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FOUR REASONS FOR AN UPPER HOUSE

**REPRESENTATIVE DEMOCRACY,
PUBLIC DELIBERATION, LEGISLATIVE OUTPUTS
AND EXECUTIVE ACCOUNTABILITY**

ABSTRACT

Arguments for and against upper houses take many forms. The first objective of this article is to defend a classification of those arguments into four basic, but by no means mutually exclusive, lines of reasoning. These lines of reasoning, it is argued, are concerned respectively with (1) democratic representation, (2) public deliberation, (3) legislative outputs and (4) scrutiny of executive government. In describing and discussing these four lines of reasoning, the article also draws attention to the special role in the debate played by arguments from government efficiency and the separation of powers, and shows how these arguments operate against a backdrop of wider debates over the relative merits of parliamentary and presidential systems of government. The second objective of the article is to evaluate these lines of argument with a view to drawing some specific conclusions about the roles performed by upper houses within the Australian State political systems, especially noting proposals for the reform or abolition of South Australia's upper house, and the outright absence of an upper house in Queensland. The general goal of the article is to show how the four types of argument can be marshalled in support of upper houses generally, as well as in support particularly of the proposition that South Australians would do best to retain their existing Legislative Council (albeit perhaps with some modest reform) and that Queenslanders would do well to consider the reestablishment of a modern second chamber in the place of the nominated chamber that was abolished in 1922.

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I INTRODUCTION

Questions about the nature, functions and desirability of upper houses have seen a marked revival in recent times. This revived interest in second chambers has been generated by both political developments and academic debate.¹ As is well known, the British House of Lords was radically transformed under the Blair Labour government to an extent which invites comparison with the Parliament Acts of 1911 and 1949,² and proposals for further change remain on the table.³ In Canada, the Harper Conservative government has proposed a fundamental review of the parliamentary system with a view to transforming the Senate into an elected body.⁴ New Zealand not so long ago initiated a major reform of its electoral system as a means, some might say, of compensating for the lack of an upper house.⁵ Germany has recently gone through the ‘first phase’ of certain federalism reforms, aspects of

¹ In this article I use the terms ‘upper house’ and ‘second chamber’ interchangeably, although I am conscious that the two labels suggest subtly different implications for the nature of the institution. See, for example, John Uhr, ‘Explicating the Australian Senate’ (2002) 8(3) *Journal of Legislative Studies* 3, 24, in relation to the Australian Senate.

² See Meg Russell, ‘Is the House of Lords Already Reformed?’ (2003) 74(3) *The Political Quarterly* 311, although compare David Feldman, ‘Reform and Reformation: Is there (still) a UK Constitution?’ (Paper presented at the Current Developments in Administrative Law Conference: The Changing Constitutional Landscape, Queen Elizabeth II Conference Centre, Westminster, 29 March 2006). On the *Parliament Acts* of 1911 and 1949, see *Jackson v Attorney General* [2006] 1 AC 262.

³ See HM Government, *The House of Lords: Reform* (2007) and the discussion in Bruce Ackerman, ‘Meritocracy v Democracy’ (2007) 29(5) *London Review of Books* <http://www.lrb.co.uk/v29/n05/acke01_.html> at 11 September 2008.

⁴ See Bill S-4 (Senate of Canada), First Reading 30 May 2006; Bill C-43 (House of Commons of Canada), First Reading 13 December 2006. Compare Herman Bakvis, ‘Prime Minister and Cabinet in Canada: An autocracy in need of reform?’ (2001) 35(4) *Journal of Canadian Studies* 60. These and other proposals were discussed at the *Transforming Canadian Governance Through Senate Reform* conference organised by the Centre for the Study of Democratic Institutions and the Political Science Department, University of British Columbia, 19-20 April 2007.

⁵ See Jack H Nagel, ‘What Political Scientists Can Learn from the 1993 Electoral Reform in New Zealand’ (1994) 27(3) *Political Science and Politics* 525, characterising the reform as, in part, a repudiation of the extreme Westminster majoritarianism in New Zealand which was widely perceived to amount to a form of ‘elective dictatorship’. The initial classification is from Arend Lijphart, *Patterns of democracy: Government forms and performance in thirty-six countries* (1999). The phrase ‘elective dictatorship’ is from Lord Hailsham, ‘Elective Dictatorship’ (1976) (21 October 1976) *The Listener* 496.

which touched on the powers of the German Bundesrat,⁶ and there are now voices calling for further reforms.⁷ While in countries such as the United States changes of the same magnitude are certainly not on the political agenda,⁸ relations between the American President and both chambers of Congress remain a matter of perennial interest.⁹

Australia has not been untouched by these trends. As in the United States, fundamental change to the composition and powers of the Australian Senate is virtually inconceivable for the foreseeable future;¹⁰ and yet, like the United States, relations between the federal government and both houses of the legislature in Australia remain of critical importance, a fact highlighted by the Senate majority secured by the Coalition government at the 2004 election.¹¹ Then we come to the Australian states, and three states in particular. In 2003, the Victorian Legislative Council was reformed on the basis of multi-member electorates and proportional voting.¹² Similarly, the Rann Labor government in South Australia has proposed a referendum on the question of reforming or abolishing the upper house,¹³ whereas in Queensland the idea of restoring an upper house has gained attention as a means of improving executive government accountability in that state.¹⁴ And this is not to

⁶ Fritz W Scharpf, 'Community, Diversity and Autonomy: The Challenges of Federalism Reform in Germany' (Paper presented at the Future of Federalism Conference, Brisbane, 10-12 July 2008.)

⁷ Arthur Gunlicks, 'German Federalism Reform: Part One' (2007) 8(1) *German Law Journal* 111.

⁸ But see Robert Dahl, *How Democratic Is the American Constitution?* (2nd ed, 2003).

⁹ See, eg, Dan Balz, 'For Bush's New Direction, Cooperation is the Challenge', *Washington Post* (Washington), 9 November 2006, A01.

¹⁰ See Consultative Group on Constitutional Change, Commonwealth of Australia, 'Resolving Deadlocks: The Public Response: Report of the Consultative Group on Constitutional Change' (2004).

¹¹ See John Uhr, *How Democratic is Parliament? A case study in auditing the performance of Parliaments* (2005) *Democratic Audit of Australia* <<http://democratic.audit.anu.edu.au/>> at 11 September 2008.

¹² *Constitution (Parliamentary Reform) Act 2003* (Vic).

¹³ Jordan Bastoni, 'Does the South Australian Legislative Council have a future?' *Democratic Audit of Australia* (Discussion Paper 29/06) <<http://democratic.audit.anu.edu.au/>> at 11 September 2008.

¹⁴ See Nicholas Aroney, Scott Prasser and John Nethercote (eds), *Restraining Elective Dictatorship: The Upper House Solution?* (2008) (forthcoming). See also Paul Syvret, 'Tuesday View', *Courier Mail* (Brisbane), 5 September 2006, 21; Paul Williams, 'Who stole Question Time', *Courier Mail* (Brisbane), 10 October 2006, 8; Andrew McColl, 'Recipe for tyranny', Letter to the Editor, *The Australian*, 15 January 2007; Madonna King, 'Queries skipped', *Courier Mail* (Brisbane), 10 February 2007, 39.

mention the significant roles played by the Legislative Councils of New South Wales, Western Australia and Tasmania in recent years.¹⁵

Alongside constitutional and political developments such as these, bicameralism has re-emerged as a topic of interest among scholars. Among book-length studies on bicameralism and second chambers,¹⁶ recent publications include volumes by Tsebelis and Money,¹⁷ Patterson and Mughan,¹⁸ Luther, Passaglia and Tarchi,¹⁹ Joyal,²⁰ Smith²¹ and Russell.²² There has also been a special edition of the *Journal of Legislative Studies*,²³ as well as a host of recent journal articles focused specifically on the functioning and the reform of upper houses, some utilising the

¹⁵ Important recent studies of the performance and design of Australian State upper houses include Bruce Stone, 'Bicameralism and Democracy: The Transformation of Australian State Upper Houses' (2002) 37 *Australian Journal of Political Science* 267; Bruce Stone, 'Changing Roles, Changing Rules: Procedural Development and Difference in Australian State Upper Houses' (2005) 40(1) *Australian Journal of Political Science* 33.

¹⁶ Earlier studies in English include J A R. Marriott, *Second Chambers* (1910); Hastings Lees-Smith, *Second Chambers in Theory and Practice* (1923); Geoffrey Roberts, *The Functions of an English Second Chamber* (1926).

¹⁷ George Tsebelis and Jeannette Money, *Bicameralism* (1997).

¹⁸ Anthony Mughan and Samuel C Patterson, 'Senates: A Comparative Perspective' in Samuel Charles Patterson and Anthony Mughan (eds), *Senates: Bicameralism in the contemporary world*, (1999), 333, who at 348 also cite studies by Jean Mastias and Jean Grangé, *Les secondes chambres du Parlement en Europe occidentale* (1987) and Laurent Trivelli, *Le bicameralisme* (1975).

¹⁹ Jörg Luther, Paolo Passaglia and Rolando Tarchi, *A World of Second Chambers* (2006).

²⁰ Serge Joyal (ed), *Protecting Canadian Democracy: The Senate You Never Knew* (2003).

²¹ David E Smith, *The Canadian senate in bicameral perspective* (2003).

²² Meg Russell, *Reforming the House of Lords: Lessons from overseas* (2000).

²³ (2001) 7(1) *The Journal of Legislative Studies*, special edition on 'Second Chambers'.

methods of public choice and rational actor analysis,²⁴ others inspired by conceptions of deliberative and participatory democracy,²⁵ and so on.²⁶

Arguments for and against bicameralism take many forms. The first objective of this article is to defend a classification of them into four basic, but by no means mutually exclusive, lines of reasoning. As presented in this article, these types of argument are concerned respectively with: (1) democratic representation; (2) public deliberation; (3) legislative outputs; and (4) scrutiny of executive government. While focused on these four lines of reasoning and the relationships between them, this article also draws attention to the special role in the debate played by arguments from government efficiency and the separation of powers, and shows how these arguments operate against a backdrop of wider debates over the relative merits of parliamentary and presidential systems of government. The second objective of the article is to evaluate these arguments with a view to drawing some specific conclusions about the roles performed by upper houses within the Australian state political systems, especially noting proposals for the reform or abolition of South Australia's upper house, and the outright absence of an upper house in Queensland. The general goal of the article is to show how the four types of argument can be marshalled in support of upper houses generally, as well as in support particularly of the proposition that South Australians would do best to retain their existing Legislative Council (albeit perhaps with some modest reform) and that Queenslanders would do well to consider the re-establishment of a modern second chamber for their State. While the article closes with a few isolated comments on the shape that reforms to the South Australian upper house might take, as well as the general nature of the upper house that ought to be reintroduced in Queensland, a detailed examination of these questions is left for another day.

²⁴ For example, William H Riker, 'The Justification of Bicameralism' (1992) 13(1) *International Political Science Review* 101; Geoffrey Brennan and Alan Hamlin, 'Bicameralism and Majoritarian Equilibrium' (1992) 74 *Public Choice* 169; John Charles Bradbury and W. Mark Crain, 'Legislative organization and government spending: Cross-country evidence' (2001) 82 *Journal of Public Economics* 309; John Charles Bradbury and W Mark Crain, 'Bicameral Legislatures and Fiscal Policy' (2002) 68(3) *Southern Economic Journal* 646; Roger D Congleton, 'On the Merits of Bicameral Legislatures: Policy Predictability within Partisan Politics' (2003) 22 *Yearbook of New Political Economy* 29.

²⁵ For example, John Uhr, 'Generating Divided Government: The Australian Senate' in Patterson and Mughan, above n 18 and see, relatedly, Clive S Bean and Martin P Wattenberg, 'Attitudes Towards Divided Government and Ticket-splitting in Australia and the United States' (1998) 33(1) *Australian Journal of Political Science* 25; Murray Goot, 'Whose Mandate? Policy promises, Strong Bicameralism and Polled Opinion' (1999) 34(3) *Australian Journal of Political Science* 327.

²⁶ See also the numerous papers discussing the Australian Senate published as part of the Papers on Parliament series:

< <http://www.aph.gov.au/Senate/pubs/pops/index.htm> >.

 II FOUR TYPES OF ARGUMENT ABOUT REPRESENTATIVE ASSEMBLIES

Arguments about the purposes and design of representative assemblies are of four basic kinds, corresponding to the four fundamental functions which modern representative assemblies are generally expected to perform.²⁷ The first of these has to do with democratic representation. Modern representative assemblies, whatever their design, powers and jurisdiction, are expected to be representative. Thus, when it comes to debate about whether Parliaments ought to be unicameral or bicameral, the argument often turns on disputed views about what representative democracy means, why it is a good thing and how it is best put into practice. And, because democracy is generally understood to require open debate, discussion and deliberation, a second line of argument that soon emerges concerns the capacity of modern representative assemblies to provide effective public forums for political debate and deliberation. Accordingly, representative assemblies commonly retain the label ‘Parliament’, reminding us that one of their primary functions is to provide a forum where speeches may be made, heard and responded to.²⁸ In this context, the argument over second chambers is often made to turn on their capacity to facilitate public deliberation and discussion and to provide a forum in which grievances can be aired.

The third and fourth kinds of argument often marshalled either for or against bicameralism are concerned with a pair of relatively more specific functions of modern Parliaments.²⁹ The first of these functions is common to virtually all representative assemblies; it is the task of legislating. For many centuries now, and particularly since Montesquieu, the responsibilities of government have been conventionally distinguished into three categories which we know as the legislative, the executive and the judicial. According to Montesquieu’s theory of the separation

²⁷ For a more detailed analysis which identifies six core functions, compare John Uhr and John Wanna, ‘The Future Roles of Parliament’ in Michael Keating, John Wanna and Patrick Weller (eds), *Institutions on the Edge? Capacity for Governance* (2000) 10, 12-17. For a similar analysis which reduces the functions to two (representation and redundancy), see Samuel C Patterson and Anthony Mughan, ‘Senates and the Theory of Bicameralism’ in Patterson and Mughan, above n 18, 10-16. For a classic statement of a series of considerations supporting the establishment of the American Senate, see James Madison (attributed), *Federalist Nos 62 and 63* (Clinton Rossiter (ed), *The Federalist Papers* (1961)).

²⁸ *Parliament* is derived from the Anglo-Norman and Middle French *parler*: ‘to speak’, ‘talk’, and the Old and Middle French *parlement*: ‘discussion’, ‘conversation’, ‘meeting’, ‘negotiation’ (c1100), and eventually came to mean a deliberative council or assembly (c1165). For a classic study of the institution of Parliament viewed from midway through the 20th century, see Ivor Jennings, *Parliament* (2nd ed, 1957).

²⁹ For a discussion of the constitutional role of the Australian Senate which includes a list of eleven specific functions, see Harry Evans and J R Odgers, *Odgers’ Australian Senate Practice* (11th ed, 2004), ch 1.

of powers, constitutional government is best secured when each of these three basic functions of government are performed by three different institutions.³⁰ Such has been the dominance of this idea that, without much critical reflection, today we regularly refer to ‘the legislature’, ‘the executive’ and ‘the judiciary’ and assume that what we mean by these terms is in each case a specific institution as well as an institution performing a particular kind of role; namely to make the law, to execute the law and to adjudicate disputes concerning the meaning and application of the law.³¹ On this view, the specific function of modern Parliaments is to legislate. Accordingly, arguments about the design of legislative institutions often appeal to the impact which unicameral or bicameral structures and processes have on the quality of legislation produced. The idea of an upper house or second chamber as a ‘house of review’ especially reflects this conception.³²

The fourth kind of argument often invoked in disputes over unicameralism and bicameralism is particularly pertinent to systems of responsible government, although it applies to presidential systems as well. The focus of attention here is not the legislative powers of Parliament, but the scrutiny of the executive government by Parliament. One of the defining characteristics of presidential systems is the appointment of executive office holders through electoral processes that make them independent of the legislature. This does not mean that the legislature has no role in such systems in approving proposed government expenditure and scrutinising government decisions. However, it does mean that the office and powers of the executive are independent of, and are not ordinarily responsible to, the legislature in the way, and to the extent, that occurs in parliamentary systems. In accordance with the Westminster parliamentary tradition, in Australia the executive power of the Commonwealth and states is vested in the Queen and exercised by the Governor-General and the several state Governors.³³ However, under the conventions of responsible government, the Governors exercise their powers in almost all circumstances upon the advice of Ministers who can guarantee the passage of the

³⁰ Charles de Secondat Montesquieu, *The spirit of the laws* (Thomas Nugent trans, 1949) Bk 11, ch 6.

³¹ A view classically upheld in *R v Kirby; Ex parte Boilermakers’ Society of Australia* (1956) 94 CLR 254 specifically in relation to the separation of judicial power, but just as famously compromised in relation to the separation of the executive and legislative power in *Victorian Stevedoring and General Contracting Co Pty Ltd and Meakes v Dignan* (1931) 46 CLR 73. For a sustained critique of the latter case, see Suri Ratnapala, *Welfare state or constitutional state?* (1990).

³² For a discussion of the house of review functions of the Australian Senate, see Richard Mulgan, ‘The Australian Senate as a “House of Review”’ (1996) 31(2) *Australian Journal of Political Science* 191.

³³ See, for example, Australian Constitution, ss 1, 61; *Australia Acts 1986* (Cth) and (UK), s 7.

annual supply Bills through Parliament.³⁴ In unicameral Queensland, this means in practice that the exercise of executive power is substantially controlled by a Premier who has the support of the majority of members of the one house, the Legislative Assembly,³⁵ whereas in the bicameral states and the Commonwealth, it means that the Prime Minister or Premier has the support of the lower house of Parliament — but not necessarily the upper house.³⁶ In both kinds of system, bicameral and unicameral, Parliaments play a special role in ensuring that executive power is exercised by individuals who are democratically accountable to the people, at least at election time.³⁷ According to the theory of responsible government, however, this democratic accountability mechanism is performed by Parliaments not only at those decisive points when the ministry is appointed (usually following a general election), but also on a more regular basis through various parliamentary processes (such as Question Time), together with conventions that individual ministers are separately accountable for the administration of their particular portfolios and departments. This accountability extends also to the ministry as a whole for its administration of the entire government. Operating constantly in the background is the proposition that the ministry remains in office only so long as it retains the support of the Parliament, so that in the event of a vote of no confidence, the government must resign or be removed. In the literature that discusses the comparative merits of presidential and parliamentary systems of government, this idea that in parliamentary systems the executive is placed, in principle, under constant parliamentary surveillance is of utmost importance.³⁸ However, the literature specifically concerned with systems of responsible government frequently draws attention to the way in which strict party discipline has enabled executive governments to dominate Parliament, secure in the support of backbench party members.³⁹ In this context, as will be seen, arguments about unicameralism and

³⁴ Classic descriptions of the British and Australian systems are given in Ivor Jennings, *Cabinet government* (3rd ed, 1959), H V Evatt, *The King and his Dominion Governors: A Study of the Reserve Powers of the Crown in Great Britain and the Dominions* (2nd ed, 1967) and George Winterton, *Parliament, the Executive and the Governor-General: A Constitutional Analysis* (1983).

³⁵ See Colin A Hughes, *The Government of Queensland* (1980) 111-13.

³⁶ Although the refusal of the Senate to pass the supply Bills and the dismissal of the Prime Minister by the Governor General in 1975 arguably rendered the government responsible to the Senate as well as the House of Representatives, at least in this instance. For a discussion, see, in particular, Colin Hughes, 'Conventions: Dicey Revisited' in Patrick Weller and Dean Jaensch (eds), *Responsible Government in Australia* (1980); Geoffrey Sawyer, *Federation under Strain: Australia 1972-1975* (1977); L J M Cooray, *Conventions, the Australian Constitution and the Future* (1979).

³⁷ See Jennings, above n 34, 503-509.

³⁸ See, for example, the range of chapters in Lijphart, above n 5.

³⁹ For two classic accounts, drawing diametrically opposed conclusions, but agreeing on this basic point, see Jennings, above n 34, and Hailsham, above n 5. For a more

bicameralism often entail questions concerning the effectiveness (or ineffectiveness) of Parliament in performing these surveillance functions.

III ARGUMENTS FROM DEMOCRATIC REPRESENTATION AND PUBLIC DELIBERATION

Probably the oldest, and for some time, one of the most prominent arguments against the existence of upper houses criticises them as conservative and undemocratic institutions which prevent progressive governments from pursuing popular and necessary policies for the benefit of the people.⁴⁰ In its classic form, commonly attributed to Emmanuel-Joseph Sieyès (1748–1836), the argument is that upper houses are either undemocratic and illegitimate, or else democratic and redundant. As the Abbé Sieyès is reputed to have put it, ‘if a second chamber dissents from the first, it is mischievous; if it agrees it is superfluous’.⁴¹

The argument, as such, is two-pronged. First, there is the picture of a traditional upper house, such as the British House of Lords prior to its recent reform, composed solely of members of the aristocracy, some of them holding their positions by hereditary title, others dependent upon a system of political patronage. According to democratic ideals, such an institution is by definition illegitimate, is rather likely to be corrupt and reactionary, and should be abolished. But what if, short of outright abolition, such an institution is put on an elective basis, so as to make it entirely democratic in composition? It is at this point that the second prong to the argument comes into play. A second chamber may be designed so as to be as democratic as the first, but then, it is argued, the institution is pointless, because it merely repeats the function of the first chamber. Parliaments are meant to represent

recent assessment, see Patrick Weller, Herman Bakvis and R A W Rhodes, *The Hollow Crown: Countervailing Trends in Core Executives* (1997).

⁴⁰ See Lewis Rockow, ‘Bentham on the Theory of Second Chambers’ (1928) 22(3) *American Political Science Review* 576.

⁴¹ Despite the fact that this line of reasoning is often attributed to Sieyès, there is reason to doubt whether he actually ever said (or even thought) anything like this. However, the argument was certainly expressed by his contemporaries during the French Revolution, and has often been repeated by critics of bicameralism. See Marriott, above n 16, 1; Herman Finer, *The Theory and Practice of Modern Government* (1932) vol I, 683-4; Jeremy Bentham, *Works* (1843), vol IV, 420-21. See also Emmanuel Sieyès, ‘What is the Third Estate? (Qu’est ce qu’est le tiers état?)’ in Michael Sonenscher (ed), *Emmanuel Joseph Sieyès: Political Writings* (2003). On Sieyès’s political thought, see Murray Forsyth, *Reason and Revolution: The Political Thought of the Abbé Sieyès* (1987); Glyndon Van Deusen, *Sieyès: His Life and his Nationalism* (1932); Pasquale Pasquino, ‘The Constitutional Republicanism of Emmanuel Sieyès’ in Biancamaria Fontana (ed), *The Invention of the Modern Republic* (1994). For a recent, slightly different statement of the dilemma, see Mughan and Patterson, above n 18, 338-40.

the people. Why create two representative chambers, when one is surely enough? More pointedly, modern democracy operates, in practice, through majority rule. But if a majority in the lower house of Parliament approves of a particular enactment, what point is there in subjecting the proposed law to a second process of review? The people have already spoken (or at least a majority of them have) through their representatives in the first chamber; there is no need for them to speak a second time. Thus, if the second chamber approves of the legislation, then it has achieved nothing; and if it rejects the proposed law, then it is contradicting the voice of the people expressed through the first. The people, when they speak, need speak only once, and when they do so, they speak with absolute authority.⁴²

At the heart of this two-pronged line of criticism of upper houses lies a particular conception of democracy, a conception which itself involves three crucial assumptions. Each of these is quite doubtful. First, it is assumed that, for the purpose of constructing political institutions, political societies can be conceived of as being composed of a unitary ‘people’ or *demos* which can be represented unproblematically in a single institution — the lower house — based on a particular electoral process. Second, it is assumed that democracy equates to majoritarianism — that legitimate democratic governance is sufficiently realised through a system of majority rule. Third, it is assumed that prevailing lower house electoral systems actually give effect to the rule of the majority. Each of these propositions is extremely doubtful. It is convenient to deal with each of them in turn.⁴³

A Unitary Conception of ‘The People’

The first assumption is that political societies can be conceived of as being composed of a unitary ‘people’ which can be represented unproblematically in a single institution — the lower house — based on a particular electoral process. Such an idea was central to the Jacobin conception of democracy which triumphed during the French Revolution.⁴⁴ The conception meant that the people’s sovereignty must be expressed in a single institution in which all French citizens were, in principle, to be represented. Accordingly, the French Constitutions of 1791 and 1793 provided for a single chamber legislative assembly in which, in theory, the

⁴² A closely associated criticism draws attention to the fact that bicameralism arose more by historical accident than by conscious design, an argument very much at home in the context of the French Revolution. Compare Marriott, above n 16, 6.

⁴³ The argument that follows in this section is a condensed version of the argument advanced in Nicholas Aroney, ‘Bicameralism and Representations of Democracy’ in Aroney, Prasser and Nethercote, above n 14.

⁴⁴ Finer, above n 41, vol I, 683-4.

sovereignty of the people of the entire nation was expressed, 'one and indivisible' as the Jacobin Constitution of 1793 put it.⁴⁵

Such a conception undoubtedly operated as a powerful myth by which the consolidated power of the new governing institutions was legitimised during the French Revolution, and it is a myth that continues to function powerfully in our day. But is it sustainable to insist on the claim that there is such a 'people'? Certainly we ought to concede that the social reality experienced by many, if not most, of those who inhabit our states and territories includes a sense of common identity as a people, a sense of oneness and unity of being, and of shared purposes and goals. However, immediately we are met with a problem. For does the question we are engaged with have to do with the design of the Parliament of a particular state within the Commonwealth of Australia, or the design of the Parliament of the Commonwealth as a whole? Are 'the people' we have in view here 'the peoples' of the several Australian states, or 'the people' of Australia as a whole? Or is it somehow both, at the same time? For the social reality in which we live, it seems, includes a perception of our 'peoplehood' at both a state and a national level. Already, then, we can see that the idea of a unitary 'people' represented unambiguously within a particular institution of government is going to have to be adjusted for the phenomenon of federalism as a vital part of our social and political experience.

But this is not all. The problem goes in the other direction. Local governments also perform important functions in our society, and they do their work through popularly elected councils in which subordinate lawmaking powers are vested. Who are 'the people' in this instance, if not the people of each particular locality? And, indeed, within many of these localities, the people vote in their respective wards, just as at a state and federal level, the people (or should we say 'peoples'?) vote in their respective local electorates for particular members of their respective Parliaments. In this way also, our social and political reality, as experienced, undermines a simplistically consolidated and Jacobin conception of democracy as the rule of a unitary people over one consolidated nation.⁴⁶ As John Gordon, a South Australian delegate to the Australian Federation Convention of 1897, rather

⁴⁵ The opening words of the *Constitutional Act of the Republic* (1793) were: 'The French Republic is one and indivisible.' See also the *Declaration of the Rights of Man and Citizen* (1793), cl 25: 'The sovereignty resides in the people; it is one and indivisible, imprescriptible, and inalienable.'

⁴⁶ For more on this issue, see Nicholas Aroney, *The Constitution of a Federal Commonwealth* (2008) (forthcoming).

abruptly and parochially put it, '[w]e have different peoples here. This is not a homogeneous state. My people are not necessarily thy people!'⁴⁷

B *Democracy as majority rule*

The second assumption bound up with the conventional critique of bicameralism is that democracy can be adequately instituted through a system of majority rule; that is, a system in which the majority are taken to speak authoritatively for the whole, whether that whole be the entire body of voters of a particular electorate, or the entire body of a particular decision-making institution, such as the Parliament or a particular house of Parliament. This idea of majority rule is presupposed by the standard argument against bicameralism because it is precisely in their capacities to veto or delay decisions reached by simple majorities in the lower houses of Parliaments that second chambers are criticised as being undemocratic. The conception of democracy assumed here looks to the majoritarian decision-making processes upon which the lower house is founded and through which it expresses its will.

But does majoritarianism exhaust the aspirations of democracy? Certainly, according to Arend Lijphart's analysis, majoritarianism constitutes one of the essential lodestars of contemporary democratic theory and practice. But, as Lijphart has also argued, a second equally important point of reference is located in an alternative, consensus model of democracy, according to which government is ideally conducted by or on behalf of, not just a simple majority, but by or on behalf of as many people as possible.⁴⁸ And this is to present democratic theory largely in proceduralist terms. There is also the more substantive orientation of theories of deliberative democracy to be considered, in which the virtues of participation and discussion are seen as essential to a healthy system of popular self-governance.⁴⁹ As Lijphart pointed out, one of the hallmarks of majoritarian systems of government is unicameralism, whereas strong bicameralism is a hallmark of consensus democracy. The criticism of bicameralism as undemocratic thus depends on the assumption that majoritarianism exhausts the aspirations of democracy, as if alternative democratic values, such as consensus and deliberation, are not as important.

⁴⁷ *Official Record of the National Australasian Convention Debates, Sydney, Second Session: Sydney 2nd to 24th September 1897 (1897)*, 665.

⁴⁸ Lijphart, above n 5, chs 2-3.

⁴⁹ See, for example, John Uhr, *Deliberative Democracy in Australia: The Changing Place of Parliament* (1998).

C *Do our electoral and parliamentary systems actually deliver majority rule?*

But let us take for granted the idea that ‘the people’ can be represented simply and straightforwardly as a unitary body, and that majoritarian decision-making processes are an adequate realisation of democratic ideals. The third assumption fundamental to the standard critique of upper houses, at least as it applies to our present circumstances, is that modern electoral systems and parliamentary processes actually deliver majority rule. But there are two problems with this, one of them technical and not at all apparent; the other rather straightforward and very apparent to any intelligent observer of modern-day elections.

The technical difficulty has to do with problems in the relationship between voter preferences (whether these be preferences among policies, candidates or parties) and the way in which electoral systems accumulate voter choices at election time. The heart of the problem has to do with what is called Condorcet’s paradox, first observed by the Marquis de Condorcet, in 1785.⁵⁰ The dilemma is that human preferences among any set of possible courses of action are not necessarily transitive, but practicable methods of accumulating and counting votes have to assume that they are, with the consequence that electoral systems can produce winners who technically secure a majority of votes after all preferences are distributed, but in relation to whom a majority of voters actually prefer an alternative candidate. To simplify the point, when voters are presented with a choice between, say, three candidates, *a*, *b* and *c*, it is not necessarily the case that even though one candidate secures more preference votes than any of the others, that that candidate is favoured by a majority over the other two candidates. A majority of voters may prefer *a* to *b*, and a majority may favour *b* over *c*, but it can, in principle, simultaneously be the case that a majority favour *c* over *a*.⁵¹ When voter preferences are non-transitive in this way, no electoral system can ensure that the candidate who is elected is positively favoured over all other candidates by a majority of voters. When, as in the popular children’s game, *paper* prevails over *rock*, *rock* prevails over *scissors*, and *scissors* prevails over *paper*, it is only possible to make rational decisions in two-cornered contests such as between *paper* and *rock*, for example. In three-cornered contests, as between *a*, *b* and *c*, or *paper*, *scissors*, *rock*, it is simply impossible to decide rationally between the three options.

⁵⁰ Marie Jean Antoine Nicolas Caritat, Marquis de Condorcet, *Essay on the Application of Analysis to the Probability of Majority Decisions* (1785).

⁵¹ Imagine a policy space in which candidate *a* favours restrictive immigration policies and government regulation of the economy; candidate *b* favours free immigration and government regulation; and candidate *c* favours free immigration and free markets. It is certainly not beyond the bounds of probability that one-third of voters will rank the candidates *a*, *b* and *c*, another third rank them *b*, *c* and *a*, and a final third rank them *c*, *a* and *b* — with the result that one majority prefers *a* to *b*, a second majority favours *b* over *c*, and yet a third majority favours *c* over *a*. Which majority is to prevail?

The contest has to be reduced to a series of successive two-cornered contests, but the decision as to *which* pairing will be compared first — a decision that will determine the final outcome — has to be entirely arbitrary.

This is not only a problem of first-past-the-post voting, although it very obviously is a problem of that kind of system. It is also a problem for proportional voting systems, including single transferable vote systems such as those used in Australia. A Condorcet winner occurs in an election where there is one candidate who is in fact preferred by a majority of voters when voter preferences as between that candidate and every other candidate are tallied. Counting methods can be devised which specifically search for Condorcet winners (these are known as Condorcet systems), but even these systems do not provide non-arbitrary solutions where, on the actual preferences of voters, Condorcet's paradox, a 'majority rule cycle', exists, and there is no Condorcet winner. Single transferable vote systems are not properly Condorcet systems, and they do not necessarily elect candidates who are Condorcet winners. In single transferable vote systems, a rule of thumb is used whereby second and subsequent preferences of voters whose first preferences were directed to the candidate receiving the lowest number of first preference votes are distributed first. This, among other things, is calculated to provide a relatively non-arbitrary starting point for the elimination of candidates and the resolution of a winner. But the rule of thumb does not necessarily produce a Condorcet winner, and it cannot in any case eliminate the possibility that Condorcet's paradox may occur. Our electoral techniques are insufficiently sophisticated to overcome the problem. Indeed, the problem is probably unresolvable in principle.

Condorcet's paradox represents the first problem with the assumption that our electoral systems actually deliver majority rule. It is, admittedly, a rather obscure problem which, in practice, is unlikely to occur where candidates can be readily placed along a single political spectrum,⁵² with the result that voter preferences are more likely to be transitive. The second problem, however, is much more obvious and well-known, and it is simply the fact that systems that use discrete electoral districts for the return of individual (or even multiple) members of Parliament routinely produce majorities on the floor of Parliament significantly in excess of the percentage of votes secured when the ballots of all voters within the entire jurisdiction are counted.⁵³ We all know how very typical it is for political parties to secure government (that is, to gain a majority in the lower house of Parliament) having only obtained something like 40 per cent to 45 per cent of the primary vote. And unless we abandon the use of local electorates altogether, this phenomenon will continue. The problem is not one of gerrymanders or malapportionment; it is a

⁵² Unlike the example given in the previous footnote.

⁵³ This of course can apply to both lower and upper house elections. See, for example, Campbell Sharman, 'The Representation of Small Parties and Independents in the Senate' (1999) 34(3) *Australian Journal of Political Science* 353.

consequence of electoral systems based on distinct electorates. And yet we remain wedded to systems of local electorates, largely because we see value in having specific members of Parliament representing particular constituencies.⁵⁴

Our dogged attachment to local electorates, despite the results that they produce, brings us back to the fact that we continue to think of ourselves simultaneously as both one people and as many different peoples, organised into various localities and groupings at a local, state and federal level. And it is at this point that the argument from democracy can be turned on its head. Rather than giving us reasons to reject upper houses and bicameralism, the many ‘peoples’ with which we identify ourselves suggests that single houses of Parliament are going to struggle to represent us in our pluralities and diversities.⁵⁵ Proportional voting systems can certainly go a long way towards remedying this problem, at least to the extent that they reproduce more accurately the many varied shades of opinion and commitment within our electorates.⁵⁶ However, consolidating representation into one house within which majority rule prevails means that even in complicated proportional and mixed electoral systems, there is an assumption that there remains a unitary

⁵⁴ The Constitution of South Australia contains a provision which is calculated to alleviate this, at least to some extent. Section 83(1) of the *Constitution Act 1934 (SA)* requires the Electoral Districts Boundaries Commission to ensure ‘as far as practicable, that the electoral redistribution is fair to prospective candidates and groups of candidates so that, if candidates of a particular group attract more than 50 per cent of the popular vote (determined by aggregating votes cast throughout the State and allocating preferences to the necessary extent), they will be elected in sufficient numbers to enable a government to be formed’. Section 83(2), however, also requires the Commission to take account of ‘communities of interest of an economic, social, regional or other kind’, among other matters. In *Featherston v Tully* [2002] SASC 243, Bleby J at [170] observed that:

Section 83 is directed only at the Electoral District Boundaries Commission. It ceases to have any work to do once the occasion has arisen for the redistribution of boundaries and the redistribution has taken place. Many things may happen to frustrate the objectives of s 83 between the completion of the redistribution process and the conduct of the next general election. New political parties may form; old ones may divide; new political alignments may be formed; demographic forecasts may not be fulfilled. However, none of those events could possibly invalidate a subsequent election.

⁵⁵ For a parallel argument in relation to government ‘mandates’, see Goot, above n 25.

⁵⁶ I put aside here the additional problem posed by political party manipulation of ‘above the line voting’ systems. See Marian Sawyer, ‘Above-the-line voting — How democratic?’ (2004) (Discussion Paper 6/04) *Democratic Audit of Australia* <<http://democratic.audit.anu.edu.au/>> at 11 September 2008. For a classic account of the relationship between electoral systems and the party-composition of Parliaments, see Maurice Duverger, *Party Politics and Pressure Groups* (1972) 23-32, and for a more recent formulation, Rein Taagepera and Matthew S Shugart, ‘Predicting the Number of Parties: A Quantitative Model of Duverger’s Mechanical Effect’ (1993) 87 *American Political Science Review* 455.

‘will of the people’ which it is the task of the electoral and parliamentary system to consolidate and express. If it is replied that, on the contrary, no assumptions about the will of the people need be made in this context, but rather that such processes are retained in order to enable decisive and effective government, then the ground has shifted radically. No longer is it claimed that such a system has superior democratic credentials to bicameralism. The pretext of democracy has been abandoned, and the appeal is now to the necessities of efficient government.⁵⁷

IV EXCURSUS:

GOVERNMENT EFFICIENCY AND THE SEPARATION OF POWERS

This last point means that arguments from democracy and public deliberation are not entirely decisive on the question of bicameralism. While the proposition is not always developed at length, arguments in favour of unicameralism often rest very substantially upon the value of decisive and effective government.⁵⁸ Parliaments legislate; and, especially in Westminster systems, Parliaments are expected to hold executive governments responsible for their administration. The argument from efficiency is that Parliaments will perform their legislative roles more effectively if they are not hamstrung by an obstructionist upper house, and that governments will be able to make and administer policy more decisively if they are responsible to one chamber only.

The argument from government efficiency has somewhat less purchase in presidential systems of government, where a sharper separation of legislative and executive power is made possible. The separation of powers doctrine is driven by a concern to divide and limit governmental power, rather than by a concern to make government efficient, effective and decisive. For this reason, debates over the relative merits of parliamentary and presidential systems usually entail arguments over the importance that should be placed upon government efficiency on one hand and the separation of powers on the other. Accordingly, when the argument from efficiency is marshalled in the context of the debate between unicameralism and bicameralism, it is important to keep in mind its relationship to the question of the separation of powers, as well as the wider debate between parliamentary and presidential systems.

Writing deliberately in opposition to the proposition that a separation of legislative, executive and judicial power makes for a good system of government, Walter Bagehot famously expressed the view that ‘the efficient secret’ and ‘characteristic merit’ of the English Constitution was ‘the close union’, indeed, ‘the nearly

⁵⁷ Compare Robert A Dahl, ‘A Democratic Dilemma: System Effectiveness versus Citizen Participation’ (1994) 109 *Political Science Quarterly* 23.

⁵⁸ See, for example, Lester B Orfield, ‘The Unicameral Legislature in Nebraska’ (1935) 34(1) *Michigan Law Review* 26, 30, 32.

complete fusion' of the executive and the legislature, through the 'connecting link' of the Cabinet.⁵⁹ As Bagehot put it:

No doubt by the traditional theory, as it exists in all the books, the goodness of our Constitution consists in the entire separation of the legislative and executive authorities, but in truth its merit consists in their singular approximation.⁶⁰

Bagehot was referring no doubt to Montesquieu and those who have followed him in thinking that the separation of powers is an important means by which the political liberty of the subject can be protected.⁶¹ Indeed, Montesquieu had spoken directly against the idea that the executive should be somehow elected by (and therefore responsible to) the legislature:

But if there were no monarch, and the executive power should be committed to a certain number of persons selected from the legislative body, there would be an end then of liberty; by reason the two powers would be united, as the same persons would sometimes possess, and would be always able to possess, a share in both.⁶²

While Bagehot shared with Montesquieu a fear of what Alexis de Tocqueville and John Stuart Mill had called the 'tyranny of the majority',⁶³ his preferred solution lay not in a separation of legislative and executive power, or in similar constitutional devices, but rather in the inculcation of appropriate moral education among the voters.⁶⁴

Writing almost a century later, Sir Ivor Jennings, like Bagehot, understood the Cabinet to be 'the core of the British constitutional system' and the 'supreme directing authority'.⁶⁵ As Jennings explained, the party system, in conjunction with the superior position of the House of Commons vis-à-vis the House of Lords, enabled the Cabinet simultaneously to maintain control over both executive power and legislative power.⁶⁶ Notably, however, Jennings emphatically rejected the proposition that the control the government was able to exercise over the House of Commons amounted to a kind of 'temporary dictatorship'. In his view, the government's position rested ultimately on popular support, and the constant

⁵⁹ Walter Bagehot, *The English constitution* (1963) 59, 65.

⁶⁰ *Ibid* 65-66.

⁶¹ See Maurice J C Vile, *Constitutionalism and the separation of powers* (1967).

⁶² Montesquieu, above n 30, 179.

⁶³ Compare Bagehot, above n 59, 277; Alexis De Tocqueville, *Democracy in America* (1862) ch 15; John Stuart Mill, *On liberty* (1859) ch 1.

⁶⁴ R H S Crossman, 'Introduction' in Bagehot, above n 59, 10.

⁶⁵ Jennings, above n 34, 1.

⁶⁶ *Ibid* 472-3.

pressure exerted upon a government conscious that it will face the judgment of the voters at the next election meant that the government could never afford to ‘neglect the feeling of the House [of Commons]’.⁶⁷ According to Jennings, again like Bagehot, the principal merit of the Westminster system lay in its capacity for efficient and decisive government, but Jennings added that this was an efficiency rendered reasonable and just through the ultimate accountability of the government to the electorate, through Parliament.⁶⁸ In the vivid metaphor with which Jennings concluded his book-long study, *Cabinet Government*: ‘[t]he dogs bark in Parliament; if there were no Parliament, they might bite.’⁶⁹ The capacity of Parliament to render the government accountable through criticism and scrutiny — particularly through the opposition — was crucial to Jennings’ defence of the system as both efficient and just.

The argument from government efficiency, particularly in the hands of these two of the most influential observers and proponents of the Westminster system, was thus premised upon the capacity of Parliament to operate from a position of at least some critical distance from the executive government. And, notably, for both Bagehot and Jennings, this included a vital role for the House of Lords. The argument from government efficiency, although enough to convince both authors of the relative superiority of parliamentary over presidential systems, was not enough to convince them that Cabinet accountability should be sacrificed on the altar of decisive and effective government. Thus, while they both recognised the predominant position occupied by the House of Commons within the British Parliament, and while they supported the reform of the House of Lords, neither of them proposed that the upper house should be altogether abolished.⁷⁰ Bagehot in particular recognised in the Lords a unique capacity to criticise the executive government, relatively free of the constraints of party discipline.⁷¹ Jennings, while more attuned to the political composition of the House of Lords and more focused on its legislative functions, seems to have thought likewise.⁷²

The views of Bagehot and Jennings suggest that the strongest defences of parliamentary systems of government are mounted where it can be insisted that a

⁶⁷ Ibid 475-6, 486.

⁶⁸ Ibid 510:

The British governmental machine is, in spite of its many defects, one of the most efficient, in not the most efficient, constitutional structures in the world. It is reasonably efficient because it can be criticised. ... It is, in short, a good system because it rests on Parliament and, through Parliament, upon the willing consent of those who are governed.

⁶⁹ Ibid 510.

⁷⁰ See Bagehot, above n 59, ch 3; Jennings, above n 34, 428-448; Jennings, above n 28, 434-53, 518-19.

⁷¹ Bagehot, above n 59, 147-8.

⁷² Jennings, above n 28, 392-5, 518-19.

sufficiently critical distance between Parliament and the executive will be effectively maintained, and that under conditions of modern responsible government, that critical distance can only be secured where there is an upper house whose party-political composition is different from that of the lower house. In this respect, parliamentary systems can leave at least some room for a separation of executive and legislative power, but only to the extent that there is a second chamber which is able to exercise its own judgment in matters of both legislation and the review of executive decisions — that is, in a manner that is independent of both the government and the lower house of Parliament.⁷³ As Bagehot himself observed:

A formidable sinister interest may always obtain the complete command of a dominant assembly by some chance and for a moment, and it is therefore of great use to have a second chamber of an opposite sort, differently composed, in which that interest in all likelihood will not rule.

The most dangerous of all sinister interests is that of the executive government, because it is the most powerful. It is perfectly possible — it has happened, and will happen again — that the cabinet, being very powerful in the Commons, may inflict minor measures on the nation which the nation did not like, but which it did not understand enough to forbid. If, therefore, a tribunal of revision can be found in which the executive, though powerful, is less powerful, the government will be the better; the retarding chamber will impede minor instances of parliamentary tyranny, though it will not prevent or much impede revolution.⁷⁴

Since the time that Bagehot first wrote these words in 1867, it could be argued that it is now the Prime Minister, rather than the Cabinet, who represents the vital ‘connecting link’ between the legislature and the executive power.⁷⁵ To the extent that modern-day Prime Ministers and Premiers exercise substantial control over their own Cabinets, let alone over Parliament, the point of a democratically-elected second chamber is rendered even more acute. As is well-known, Queensland’s former Premier, Sir Joh Bjelke-Petersen was famously unable to explain what the separation of powers meant,⁷⁶ and we can understand why. Without an upper house

⁷³ John Stuart Mill, *Considerations on representative government* (1861) ch 13 (Everyman edition), 325-6. If a governing party is able to secure a majority in both houses, the capacity of the second chamber to resist the government is of course significantly reduced. See Bruce Stone, ‘State legislative councils – Designing for accountability’ in Aroney, Prasser and Nethercote, above n 14.

⁷⁴ Bagehot, above n 59, 134-5.

⁷⁵ Jennings placed much greater stress upon the Prime Minister than had Bagehot. See Jennings, above n 34, chs 2, 8, and compare Crossman, above n 64. For a discussion, see Patrick Weller, *First Among Equals: Prime Ministers in Westminster Systems* (1985) ch 1.

⁷⁶ Evan Whitton, *The Hillbilly Dictator: Australia’s Police State* (1989) 184-185.

to contend with, his entire experience of government was one in which he and his Cabinet effectively controlled the exercise of both executive and legislative power.⁷⁷ It should come as no surprise that a Premier not used to having to give an account of his administration to a powerful and assertive Parliament, should use the dismissive refrain for which he became famous ('don't you worry about that') as the title of his published memoirs.⁷⁸ When political power is consolidated into the hands of a small number of people, Lord Acton's aphorism seems to hold true: it tends to corrupt.⁷⁹ However, appropriately constructed upper houses, it is argued, place a constraint upon the consolidation of governmental power into the hands of a small group of like-minded people — of whatever political persuasion — thereby tending to the limitation and division of the exercise of governmental power, with all of the constitutional and liberty-supporting consequences that this can have. As John Stuart Mill put it:

The consideration which tells most, in my judgment, in favour of two Chambers ... is the evil effect produced upon the mind of any holder of power, whether an individual or an assembly, *by the consciousness of having only themselves to consult*. It is important that no set of persons should, in great affairs, be able, even temporarily, to make their *sic volo* prevail without asking anyone else for his consent. A majority in a single assembly, when it has assumed a permanent character — when composed of the same persons habitually acting together, and always assured of victory in their own House — *easily becomes despotic and overweening*, if released from the necessity of considering whether its acts will be concurred in by another constituted authority. The same reason which induced the Romans to have two consuls makes it desirable there should be two Chambers: that neither of them may be exposed to the corrupting influence of undivided power, even for the space of a single year. One of the most indispensable requisites in the practical conduct of politics, especially in the management of free institutions, is conciliation: a readiness to compromise; a willingness to concede something to opponents, and to shape good measures so as to be as little offensive as possible to persons of opposite views; and of this salutary habit, the mutual give and take (as it has been called) between two Houses is a perpetual school; useful as such even now, and its utility would probably be even more felt in a more democratic constitution of the Legislature.⁸⁰

⁷⁷ See Peter Coaldrake, 'Parliament and the Executive' in Allan Patience (ed), *The Bjelke-Petersen Premiership 1968-1983* (1985), 219.

⁷⁸ Johannes Bjelke-Petersen, *Don't You Worry About That!: The Joh Bjelke-Petersen Memoirs* (1990). For an account of Bjelke-Petersen's Premiership, see Rae Wear, *Johannes Bjelke-Petersen: The Lord's Premier* (2002).

⁷⁹ Letter from Lord Acton to Bishop Mandell Creighton, 3 April 1887. See F. Engel De Janösi, 'The Correspondence between Lord Acton and Bishop Creighton' (1940) 6(3) *Cambridge Historical Journal* 307.

⁸⁰ Mill, above n 73, 325 (emphasis added).

It is with this background in mind that arguments for bicameralism are often motivated by concerns to control and limit political power and to protect human rights, both in terms of the exercise of legislative power and the accountability of the government for its exercise of executive power.⁸¹

V ARGUMENTS FROM LEGISLATIVE OUTPUTS

It is undoubted that one of the most important roles of a Parliament is to legislate. In this respect, the particular question is whether second chambers, operating as ‘houses of review’ and exercising judgment that is independent of the government and lower house, can improve the quality of legislation in a way that other mechanisms cannot — or whether, on the contrary, upper houses operate rather as obstructions to the timely and efficient enactment of legislation.

Now, lawmaking is nothing if it is not a technical legal process, and there are professional standards of lawmaking to which legislatures ought always to aspire.⁸² That statutes should be clear, concise, consistent and effective is unlikely to be doubted. And it is true that legislative vices such as ambiguity, prolixity, inconsistency and ineffectiveness can, to a real extent, be minimised through the maintenance of well-resourced legislative agencies (such as the Parliamentary Counsel) to provide drafting services to governments and members of Parliament. However, classic arguments for bicameralism suggest that upper houses can provide an additional dimension which cannot be reproduced simply through technical drafting agencies, as important as these may be.

The existence of a second chamber introduces an additional, necessary step for the enactment of legislation. This means, first, that legislation must be approved by a second body of elected representatives and, second, that the time taken over the enactment of legislation is increased.⁸³ Both of these factors are conducive to additional and wider debate over the general policy of proposed laws, as well as more exacting scrutiny of the particular measures proposed in their technical details and likely consequences. Most bills that come before Australian Parliaments are initiated by the government and reflect government policy.⁸⁴ As has been noted, an upper house that has a different political complexion to the lower house prevents

⁸¹ See Meg Russell, ‘Responsibilities of Second Chambers: Constitutional and Human Rights Safeguards’ (2001) 7(1) *Legislative Studies* 61.

⁸² See, for example, *Legislative Standards Act 1992* (Qld). For a general discussion, see Jeremy Waldron, *The Dignity of Legislation* (1999).

⁸³ I draw here, in part, from Stone, above n 73 and Nicholas Baldwin, ‘Concluding Observations’ (2001) 7(1) *Journal of Legislative Studies* 171. See also Lees-Smith, above n 16, 32-3; Jennings, above n 28, 445-53.

⁸⁴ See, for example, B. C. Wright, I. C. Harris and P. E. Fowler, *House of Representatives Practice* (5th ed, 2005) 336, 341-2.

ultimate control over the exercise of legislative power from being consolidated into the hands of those who already control the exercise of executive power. And even if the governing party enjoys a majority in the upper house, its existence as a formally independent chamber can make a difference.⁸⁵ Upper houses, while undoubtedly party-political in their composition and outlook, are one step removed from the tensions of the lower house and, as a matter of practice, provide a forum for debate which is relatively less partisan and relatively more deliberative.⁸⁶ This difference in tone carries through into the day-to-day operation of upper house committees, even where governing parties enjoy controlling majorities, and especially when they do not.⁸⁷

Evidence from the practical working of second chambers, particularly through their committees, supports these generalisations.⁸⁸ Upper houses are not perfect institutions, but they make a difference,⁸⁹ and the sheer volume of amendments proposed by upper houses and eventually accepted by governments in the lower

⁸⁵ See William Heller, 'Bicameralism, Representation and Parliamentary Decision-making' (Paper presented at the Transforming Canadian Governance Through Senate Reform Conference, University of British Columbia, Vancouver, 18-19 April 2007).

⁸⁶ Compare the observations made in United Kingdom, Report of the Royal Commission on the Reform of the House of Lords, *A House for the Future* (2000) [4.35-4.43], especially [4.39]:

Taking a Bill through the Lords is very different from taking it through the Commons. Debate in the Commons is often more confrontational and party political. The Minister in charge of the Bill is usually closely identified with the policy and challenges are perceived to be politically motivated. In most debates, especially in Committee, Ministers are seen as defending their policy proposals against Opposition criticism. In the Lords the consideration of Bills is at once less partisan and more unpredictable. Debate tends to focus on the merits of particular points, without a partisan edge, and Ministers cannot rely on uncritical support from their own party. The style of the debate – less party political and more courteous – makes it easier for Ministers to agree to reconsider points without appearing to 'lose'.

⁸⁷ For a recent assessment of the impact of the Coalition parties' majority in the Australian Senate, see Stewart Ashe, 'Reform of the Senate Committee System: Evolving back to the past?' (2007) 21(2) *Australasian Parliamentary Review* 50.

⁸⁸ See, generally, Commonwealth, *Senate Estimates Scrutiny of Government Finance and Expenditure: What's it for, does it work and at what cost?*, Papers on Parliament No 6 (1990); Department of the Senate, 'Senate Committees and Responsible Government: Proceedings of the Conference to Mark the Twentieth Anniversary of Senate Legislative and General Purpose Standing Committees and Senate Estimates Committees' (Paper presented at the Papers on Parliament No 12, Canberra, 1991); Commonwealth, *A Light of Reason: Transcript and Supporting Papers of a Seminar on the Work of the Senate Select Committee on Superannuation*, Papers on Parliament No 45 (2006).

⁸⁹ See Mughan and Patterson, above n 18, 342-3.

house suggests that they make a difference for the better.⁹⁰ Scrutiny of legislation, and especially of regulations made under statutory authority by the executive government, is particularly facilitated through second chamber committees.⁹¹ Without this kind of scrutiny, executive regulations can come into force without very much public debate at all. Indeed, second chambers are particularly well-placed to scrutinise delegated legislation. As elected bodies they possess the political legitimacy to question the policy of delegated legislation; and, unlike lower houses, they are sufficiently removed from the executive government to subject delegated legislation to searching scrutiny.

The existence of a second chamber thus enables a different quality of debate and more substantial scrutiny to occur, not only within the second chamber itself, but also amongst the public generally in various forums and through various media outlets. Indeed, these two points reinforce the suggestion that an upper house can improve the democratic credentials of the system as a whole, because it facilitates both longer and deeper public deliberation over proposed government objectives and the means that the government proposes to adopt in order to secure those objectives. Legislation, as with government activity generally, is likely to have significant, and at times inherently unpredictable, consequences. Quite apart from the good of public deliberation, a second chamber provides a means by which a potentially wider representative sample of the community is able to criticise or resist proposed legislation and other government policies. Given that government majorities in lower houses are typically based on the direct support of significantly less than 50 per cent of the voting population, upper houses elected on the basis of proportionate representation provide a check on government legislation by a body which more effectively accumulates the views of as many voters as possible.

⁹⁰ Uhr, above n 1, 15-16. Some upper houses are more effective than others. Harry Evans, 'The Case for Bicameralism' in Aroney, Prasser and Nethercote, above n 14, produces statistics showing the rate at which proposed federal legislation was amended by the Senate both before and after the governing Coalition parties secured a majority in the Senate on 1 July 2005. See also the statistics discussed in Uhr and Wanna, above n 27, 17-20. The effectiveness of a particular upper house at a particular point in time will depend upon such things as prevailing political culture and expectations, parliamentary procedures and the party-political composition of the second chamber, as well as simply the personal caliber of the members of Parliament themselves. The point is, however, that without a second chamber the opportunity for parliamentary scrutiny of this kind is very much diminished.

⁹¹ Dennis Pearce, 'Rules, Regulations and Red Tape: Parliamentary Scrutiny and Delegated Legislation' (Speech delivered at The Distinctive Foundations of Australian Democracy: Lectures in the Senate Occasional Lecture Series 2003-2004, Parliament House, Canberra (25 June 2004)).

VI ARGUMENTS FROM EXECUTIVE ACCOUNTABILITY

This last point brings us to the final kind of argument that is invoked in debates over bicameralism, and that has to do with the capacity of upper houses to contribute to improved executive government accountability. The Royal Commission on the Reform of the House of Lords, chaired by Lord Wakeham,⁹² began its deliberations by stepping back and considering what the overall role of the second chamber should be, given the present functioning of the British system of government.⁹³ In this connection, the Commission pointed out that the answer to the question ‘Why have a second chamber?’ provides a firm rationale for the various functions which a reformed second chamber ought to perform.⁹⁴ According to the Commission, three very important facets of the British system of government would have to be kept in mind: first, the legislative sovereignty of the British Parliament; second, the pre-eminent position of the House of Commons; and, third, the dominating power exercised by the government of the day, especially in its capacity to ensure that its budgets are implemented and its legislative programme enacted.⁹⁵ As in Australia, governments in the United Kingdom are normally either one-party or tightly-disciplined coalition governments, backed by absolute majorities in the lower house of Parliament. There is generally no need for such governments to negotiate with ad hoc coalition partners about their budgets and policies. While backbenchers need to be kept in mind and at times placated, the high level of party discipline in the United Kingdom and especially in Australia means that the government’s will almost always prevails.

This state of affairs — a condition which Lord Hailsham famously described as ‘elective dictatorship’⁹⁶ — is widely thought to provide a final and decisive reason to support the existence of upper houses within Westminster parliamentary democracies. As the Wakeham Commission pointed out, lower houses of Parliament are only with very great difficulty able *both* to sustain in power the government of the day *and* to act as an effective check upon it.⁹⁷ As the Commission report concluded:

[g]iven the government’s enormous power in our system, it seems to us important to have a second chamber able and willing to complement the

⁹² United Kingdom, Report of the Royal Commission on the Reform of the House of Lords, *A House for the Future* (2000).

⁹³ Ibid [3.2].

⁹⁴ Ibid.

⁹⁵ Ibid [3.1-3.7].

⁹⁶ Hailsham, above n 5. See also David Hamer, *Can responsible government survive in Australia?* (2nd ed, 2004) ch 11.

⁹⁷ Royal Commission on the Reform of the House of Lords, above n 92, [3.23].

House of Commons in its essential work of scrutinising the executive and holding the government to account.⁹⁸

A Government responsibility

The strength of the argument from executive accountability hinges on what we mean by the words ‘responsibility’, ‘accountability’ and ‘scrutiny’ in this context. Executive responsibility to Parliament is conventionally distinguished into two main categories: the individual responsibility of Ministers for the administration of their portfolios, and the collective responsibility of the entire ministry for its administration of the government as a whole. However, owing to the very tight party discipline that currently prevails, resignation of an entire ministry occurs, in practice, only at election time. On those very rare occasions when a Prime Minister or Premier loses the confidence of his or her party and is forced to resign,⁹⁹ the capacity of the party to sustain a vote of no confidence in the lower house looms in the background, but generally does not need to be exercised. Resignations of individual Ministers for maladministration or corruption are certainly more common, but these events rest almost entirely on political factors and very little, if at all, upon a sense of duty to conform to objective standards of appropriate conduct.¹⁰⁰ Ministers routinely resist calls for their resignation and Premiers and Prime Ministers support them in this attitude,¹⁰¹ only forcing them to resign when their position becomes completely untenable,¹⁰² as when it can be shown that a Minister was directly and personally involved in some serious error of judgment and the political price of remaining in ministerial office has become too high.¹⁰³

Executive responsibility in this seismic sense goes to the very existence of the government and the ministerial offices held by individual members of Parliament.

⁹⁸ Ibid [3.6].

⁹⁹ For example, Prime Minister Bob Hawke in 1991, and Premier Joh Bjelke-Petersen in 1987.

¹⁰⁰ The classic argument is Samuel E. Finer, ‘The Individual Responsibility of Ministers’ (1956) 34 *Public Administration* 377. See, generally, Wright, Harris and Fowler, above n 84, ch 2; Rodney Brazier, *Ministers of the Crown* (1997) ch 15.

¹⁰¹ For example, Queensland Attorney-General Denver Beanland refused to resign in 1997 after a vote of no confidence against him was passed in the Queensland Parliament, supported by an independent member, Liz Cunningham.

¹⁰² Elaine Thompson and Greg Tillotsen, ‘Caught in the Act: The Smoking Gun View of Ministerial Responsibility’ (1999) 58(1) *Australian Journal of Public Administration* 48.

¹⁰³ See Barbara Page, ‘Ministerial Resignation and Individual Ministerial Responsibility in Australia, 1976-89’ (1990) *Journal of Commonwealth & Comparative Politics* 141. Compare Commonwealth, Royal Commission on Australian Government Administration, *Report of the Royal Commission on Australian Government Administration* (1976) 59-60.

However, the infrequency of ministerial resignations and the extreme unlikelihood of backbench revolts, votes of no confidence and refusals of supply is symptomatic of the control that executive governments routinely exercise, through the party system, over lower houses of Parliament. This executive domination of lower houses raises several questions about the role of upper houses. If lower houses are characteristically controlled by governments in this way, can upper houses play an effective role in making governments more accountable? Perhaps so, but is it in respect of the responsibility of the entire government to Parliament that upper houses have a legitimate role to play? Should upper houses have power to force the resignation or dismissal of governments by refusing to pass annual supply bills, as the Senate did in 1975? Would not executive responsibility to two different houses of Parliament be a recipe for instability? Can a government be the servant of two masters?

On these questions, views are divided, even among those who defend the existence of upper houses in general terms. Not surprisingly, the Commonwealth and state constitutions address the issues in different ways.¹⁰⁴ To dictate that governments have the explicit support of both houses of Parliament would necessitate a very high level of consensus for the formation of governments, an exacting requirement that would make it much more difficult to form and sustain stable governments than is presently the case. Nonetheless, the degree of instability which results from any particular constitutional structure depends on a range of factors, some legal, others political.¹⁰⁵ Thus, Italian governments are notoriously unstable, but this is not especially due to the powers of the Italian upper house, but is rather the product of the prevailing political culture of that country.¹⁰⁶ By contrast, the federal executive council of Switzerland is elected at a joint sitting of both houses of the Federal Assembly (the Swiss legislature),¹⁰⁷ but the office is held for a fixed term of four years¹⁰⁸ and conventions of government by inter-party consensus limit the extent to

¹⁰⁴ Compare, for example, *Commonwealth Constitution* s 53; *Constitution Act 1902* (NSW) s 5A; *Constitution Act 1934* (SA) ss 10, 60-64; *Constitution Act 1934* (Tas) ss 36-45. For a discussion, see R. D. Lumb, *The constitutions of the Australian states* (5th ed, 1991) 148-51.

¹⁰⁵ Compare Roger Scully, 'Dealing with Big Brother: Relations with the First Chamber' (2001) 7(1) *Journal of Legislative Studies* 93.

¹⁰⁶ See Claudio Lodici, 'The Italian Senato' in Patterson and Mughan, above n 18, 254; Gianfranco Pasquino, 'The Italian Senate' (2002) 8(3) *Journal of Legislative Studies* 67, 73-4; Giliberto Capano and Marco Giuliani, 'Governing Without Surviving? An Italian Paradox: Law-Making in Italy, 1987-2001' (2001) 7(4) *The Journal of Legislative Studies* 13, discussing Giuseppe Di Palma, *Surviving without Governing: The Italian Parties in Parliament* (1977) and Joseph La Palombara, *Democracy, Italian Style* (1987). However, see Mughan and Patterson, above n 18, 335.

¹⁰⁷ Swiss Constitution, Art. 175(2).

¹⁰⁸ Swiss Constitution, Art. 145.

which this occasions instability.¹⁰⁹ Indeed, these features of the system are arguably productive of a high degree of policy stability in that country.¹¹⁰

During the debate over the drafting of the *Australian Constitution* during the 1890s, the framers of the *Constitution* divided into three basic camps on this issue.¹¹¹ On one hand, there were those delegates, such as Richard Baker, Samuel Griffith, John Cockburn and Andrew Inglis Clark, who were open to the possibility of constructing a federal executive that would be dependent upon the support of both houses of the Parliament, citing the Swiss model as a precedent. On the other hand, there were those, like Alfred Deakin, Isaac Isaacs and H B Higgins, who wished to see a more traditional, British pattern of parliamentary government take root at a federal level, in which the lower house would be the house of government. Neither of these two sides was entirely able to prevail, however, and a mediating position, favoured by delegates such as Edmund Barton and Richard O'Connor, won the day, under which the House of Representatives was given a privileged position in relation to the initiation and amendment of financial bills, but the Senate would retain the legal power to reject supply.¹¹² Since that time it has become a well-entrenched convention in Australian politics that governments are formed only in the House of Representatives. However, the Senate has on several occasions threatened to exercise the power to refuse supply and on one very well-known occasion in 1975 indeed exercised the power, leading eventually to the dismissal of the government by the Governor-General.¹¹³

In this context, much of the debate at both a federal and state level has been over the precise powers that upper houses ought to possess, particularly in relation to financial bills. Some argue that upper houses should have no power over financial bills at all, and have proposed amendments to the *Commonwealth Constitution* to remove the Senate's power to refuse to pass supply.¹¹⁴ Others have sought to limit the effect of any attempt by an upper house to block supply by proposing either constitutional or legislative measures that would authorise the government to continue to spend money at the same level as previously approved until the stand-

¹⁰⁹ Swiss Constitution, Art. 175(4) requires the various geographical and language regions to be adequately represented. By convention, seats on the Federal Council are distributed among the four major parties as well as among the Cantons and language groups.

¹¹⁰ For general descriptions of the Swiss political system, see Wolf Linder, *Swiss Democracy: Possible Solutions to Conflict in Multicultural Societies* (1994) and Nicolas Schmitt, *Federalism: The Swiss Experience* (1996).

¹¹¹ See Aroney, above n 46, chs 7, 8.

¹¹² *Commonwealth Constitution* s 53.

¹¹³ See Sawer, above n 36, ch 7; Cooray, above n 36, 120-23, 149-52, 162-6, 176-80.

¹¹⁴ For example, *Final Report of the Constitutional Commission: Summary* (1988) 9.

off between the upper house and the government is resolved.¹¹⁵ Others alternatively suggest that the real problem with the events of 1975 as far as the Senate was concerned was its capacity to force an election for the House of Representatives without necessarily facing a full election itself,¹¹⁶ and they propose constitutional amendments that would either establish fixed terms for the lower house or provide that an upper house which refuses supply and forces election must also face the voters itself.¹¹⁷

Government stability and efficiency remain important values to be reckoned with in questions of constitutional design, and there are arguments for at least limiting the capacity of upper houses to bring down entire governments without facing an election themselves. And yet, as Bruce Stone has argued, there remain strong arguments in favour of preserving the powers of upper houses in relation to financial bills because the capacity to refuse supply is the ultimate means by which governments can be held to account.¹¹⁸

B *Government Accountability*

As important as it is, collective and individual ministerial responsibility in the seismic sense just discussed is still only one aspect of the much larger question of executive accountability and the capacity of Parliaments and other institutions to scrutinise government administration. In this respect, much more particular mechanisms than votes of no confidence and refusals to pass supply bills are at stake. Thus, Ministers are required to answer questions posed by the opposition during Question Time, they can be required to produce documents, and parliamentary committees have the capacity to subject government administration to exacting scrutiny. Moreover, the modern administrative state offers a whole range of extra-parliamentary accountability mechanisms.¹¹⁹ What unique contribution, if any, can a second chamber make in this context?

At this point, a final set of arguments in favour of unicameral Parliaments is commonly offered, the main point of which is that government accountability can be adequately maintained and improved through reform of the lower house, without necessarily resorting to a second chamber. In the first place, it is argued that the

¹¹⁵ Stanley Bach, *Platypus and parliament: the Australian Senate in theory and practice* (2003) 303-5.

¹¹⁶ A double dissolution was held in 1975 only because, co-incidentally, the preconditions for this under s 57 of the *Constitution* had been met.

¹¹⁷ Harry Evans, 'Constitutionalism and Party Government in Australia' (Occasional Paper No. 1, Australasian Study of Parliament Group, 1988) 58-9.

¹¹⁸ Bruce Stone, 'The Australian Senate: Strong Bicameralism Resurgent' in Luther, Passaglia and Tarchi, above n 19, 578-9, citing Bach, above n 115, 306.

¹¹⁹ Several of these mechanisms are discussed below.

capacity of a single chamber to scrutinise the government can be enhanced when its composition is made sufficiently diverse through a system of proportional voting and its committees are given the opportunity to operate free from government control, as is said to be the case in New Zealand.¹²⁰ Second, it is argued that non-parliamentary institutions and processes, such as auditors-general, ombudsmen, administrative appeals tribunals, freedom of information statutes, commissions of inquiry, criminal justice commissions and the like, provide important and sufficient means by which executive governments can be held to account.¹²¹

The difficulty with both of these lines of argument has to do with the scope, practical effectiveness and sustainability of parliamentary reforms and extra-parliamentary processes of these kinds. Four central characteristics of a democratically-elected second chamber, one or more of them absent from such alternative mechanisms, are crucial here. First, a constitutionally-established upper house cannot be abolished at the whim of the executive. Second, when elected, a second chamber enjoys fundamental political legitimacy derived from its electoral foundations. Third, an upper house is institutionally separate and procedurally independent of the lower house and, therefore, of the government. Fourth, a second chamber possesses all of the corporate powers of a House of Parliament, which it can use to hold the government to account. Several consequences flow from these characteristics for the practical functioning and effectiveness of upper houses, especially when compared with the alternative accountability measures mentioned above.

Proportional voting in a unicameral Parliament will almost certainly produce a chamber with a significantly more diverse profile, and may also make the formation of ad hoc coalition governments more common. Coalition governments of this kind will require parties to negotiate and compromise on matters of government policy and administration, weakening the capacity of any one political party to dominate the government's agenda. However, within parliamentary systems, the seat of both executive and legislative power will nonetheless ultimately fall into the hands of a

¹²⁰ See Paul Reynolds, 'The Case Against the Restoration of an Upper House in Queensland' (Paper presented at the conference *Improving Government Accountability in Queensland: The Upper House Solution?*, Brisbane, 2006), citing Marcus Ganley, 'Select Committees and Their Role in Keeping Parliament Relevant: Do the New Zealand Select Committees Make a Difference?' (2001) 16(2) *Australasian Parliamentary Review* 140 and Elizabeth McLeay, 'Parliamentary Committees in New Zealand: A House Continuously Reforming Itself' (2001) 16(2) *Australasian Parliamentary Review* 121. Under mixed member proportional voting, as it has been implemented in New Zealand, electors have two separate votes, one in respect their local constituency, and a second on a party-list basis.

¹²¹ See, for example, Bradley Selway, 'Mr Egan, the Legislative Council and Responsible Government' in Adrian Stone and George Williams (eds), *The High Court at the Crossroads: Essays in Constitutional Law* (2000) 35, 61-64.

ruling coalition, led by the Prime Minister and Cabinet.¹²² Thus, while the New Zealand experience suggests that greater levels of consultation within the ruling coalition are to be expected under conditions of mixed member proportional representation within a unicameral Parliament, nonetheless the ruling coalition will continue to have strong incentives to avoid parliamentary scrutiny as much as possible, and the breadth of the coalition upon which the government has to rely will tend to determine the extent to which it is forced to allow room for potentially dissident voices.¹²³ As Barker and McLeay have observed: ‘[c]onsensual politics are not necessarily achieved by PR alone; and policy power, as always, is largely a function of numbers of votes for and against a government.’¹²⁴

Within a unicameral Parliament — no matter how it is elected — the existence and effectiveness of parliamentary committees and various extra-parliamentary mechanisms will ultimately depend upon the continued support of a majority in the one chamber, *the same majority that has ipso facto given its support to the government*. By contrast, the existence of a second chamber — especially when proportionally-elected — makes it much more difficult and unlikely for a ruling coalition (the government) to control the entire Parliament; and it is the existence of a second chamber that lies beyond the control of the government which provides a final bulwark against the disestablishment of both parliamentary and extra-parliamentary mechanisms by which the government is made accountable. As Harry Evans has put it, ‘all non-political safeguards depend ultimately on the political processes for their establishment, maintenance and defence.’¹²⁵

Moreover, extra-parliamentary accountability mechanisms are limited in scope and jurisdiction and lack the legitimacy and powers of an independently elected House of Parliament. For example, criminal justice commissions can only undertake investigations into criminal activities and official misconduct,¹²⁶ whereas

¹²² For a discussion of the difference that a coalition government may make to the relationship between parliamentary parties and the core executive, see Patrick Weller, ‘Political Parties and the Core Executive’ in Weller, Bakvis and Rhodes, above n 39.

¹²³ See Fiona Barker and Elizabeth McLeay, ‘How Much Change?: An Analysis of the Initial Impact of Proportional Representation on the New Zealand Parliamentary Party System’ (2000) 6(2) *Party Politics* 131, 141-4.

¹²⁴ Ibid 148.

¹²⁵ Evans, above n 90, 4. The argument is developed more fully in Harry Evans, ‘Parliament and Extra-Parliamentary Accountability Institutions’ (1999) 58(1) *Australian Journal of Public Administration* 87. The vulnerability of extra-parliamentary institutions to executive interference or abolition was starkly illustrated by the Kennett government’s emasculation of the powers of the Victorian Auditor-General in the 1990s. As it happened, however, this was soon reversed by the Bracks government, which took steps to entrench the office within the *Victorian Constitution*. See *Constitution Act 1975* (Vic) ss 94A-94C.

¹²⁶ See, for example, *Crime and Misconduct Act 2001* (Qld) ch 2.

governments and administrations need to be scrutinised not only for traces of corruption and serious wrongdoing, but also for incompetence and poor policy choices. Similarly, the office of parliamentary ombudsman is typically limited to the investigation of complaints about the performance of government agencies, and is empowered only to make recommendations to the agency concerned or to the relevant Minister.¹²⁷ Likewise, the existence and terms of reference of royal commissions are, by definition, determined by governments, and governments typically institute them only under extreme public pressure, or as institutions of last resort.¹²⁸ Freedom of information laws, while they have contributed to open government, remain circumscribed in important ways.¹²⁹

Compared with all of these mechanisms, as valuable as many of them may be, only representative institutions that are not generally controlled by the government have both the capacity and the legitimacy to investigate on all of these levels, and more, following the trail wherever it leads. Moreover, upper houses have an independent capacity to determine their own procedures and make decisions about the exercise of their own very substantial powers.¹³⁰ Because they enjoy all of the immunities and privileges of a House of Parliament,¹³¹ upper houses are able to perform their scrutinising responsibilities independently of both the executive government and the lower house. Upper houses are able to question ministers and to conduct inquiries,¹³² and members of upper houses enjoy freedom of speech and immunity from prosecution for what is said in the chamber.¹³³ The amount of time Ministers

¹²⁷ See Bruce Barbour, 'What are the Essential Features of an Ombudsman?' in Robyn Creyke and John McMillan (eds), *Administrative Law: The Essentials* (2002). See, likewise, Richard Mulgan, 'Auditors-General: Cuckoos in the Managerialist Nest?' (2001) 60(2) *Australian Journal of Public Administration* 24.

¹²⁸ Scott Prasser, *Royal commissions and public inquiries in Australia* (2006) ch 4.

¹²⁹ Spencer Zifcak, 'Freedom of Information: Back to Basics' in Creyke and McMillan above n 127. It is worth noting in this respect that all Australian jurisdictions which have FOI legislation except Queensland, include in their Cabinet exemptions an exception for factual or statistical material that does not disclose information concerning Cabinet deliberations or decisions. See Legal Constitutional and Administrative Review Committee, Legislative Assembly of Queensland, 'Report No. 32: Freedom of Information in Queensland' (2001), 194; and the Queensland Government response: The Honourable Rod Welford MP, 'Response to The Legal, Constitutional and Administrative Review Committee Report No. 32' (2001) 48. The committee report and the Minister's response can be accessed at: <<http://www.parliament.qld.gov.au/committees/view/committees/LCARC.asp>> at 11 September 2008.

¹³⁰ For a discussion, see Evans and Odgers, above n 29, ch 2; Enid Campbell, *Parliamentary privilege* (2003).

¹³¹ On which, see Neil Laurie, 'The Grand Inquest of the Nation: A Notion of the Past?' (2001) 16(1) *Australasian Parliamentary Review* 173.

¹³² See Evans, above n 90, 8-9.

¹³³ See Evans and Odgers, above n 29, ch 2.

have to commit to answering questions on both the floor of the chamber and in estimates hearings is a measure of the extent to which upper houses effectively contribute to the task of holding governments to account.¹³⁴ Moreover, upper houses have a corporate power to require Ministers to produce documents and to use the production of these documents as a means of scrutinising the government's policies and administration.¹³⁵

A prominent illustration of this last point is provided by the New South Wales cases of *Egan v Willis* and *Egan v Chadwick*.¹³⁶ At the times that these cases were decided, Michael Egan was a member of the Legislative Council, Leader of the Government in the house, and Treasurer and Minister in several portfolios. Between 1995 and 1998, the Legislative Council ordered Egan to produce a number of documents relating to a whole range of controversial government decisions, including the closure of regional research institutes,¹³⁷ transactions with various commercial entities,¹³⁸ closure of regional Education Department offices, a decision to deny approval for a proposed gold mine,¹³⁹ and contamination of Sydney's water supply. Egan refused to comply with the orders of the Legislative Council on two grounds: first, that the Legislative Council simply lacked the authority to require a Minister to produce documents and, second, that some of the documents were Cabinet documents enjoying the protection of public interest immunity, others were the subject of legal professional privilege, and others were subject to conditions of commercial confidentiality.¹⁴⁰ The Legislative Council responded by holding Egan

¹³⁴ Uhr, above n 1, 15-16.

¹³⁵ For the power to compel the production of documents, see, for example, *Parliament of Queensland Act 2001* (Qld) ch 3, pt 1; *Parliamentary Privileges Act 1891* (WA) ss 1, 4; *Parliamentary Privilege Act 1858* (Tas) ss 1-3; *Constitution Act 1975* (Vic) s 19(1); *Constitution Act 1934* (SA) s 38; *Constitution Act 1901* (Cth) s 49; *Egan v Willis* (1998) 195 CLR 424.

¹³⁶ *Egan v Willis and Cahill* (1996) 40 NSWLR 650; *Egan v Willis* (1998) 195 CLR 424; *Egan v Chadwick* (1999) 46 NSWLR 563.

¹³⁷ The closure of veterinary laboratories at Wagga Wagga and Armadale and the Biological and Chemical Research Institute at Rydalmere.

¹³⁸ The redevelopment of the Sydney Showground as a Twentieth Century Fox film studio.

¹³⁹ The government's consideration of the Report of the Commission of Inquiry into the Lake Cowal gold mine and associated facilities.

¹⁴⁰ The *Egan* cases were the first in which Australian courts were asked to adjudicate on the question whether a legislative chamber had the power to order the production of documents from a Minister. Prior to this, the practice had been that Ministers would produce documents, but that Parliaments recognized certain exceptions relating to Cabinet documents, legal advice, the identity of public servants and commercial confidentiality. How this worked out in practice was resolved politically. It has been observed that in New South Wales, between 1856 and 1933 the Legislative Council passed 217 orders for papers, of which 171 were complied with, 45 were not, and one order was rescinded; but that no orders for papers were made after 1933 until the

in contempt and ordering his removal from the chamber. Egan responded by bringing two actions, one in 1996, which was appealed ultimately to the High Court of Australia,¹⁴¹ and a second in 1998, which was decided by the New South Wales Court of Appeal.¹⁴² Both the Court of Appeal and the High Court upheld the following propositions:¹⁴³

1. The Legislative Council has such powers as are reasonably necessary for its existence and for the proper exercise of its functions.
2. The functions of the Legislative Council include:
 - a. the investigation of matters related to contemplated legislation; and
 - b. the scrutiny of the executive government (this latter function being a vital aspect of the system of responsible government, and one not limited to the lower house).

1990s. See Susan Want, 'Orders for Papers in the Legislative Council of New South Wales: Developments and Challenges' (Paper presented at the Australasian Study of Parliament Group Annual Conference, Wellington, New Zealand, 28-30 September 2006) 2. It may be conjectured whether these statistics are reflective of shifts in the perceived legitimacy of the Legislative Council on one hand, and shifts in the power balance between the executive government and Parliament on the other. A Legislative Council which is aristocratic but generally thought legitimate will have no hesitation in seeking to hold the executive government to account, and a government will feel pressure to comply with its requests for documents (the period 1856-1933). However, a Legislative Council that is less than fully democratic and perceived to be somewhat illegitimate, will be less certain of its role and an executive government will be much less inclined to accede to its demands (the period 1933-1996). But then, a reformed Legislative Council, democratically elected on the basis of proportional representation and over which the government does not command a majority, will become again more assertive, while an executive government used to dominating Parliament, will resist assertions of Legislative Council power (the *Egan* affair, 1995-1998), unless forced to accede (the period since the *Egan* cases).

¹⁴¹ *Egan v Willis and Cahill* (1996) 40 NSWLR 650; *Egan v Willis* (1998) 195 CLR 424.
¹⁴² *Egan v Chadwick* (1999) 46 NSWLR 563.

¹⁴³ I draw here from Selway, above n 121, 43-45, 48. The power of the legislative councils of the other States to require the government to produce documents was undoubted because specifically provided for in legislation, but such legislation did not exist in New South Wales, so that the courts had to give effect to the common law as it applied to the New South Wales Parliament, and in so doing the judges reflected deeply on the nature and operation of responsible government in Australia, and determined that a power to require the production of documents was a necessary incident of the performance by Legislative Councils of their essential scrutiny of government functions.

3. To undertake these functions, it is reasonably necessary for the Legislative Council to have the power to call for documents from the executive government, and to suspend a Minister for not complying with its orders to produce such documents.
4. The power of the Legislative Council to call for documents from Ministers includes documents which would otherwise enjoy the protection of legal professional privilege and public interest immunity — subject, however, to the important exception of Cabinet documents.¹⁴⁴

The significance of the decisions is two-fold. First, the reasoning rests upon the general principle that houses of Parliament have such powers as are reasonably necessary for the proper exercise of their functions, and that these functions include the scrutiny of the executive government. The power to require the production of documents is but one implication of this elemental premise; there are surely many others. Individual houses of Parliament have a role and status which is both fundamental and open-ended in a way and to an extent that simply cannot be emulated or replaced by various ancillary accountability mechanisms, such as ombudsmen, freedom of information, statutory commissions and so on.

Second, the events in New South Wales, together with the specific affirmation of the inherent power of upper houses to call for documents, appear to have had a practical impact upon the conduct of upper houses elsewhere in Australia. Thus, it has been argued that the two *Egan* decisions encouraged the Senate in its scrutiny of the Commonwealth government before the government secured a majority in the Senate at the 2004 election.¹⁴⁵ The New South Wales Legislative Council itself ramped up its demands for documents quite dramatically, most prominently in relation to major infrastructure projects such as the cross-city tunnel,¹⁴⁶ a development which has helped to place the Labor government under sustained public scrutiny throughout the period since these cases were decided.

¹⁴⁴ Requests for documents in respect of which the government claims an exemption are now in practice adjudicated by an independent arbitrator: see Gerard Carney, 'Egan v Willis and Egan v Chadwick: The Triumph of Responsible Government' in George Winterton (ed), *State Constitutional Landmarks* (2006) 329.

¹⁴⁵ Ibid 299, citing Harry Evans, 'Lively, Analytical History of the NSW Parliament' (2006) 9 *Constitutional Law and Policy Review* 17, 19-20. However, it has also been observed that there has been a trend towards federal government refusal to accede to requests for documents in very recent years: Evans, above n 90, 8-9.

¹⁴⁶ Want, above n 140.

The important qualification in relation to these developments concerns the exception relating to Cabinet documents.¹⁴⁷ In *Egan v Chadwick*, Priestley JA held that there is no absolute immunity in respect of Cabinet documents, observing that:

notwithstanding the great respect that must be paid to such incidents of responsible government as cabinet confidentiality and collective responsibility, no *legal right* to *absolute* secrecy is given to any group of men and women in government, the possibility of accountability can never be kept out of mind, and this can only be to the benefit of the people of a truly representative democracy.¹⁴⁸

A majority consisting of Spigelman CJ and Meagher JA disagreed, concluding that Cabinet documents are generally exempt from production.¹⁴⁹ One of the crucial issues for future determination will therefore be the question of what documents fall into this category. As might be expected, the New South Wales government has increasingly used the Cabinet exception as a ground upon which to refuse the production of documents.¹⁵⁰ Notably, however, the Chief Justice in *Egan v Chadwick* drew a distinction between documents ‘which disclose the actual deliberations within Cabinet’ (which are exempt) and those which are merely ‘in the nature of reports or submissions prepared for the assistance of Cabinet’, and his Honour observed that documents ‘prepared outside Cabinet for submission to Cabinet’ may, ‘depending upon their content’, fall into *either* category.¹⁵¹ To the extent that this principle is accepted, the capacity of governments to avoid parliamentary scrutiny will be limited to documents which actually reveal the ‘deliberations of cabinet’.¹⁵² At present, though, governments are tending to interpret the category widely. Future developments in this area will thus depend largely upon future clashes of political will between governments and upper houses, and possibly further judicial decisions.

However, developments such as these are not about to have an impact in Queensland, simply because Queensland does not have an upper house.¹⁵³ Without

¹⁴⁷ For close analyses of the judgments, see Christos Mantziaris, ‘Egan v. Willis and Egan v. Chadwick: Responsible Government and Parliamentary Privilege’ (Parliamentary Library, Parliament of Australia, 1999); Gareth Griffith, ‘*Egan v Chadwick* and Other Recent Developments in the Powers of Elected Upper Houses’ (NSW Parliamentary Library Research Service, 1999).

¹⁴⁸ *Egan v Chadwick* (1999) NSWLR 563, 595 (Priestley JA).

¹⁴⁹ *Ibid* 576 (Spigelman CJ), 597 (Meagher JA).

¹⁵⁰ Beverly Duffy, ‘Orders for Papers and Cabinet Confidentiality post *Egan v Chadwick*’ (2006) 21(2) *Australasian Parliamentary Review* 93.

¹⁵¹ *Egan v Chadwick* (1999) NSWLR 563, 594-5.

¹⁵² See Harry Evans, ‘Enough of Executive Arrogance? Egan v Chadwick and others’ (1999) 2(1) *Constitutional Law and Policy Review* 11.

¹⁵³ In 1992 the Queensland Electoral and Administrative Review Commission noted that the absence of an upper house ‘has had a profound effect on the ability of the

an upper house in New South Wales, the *Egan* cases would of course never have arisen, and the general principle of government liability to produce ‘state papers’ to parliamentary inquiries would not have been established in such emphatic terms. As Gerard Carney has observed:

These cases judicially confirm the fundamental role of each House of Parliament, including the Legislative Council, to scrutinize the activities of the executive branch. ... The fact that the government does not have to maintain the confidence of the Legislative Council does not mean that it is not accountable to that House. By recognising a different way each House of Parliament may hold the executive government accountable for its administration of the State, these cases have reinforced and reinvigorated, if not redefined, the principle of responsible government in Australia.¹⁵⁴

C Government Responsibility Revisited

In sum, elected second chambers are politically legitimate institutions, separate from the lower house and independent of the government, possessing all of the corporate powers of a House of Parliament. These characteristics give upper houses a unique capacity to scrutinise governments and make them accountable. Alternative bodies do not have the same elective authority to sustain and support their inquiries and investigations.

There is additional evidence, moreover, that these capacities contribute, not only to scrutiny and accountability, but also in an indirect way to the political responsibility of governments to the voters at election time. Particular parliamentary activities by which the executive is scrutinised, whether through Question Time, parliamentary inquiries, committee work or the production of documents, are individually unlikely of themselves to bring about a change of government. The collective responsibility of the government as a whole is of a different order from the discrete accountability mechanisms used by upper houses to scrutinise government policies and administration, and it is difficult to measure the impact of the latter on the former. However, there is one general indicator which does indeed suggest — although it does not demonstrate — that upper houses can make a difference at election time, when the prospects of entire governments are at stake. As the data compiled in the Appendix to this article indicates, there is a significant difference in patterns of government incumbency among the several Australian state, territory and federal

Queensland Parliament to carry out its functions under the Constitution and conventions which require it to act responsibly and review the activities of the executive arm of government.’ See Electoral and Administrative Review Commission, *Report on a Review of Parliamentary Committees* (1992), paragraphs 2.148-150.

¹⁵⁴

Carney, above n 144, 298. See, likewise, Griffith, above n 147, 20-23.

electoral systems.¹⁵⁵ In particular, upon examination of the data it is immediately noticeable that two of the three unicameral jurisdictions, Queensland and the Northern Territory, have been marked by relatively long periods of party incumbency, whereas the bicameral jurisdictions have been marked by relatively shorter periods of single-party domination. Queensland in particular has essentially had only three extended political regimes, a long Labor administration from 1918 to 1957, a long Country-National administration from 1957 to 1989, and a relatively long Labor administration that has controlled the field down to the present day. These three very long periods of party-political dominance were interrupted in each case by only three very short-lived and relatively insignificant and unstable alternative administrations in 1929-31, 1968 and 1996-98 respectively.

Of course, the causes of government incumbency and decline are very complex, and cannot be reduced to any single cause.¹⁵⁶ Thus, factors such as electoral manipulation and malapportionment have certainly been very important in maintaining the pattern of extended party domination in Queensland between 1918 and 1989. However, it is important to note that other states — particularly Western Australia and South Australia — have had similarly malapportioned electoral systems, but these, like New South Wales, Victoria and Tasmania, have experienced a much more regular turnover of parties in government, especially in recent decades. While the distinct political history of Queensland cannot be explained simply by reference to the design of its Parliament,¹⁵⁷ the noticeable difference in incumbency rates as between unicameral and bicameral state systems suggests that upper houses make at least some difference to the longevity of particular party-political administrations.

The general tendency of unicameralism, it appears, is to facilitate executive domination of politics by circumscribing opportunities for debate and scrutiny. The general tendency of bicameralism, on the other hand, is to provide additional avenues for scrutiny and debate, which themselves place additional pressure on governments, increasing the likelihood of fundamental electoral change over the course of time.

¹⁵⁵ Compare Ralph Chapman, 'Accountability: Is Westminster the Problem?' (2000) 59(4) *Australian Journal of Public Administration* 116, 118, who draws attention to extended periods of single party government in both the Commonwealth and all of the Australian States, but does not closely compare the Queensland experience with the experience of the other Australian States and Commonwealth.

¹⁵⁶ The mixed picture presented by the unicameral Australian territories demonstrates this: while there has been a dominant Liberal-Country presence for much of the life of the Northern Territory legislature, the Australian Capital Territory has seen regular switches between Liberal and Labor Party governments since 1989.

¹⁵⁷ See Patricia Smith, 'Queensland's Political Culture' in Allan Patience (ed), *The Bjelke-Petersen Premiership 1968-1983: Issues in Public Policy* (1985) 219.

VII CONCLUSIONS

At the New South Wales election of 27 March 1999, three months after the High Court had decided *Egan v Willis*, the Carr Labor government was returned to office, but again without a majority in the Legislative Council, and with an increase in the number of crossbenchers from 7 to 13. The voting pattern in the 1999 New South Wales election is not atypical of each of Australia's bicameral jurisdictions. Split-ticket voting, at both a federal and state level, demonstrates that voters both appreciate the difference between the two houses and deliberately vote differently in each, with the entirely predictable result that governments enjoying majorities in the lower house usually fail to secure majorities in the upper house.¹⁵⁸ Split-ticket voting provides a final and clinching reason for the retention and strengthening of our bicameral legislatures where we have them but they are under attack (as in South Australia), and the reinstatement of them where (as in Queensland) we have lost them.¹⁵⁹

Elected second chambers, particularly where a system of proportional representation tends to secure a composition which is different from the lower house and which is more reflective of voting preferences, have the potential to make a real difference to the democratic legitimacy of our governments and to the quality of public debate and deliberation that underlies government decision-making. Upper houses also function effectively as houses of review in terms of their legislative functions — an analysis of government legislation initiated in lower houses and either rejected or amended by upper houses provides a measure of their performance in this respect. And, as has been seen, upper houses have made a significant difference to the level of executive accountability, most particularly through their capacities to question Ministers, undertake inquiries and require Ministers to produce documents. Finally, as has been proposed, the incumbency patterns in the various Australian jurisdictions suggest all of these relatively

¹⁵⁸ See, generally, Bean and Wattenberg, above n 25. George Brandis points out that although 45.1 per cent of electors had cast a first preference vote for the coalition at the 2004 Senate election, a public opinion poll revealed that only 39 per cent of people were happy that the government had won a majority in the Senate, and 47 per cent thought it would be better if the Senate were not controlled by the government of the day. See George Brandis, 'The Australian Senate and Responsible government' (Paper presented at the Gilbert + Tobin Centre of Public Law 2005 Constitutional Law Conference, Sydney, 18 February 2005) 6.

¹⁵⁹ The Legislative Council of Queensland was abolished by the *Constitution Act Amendment Act 1922* (Qld). *Constitution Act Amendment Act 1934* (Qld), s 3, subsequently required that reinstatement of a second chamber in Queensland would require a referendum, a requirement affirmed by the *Constitution Act 1867* (Qld), s 53. On the question of the legal effectiveness of these provisions, see Gerard Carney, 'Abolition and Restoration of a Legislative Council: Queensland and the other States' in Aroney, Prasser and Nethercote, above n 14.

mundane accountability mechanisms can amount to an even more significant impact on the collective responsibility of entire governments to the Parliament as a whole, and through them, to the people.

This is not to suggest that Australian upper houses are not in need of reform or that they could not improve their performance in all of the dimensions that have been discussed in this article.¹⁶⁰ The mere existence of an upper house is not sufficient.¹⁶¹ Much depends on its design, and on the calibre and determination of its members. But it *is* to suggest that second chambers can make a difference: a difference that matters, and a difference for the better.

¹⁶⁰ See Uhr and Wanna, above n 27, 31-43. Dean Jaensch has recently suggested that the South Australian Legislative Council ought to be reformed by preventing Ministers from sitting in that House. See Dean Jaensch, 'Bicameralism' (Paper presented at the conference *The Politics of Democracy*, History Trust of South Australia, Adelaide, 8-9 March 2007). The first problem with this proposal is that it would make it more difficult, if not eliminate the capacity of the upper house to require Ministers to produce documents. The second problem is that it would have an adverse effect on the quality of candidates. For a discussion, see Bach, above n 115, 305-310. Generally, what attracts strong candidates in Australia is a prospect of a ministry. For a recent list of proposed reforms to the South Australian Parliament as a whole, see John Uhr, 'Reforming the Parliament' [2002] *Democratic Audit of Australia* <<http://democratic.audit.anu.edu.au/>> at 11 September 2008.

¹⁶¹ Compare Ken Coghill, 'Why Accountability Must be Renewed' (2006) 21(2) *Australasian Parliamentary Review* 10.

APPENDIX

PERIODS OF GOVERNMENT INCUMBENCY IN THE AUSTRALIAN COMMONWEALTH,
STATES AND TERRITORIES SINCE 1918¹⁶²

	CTH	NSW	VIC	SA	WA	TAS	QLD	NT	ACT
1918	Nationalist	Nationalist	Nationalist	Cth	Nationalist	Cth Lib	Labor		
1919	Nationalist	Nationalist	Nationalist	Cth	Nationalist	Cth Lib	Labor		
1920	Nationalist	Labor	Nationalist	Lib	Labor	Cth Lib	Labor		
1921	Nationalist	Labor	Nationalist	Lib	Labor	Cth Lib	Labor		
1922	Nationalist	Labor	Nationalist	Lib	Labor	Cth Lib	Labor		
1923	Nationalist	Nationalist	Nationalist	Lib	Labor	Nationalist	Labor		
1924	Nationalist	Nationalist	Nationalist	Labor	Labor	Labor	Labor		
1925	Nationalist	Labor	CP	Labor	Labor	Labor	Labor		
1926	Nationalist	Labor	CP	Labor	Labor	Labor	Labor		
1927	Nationalist	Labor	CP	Lib	Labor	Labor	Labor		
1928	Nationalist	Nationalist	Labor	Lib	Labor	Nationalist	Labor		
1929	Nationalist	Nationalist	Nationalist	Lib	Labor	Nationalist	Country		
1930	Labor	Nationalist	Labor	Labor	Nationalist	Nationalist	Country		
1931	Labor	Labor	Labor	Labor	Nationalist	Nationalist	Country		
1932	United	Labor	United	Labor	Nationalist	Nationalist	Labor		
1933	United	United	United	LCL	Labor	Nationalist	Labor		
1934	United	United	United	LCL	Labor	Labor	Labor		
1935	United	United	Country	LCL	Labor	Labor	Labor		
1936	United	United	Country	LCL	Labor	Labor	Labor		
1937	United	United	Country	LCL	Labor	Labor	Labor		
1938	United	United	Country	LCL	Labor	Labor	Labor		
1939	United	United	Country	LCL	Labor	Labor	Labor		
1940	United	United	Country	LCL	Labor	Labor	Labor		
1941	United	Labor	Country	LCL	Labor	Labor	Labor		
1942	Labor	Labor	Country	LCL	Labor	Labor	Labor		
1943	Labor	Labor	Country	LCL	Labor	Labor	Labor		
1944	Labor	Labor	Country	LCL	Labor	Labor	Labor		
1945	Labor	Labor	Country	LCL	Labor	Labor	Labor		
1946	Labor	Labor	Labor	LCL	Liberal	Labor	Labor		
1947	Labor	Labor	Labor	LCL	Liberal	Labor	Labor		
1948	Labor	Labor	Liberal	LCL	Liberal	Labor	Labor		
1949	Labor	Labor	Liberal	LCL	Liberal	Labor	Labor		
1950	Liberal	Labor	Country	LCL	Liberal	Labor	Labor		
1951	Liberal	Labor	Country	LCL	Liberal	Labor	Labor		

¹⁶² Extremely short-lived governments (less than six months) are not indicated in this table. Periods of incumbency are approximated to the nearest whole year in order to simplify the data. Sole-party, coalition and minority governments are not distinguished.

1952	Liberal	Labor	Country	LCL	Liberal	Labor	Labor		
1953	Liberal	Labor	Country	LCL	Labor	Labor	Labor		
1954	Liberal	Labor	Country	LCL	Labor	Labor	Labor		
1955	Liberal	Labor	Labor	LCL	Labor	Labor	Labor		
1956	Liberal	Labor	Liberal	LCL	Labor	Labor	Labor		
1957	Liberal	Labor	Liberal	LCL	Labor	Labor	Labor		
1958	Liberal	Labor	Liberal	LCL	Labor	Labor	Country		
1959	Liberal	Labor	Liberal	LCL	Liberal	Labor	Country		
1960	Liberal	Labor	Liberal	LCL	Liberal	Labor	Country		
1961	Liberal	Labor	Liberal	LCL	Liberal	Labor	Country		
1962	Liberal	Labor	Liberal	LCL	Liberal	Labor	Country		
1963	Liberal	Labor	Liberal	LCL	Liberal	Labor	Country		
1964	Liberal	Labor	Liberal	LCL	Liberal	Labor	Country		
1965	Liberal	Liberal	Liberal	Labor	Liberal	Labor	Country		
1966	Liberal	Liberal	Liberal	Labor	Liberal	Labor	Country		
1967	Liberal	Liberal	Liberal	Labor	Liberal	Labor	Country		
1968	Liberal	Liberal	Liberal	LCL	Liberal	Labor	Country		
1969	Liberal	Liberal	Liberal	LCL	Liberal	Liberal	Country		
1970	Liberal	Liberal	Liberal	Labor	Liberal	Liberal	Country		
1971	Liberal	Liberal	Liberal	Labor	Labor	Liberal	Country		
1972	Liberal	Liberal	Liberal	Labor	Labor	Labor	Country		
1973	Labor	Liberal	Liberal	Labor	Labor	Labor	Country		
1974	Labor	Liberal	Liberal	Labor	Liberal	Labor	Country	CLP	
1975	Labor	Liberal	Liberal	Labor	Liberal	Labor	Country	CLP	
1976	Liberal	Labor	Liberal	Labor	Liberal	Labor	Country	CLP	
1977	Liberal	Labor	Liberal	Labor	Liberal	Labor	Country	CLP	
1978	Liberal	Labor	Liberal	Labor	Liberal	Labor	Country	CLP	
1979	Liberal	Labor	Liberal	Labor	Liberal	Labor	Country	CLP	
1980	Liberal	Labor	Liberal	Liberal	Liberal	Labor	Country	CLP	
1981	Liberal	Labor	Liberal	Liberal	Liberal	Labor	Country	CLP	
1982	Liberal	Labor	Labor	Liberal	Liberal	Liberal	National	CLP	
1983	Labor	Labor	Labor	Labor	Labor	Liberal	National	CLP	
1984	Labor	Labor	Labor	Labor	Labor	Liberal	National	CLP	
1985	Labor	Labor	Labor	Labor	Labor	Liberal	National	CLP	
1986	Labor	Labor	Labor	Labor	Labor	Liberal	National	CLP	
1987	Labor	Labor	Labor	Labor	Labor	Liberal	National	CLP	
1988	Labor	Liberal	Labor	Labor	Labor	Liberal	National	CLP	
1989	Labor	Liberal	Labor	Labor	Labor	Labor	National	CLP	Labor
1990	Labor	Liberal	Labor	Labor	Labor	Labor	Labor	CLP	Liberal
1991	Labor	Liberal	Labor	Labor	Labor	Labor	Labor	CLP	Labor
1992	Labor	Liberal	Liberal	Labor	Labor	Liberal	Labor	CLP	Labor
1993	Labor	Liberal	Liberal	Labor	Liberal	Liberal	Labor	CLP	Labor
1994	Labor	Liberal	Liberal	Liberal	Liberal	Liberal	Labor	CLP	Labor
1995	Labor	Labor	Liberal	Liberal	Liberal	Liberal	Labor	CLP	Liberal
1996	Liberal	Labor	Liberal	Liberal	Liberal	Liberal	National	CLP	Liberal
1997	Liberal	Labor	Liberal	Liberal	Liberal	Liberal	National	CLP	Liberal
1998	Liberal	Labor	Liberal	Liberal	Liberal	Liberal	Labor	CLP	Liberal
1999	Liberal	Labor	Liberal	Liberal	Liberal	Labor	Labor	CLP	Liberal
2000	Liberal	Labor	Labor	Liberal	Liberal	Labor	Labor	CLP	Liberal
2001	Liberal	Labor	Labor	Liberal	Labor	Labor	Labor	Labor	Liberal

