sets a quite high quota of 16.6% which reduces the proportionality of the system. The following Table seeks (with multiple caveats and qualifications) to translate the 2002 election results into suggested new Council boundaries.

TABLE 1: Legislative Council – Possible Composition(s) by proposed 8 multi-member Regions*

Region 1

	Labor	Liberal	National	Green
Max no. of members	2	2	1	1
Min no. of members	2	2	0	0

Region 2

	Labor	Liberal	National	Green
Max no. of members	2	2	0	1
Min no. of members	2	2	0	1

Region 3

	Labor	Liberal	National	Green
Max no. of members	2	2	1	1
Min no. of members	2	2	0	0

Region 4

	Labor	Liberal	National	Green
Max no. of members	2	2	0	1
Min no. of members	2	2	0	1

Region 5

	Labor	Liberal	National	Green
Max no. of members	3	2	0	0
Min no. of members	3	2	0	0

Region 6

	Labor	Liberal	National	Green
Max no. of members	2	2	2	0
Min no. of members	2	1	1	0

Region 7

	Labor	Liberal	National	Green
Max no. of members	3	2	0	0
Min no. of members	3	2	0	0

Region 8

	Labor	Liberal	National	Green

Max no. of members	4	1	0	1
Min no. of members	3	1	0	0

TOTAL

	Labor	Liberal	National	Green
Max no. of members	20	15	4	5
Min no. of members	19	14	1	2

Source Gardner and Costar 2003

2. Proportional Representation.

Given that the Council's electoral system is neither gerrymandered nor malapportioned and is based on the same principles as those of the lower house, does it need changing? Yes because the present system exhibits some of the negative features of the 'block preferential' method used in the Senate between 1919 and 1946. Council Provinces are large, containing four times the enrolment of lower house seats. District 'magnitude' combined with STV enhances proportionality of outcomes, but when combined with single member alternative voting has the opposite effect because of the capacity of such a majoritarian system to waste votes. For example, at the 1999 Council election the ALP wasted 51% of its primary vote to the Liberal Party's 31% and despite polling an average 44% of the two-party preferred vote in 1992 and 1996 Labor held only 10 of the 44 Provinces (23 %). The boot was on the other foot in 2002 with the Liberal party wasting 66% of its primary Council vote to Labor's 14 %. The type of PR adopted is Senate like in that it allows for above the line voting—thereby ruling out the Constitutional Commission's interest in Robson Rotation.

Below the line voting is by the optional preferential method.

CASUAL VACANCIES

The countback method was rejected in favour of a variation of S15, whereby the parties nominate replacements but the replacement of Independent Councillors may prove controversial.

SUPPLY AND DEADLOCKS

While there is general agreement that upper houses need reasonable strong powers, usually to amend general legislation, there is decidedly less consensus over the question of supply. The Victorian bill removes supply but not general legislative power and proposes a 'conference of party managers' solution to deadlock with the proviso for a lower house dissolution or the holding over of the Deadlocked Bill until the next Parliament where if passed by the Assembly but not the Council within 2 months a joint sitting may be convened. Would the power to block supply encourage a government to negotiate or might it corrode desired bipartisanship in the Resolution Committee and/or encourage opposition intransigence. The current electoral environment, rather than constitutional prescription would probably determine it.

The two twentieth century occasions on which the Council employed the supply power to break governments were in 1947 and 1952. Both were, typically for the time, minority (Labor) and (Country Party) administrations and the approximation of their defeats was representative of a particularly turbulent period in Victorian politics. The 1952 and 1955 elections ended (until 1999) minoritarianism and produced forty years of successive one-party governments. Thanks largely to the DLP, Henry Bolte reigned supreme in the Assembly, but was to be denied a stable majority in the Council until June 1970, where the Country Party, and for a time an Independent, held the 'balance of power'. While the upper

house threatened supply twice (1964 & 65), rejected 30 bills passed by the lower chamber and amended many others, Ray Wright is correct in his comment that' the govt's legislative program was not seriously disrupted by an ostensibly hostile upper house'

In fact what developed over this period was a culture of 'negotiated legislation' qualitatively different from the gladiatorialism of earlier times. One should not be dewy-eyed over this Golden Age of bicameralism since it was a product of *real politique.* The cold fact was that Bolte did not have an upper house majority and was denied the threat of a double dissolution to secure one: He had to compromise if he wished his bills to pass. The Country Party, while a vigorous electoral opponent of the LCP, needed to temper its legislative aggression because of the conservatism of its constituency. Labor was similarly constrained by the debilitations of the Split and the persistence of the DLP. All the players could inflict wounds on each other, but there were powerful incentives not to kill. Interestingly this cooperative culture persisted after 1970 and even into the early years of the Cain government. It was only after Labor began to unravel in the late 1980s that the upper house became hyper-aggressive.

The bicameral quietism of the Kennett years (1992-99) was to be expected given the large Liberal majorities and the non-consultative, *contra* Hamer and Thompson, demeanor of the Premier. The Council was relatively benign to the minority Bracks' government (1999-2002), save for the establishment of two select committees to probe alleged wrong doings, largely because Labor, controlling neither chamber, chose legislative caution over activism. Following the 2002 State election the ALP has secure and comfortable Assembly and Council majorities.

ENTRENCHMENT

Hitherto, Victoria's has been the most flexible of the federations' constitutions, amendable by the passage of Bills by absolute majorities through both chambers.

To this is to be added two forms of entrenchment:

1. referendum
2. a special three the members of the Assembly and Council respectively fifths majority of

The following 'core' matters are entrenched by referendum–

- The requirement for a referendum;
- Regions, number of members and the quorum of the Council and to the President;
- Districts, duration of, quorum of and number of members of, the assembly and to the Speaker;
- A session of Parliament each year;
- Appropriation Bills and the inability of the Council to block supply;
- Dispute resolution process for deadlocked Bills;
- Local Government as a distinct and essential tier of government;
- Continuance of the Supreme Court;
- Executive arm of Government and the Executive Council;
- The Auditor-General, the Director of Public Prosecutions, the Ombudsman and the Electoral Commissioner as independent officers of the Parliament;
- Electoral Boundaries Commission functions, and

- Freedom of Information functions.

The following 'procedural' matters are entrenched by a special 3/5th majority –

- The requirement for a special majority;
- The Crown, including provisions relating to prorogation and dissolution;
- Constitution and powers of the parliament;
- Eligibility requirements for members and voters; and
- The provision which enables a House to relieve a member from the consequences of alleged defaults (e.g. breach of the office of profit provisions)

The following matters are entrenched absolute majority –

- The requirement for an absolute majority;
- The membership of the Court, appointment of judges, reserve judges, judge's and master's salaries, allowance and pensions etc; and
- The jurisdiction of the Supreme Court (including the requirement for section 85 statements)

CONCLUSION

In arguing strongly against Dunstan's attempt in 1937 to insert a double dissolution clause in the Victorian Constitution, Clifden Eager stated that' the upper house differed from the lower in terms of its constituency, its perspective and its experience…it did not have to be wholly representative'. This was an accurate account of the Legislative Council,

even if it proceeded from less than democratic assumptions. Yet beginning with the adoption for the Council of universal franchise in 1950, the two chambers have come to resemble each other in almost all key respects: they are elected on the same franchise and on the same constituency boundaries drawn by a single Electoral Boundaries Commission; they both employ compulsory preferential voting; they share the same polling day; they possess, save for initiating money bills, equal legislative power; they operate, for the most part, Joint Parliamentary Committees and all 132 members, except two assembly Independents, represent the same three political parties in both chambers. By contrast their differences are few: the eighty-eight Assembly members are drawn from single member districts with maximum 4 year terms, whereas their 44 upper house colleagues are drawn two each in staggered mode from 22 Provinces with maximum 8 year terms; and both chambers control their own Standing Orders. The latter may prove too critical to any future growth of a more accountability-based culture in the Legislative Council. The current legislation seeks simultaneously to increase congruence by introducing semi-fixed 4 year terms for both houses and to decrease it by replacing alternative voting in the Council with multi member based STV PR and removing the Council's power to reject, but not to debate, appropriation bills.

Back to the $64 question; will it work? Time will tell as it did for the Senate from 1949 and the NSW Legislative Council from 1978. PR alone won't achieve enhanced accountability unless the members of the reformed Council take advantage of its Standing Orders and develop a genuine culture of review.