

# BOOK REVIEW

MARK LAUCHS\*

*Nicholas Aroney, Scott Prasser and J R Nethercote,  
Restraining Elective Dictatorship: The Upper  
House Solution? (University of Western Australia  
Press, 2009) 299 pp*

This book is a compilation of the papers at a conference held in Brisbane in 2006 to discuss whether Queensland needed an upper house. The book consists of a series of chapters reflecting the papers given by individual authors; mostly academics and politicians. Queensland is unique amongst Australian states in being unicameral. It was not established that way but lost its upper house through the circumstances of history. At the time of writing this review, Queensland is going through a heightened awareness of accountability issues with the government seeking submissions on potential reforms following a series of corruption allegations. It is therefore timely that a book such as this is released to provide a thorough examination of a key issue of structural good government.

The original Queensland Parliament was typical of 19<sup>th</sup> century colonial Parliaments. It reflected the British balance between the Commons and the Lords. The Legislative Assembly was, like the House of Commons, an elected representative house. The Council, like the House of Lords, was populated with men of character and wealth who had a vested interest in the colony. Its members were appointed rather than elected and were not restricted by terms. Over time, unelected houses lost favour throughout the Commonwealth and the United States, and their members were replaced by elected representatives. Queensland went down a different route and abolished rather than changed the composition of its upper house.

The abolition occurred in 1922 under the premiership of 'Red' Ted Theodore. The circumstances are controversial. As McPherson explains in his chapter, there was no need for a referendum to change this aspect of the Queensland constitution. However, the Legislative Council did have to vote in favour of its own demise. There had been progressive new appointments of Council members but the majority opposed abolition. The Premier took advantage of the Governor's absence and persuaded a compliant Lieutenant Governor to appoint sufficient new, friendly members to the council to

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ensure a win on a vote on its abolition. A later Labor Premier, Forgan Smith, would double-entrench the requirement for a referendum to re-establish any form of new second house in the Queensland Parliament.

The model for a modern upper house, certainly as it is approached in this volume, comes more from the United States of America tradition than Britain. The United States constitution established an upper house system but clearly did not want to represent an aristocracy. The senate represented the states while the congress represented the population. Madison and others saw the senate as a form of restraint on abusive power rather than simply as a representation of state interests. As Uhr explains in his chapter, the particular form of abuse was the unrestrained production of legislation and subsequently, too much government. Two dissimilar bodies with their own plots and schemes would have to compromise to succeed. It would also reduce the power of populist politicians who would need to appeal to two different audiences.

Thus the impetus for this book was a call for a new upper house of some form to act as a restraint on the power of the Queensland Legislative Assembly, thus the title of the book. A modern lower house is an animal not imagined by the British or Queensland governments when the establishing and constitutional documents were developed. Modern Australian party discipline ensures that the Legislative Assembly is controlled by the government of the day, which means it is controlled by the Cabinet, which further means that it is controlled by the Premier. A single person or clique can have sufficient power to direct the action of the Parliament including its systems of review. In effect an elected party can operate a dictatorship; this dictatorship's term can be extended by its ability to stifle accountability and scrutiny, and thereby, ensure its re-election. An upper house would have the potential to restrain this power through its ability to review, delay and oppose the legislation passed by the Assembly. However, a new house could simply create another body of politicians which would also need restraint and review. The ultimate question was not whether there should be an upper house but how to end the dictatorship of the Premier.

A major criticism of upper houses are that they are either undemocratic, as Aroney points out, the Queensland unelected Legislative Council was, or that if elected they are redundant as a mere copy of the lower house. An upper house was a necessity in Australia to allow for a federation of heterogeneous states. Aroney argues that an upper house provides the chance to provide representation of heterogeneous interests within Queensland just as the Senate represents the different interests of the states. This would reflect a consensus rather than majoritarian democracy. He further suggests that an upper house would also allow a venue to hear the voices of other interests in debate rather than just the two major parties. Aroney concludes that a second house is needed because it is impossible for one house to be representative even using preferential voting. His solution, and one reflected by most other authors, is an upper house elected by multimember electorate/s using proportional voting, although he notes that such a house would not be needed if the lower house was elected by this method. Brennan supports Aroney in his paper with a rather complex philosophical 'proof' that a bicameral system is actually more representative of public views than a unicameral system. No elective system would guarantee that a party will not control both houses. The instances are rare and the consequences either efficient or dire depending on whether you support the government at the time. However, some argue that the hubris of controlling both houses will lead to a loss in a general election.

Uhr says that the value of an upper house is its existence as a powerful foil to the Legislative Assembly, rather than its 'internal qualities'. He notes that people criticise bicameralism because one of the two houses is redundant. But he notes that public choice theorists claim that the competition between the houses restrains electoral dictatorship by forcing compromise to ensure legislation proceeds. The dominant party in the lower house must reach a consensus with at least one minority interest in order to pass their legislation. Thus the role of bicameralism is not to duplicate but to limit government.

A number of speakers provide their views on the value of the Australian Senate. Harry Evans points out that the power of one political body can only be restrained by an equally powerful distinct political body. He further notes that political organisations must be designed in a manner which recognises the flaws of human nature rather than relying on aspirational notions of human virtues for their success. He prefers a second house to independent watchdogs, as, even if they are statutorily independent of the executive, they are never completely free of the powers of appointment and budget control by the Prime Minister and Treasury. Thus these bodies would not be equally powerful and thus less effective as restraints on elective dictatorship. However, Evans says that the Senate has done little to obstruct the legislative agenda of the lower house. The senate committee were not outstanding but they revealed much information that would never have otherwise entered the public domain. In effect, he concludes that we are better off with the Senate than without it, but it has never reached its full potential.

Nethercote agreed that the Senate was less effective than it should be. He has studied the operations of senate committees and found that the work is done by the majority party members rather than opposition and minor party members who are rather lax in the participation and, in the latter case, partisan in their views. He also had little faith in its roll as a forum for positive public debate. Nethercote says that there is little debate on public issues, either in sittings or in committees, except as a means of criticism of government policy. Nethercote agrees that the committee system is the great strength of the Senate but says that they should make greater use of experts rather than rely solely on public submissions and hearings. They also need more support staff. Nethercote concluded that the ultimate check on the government is not the senate but the people in a general election.

Two senators, George Brandis and John Hogg, point the key historical developments that strengthened the power of the Senate. Both Brandis and Hogg nominate the shift in 1949 from the first past the post system which had distorted representation by sending party members to the senate in blocks. Proportional voting was more representative and gave seats to minor parties. This gave one party large unrepresentative majorities in the Senate. Both also cite the creation of the Estimates Committees in 1970 as a forum for allowing senators to extensively cross examine senior public officials. Queensland has an estimates committee system but it is far less effective or open than its Senate cousin. Finally, Brandis said that Hawke's increase in the number of members of the House of Representatives meant that the Senate's membership was automatically increased making it easier for minor parties to obtain the requisite number of proportional votes to obtain a seat. Each senator also noted that powerful governments of both persuasions have tried to restrain the power of uncooperative Senates. Brandis notes that political party's support for the senate waxes and wanes with their control over the body.

Authors from abroad provided perspectives from other jurisdictions. Meg Russel describes the attempts to reform the House of Lords to reflect the issues of legitimacy and distinction from the lower house. They want reform without providing an elected house and are examining a cap on the number of members a party can have in the House to ensure that no government could control both houses. Paul Thomas from Canada, a nation which retains an unelected upper house, describes that country's issues and reform agenda, while David Docherty discusses the upper house issues in the provinces. The last provincial upper house was abolished in 1968, with Ontario abolishing its chamber as early as 1841. While he notes the negative effects that flow from this, he is unconfident that any will be returned because the public will never support the production of more politicians.

Graeme Starr points out that the US Senate is the predominant house in that nation, with exclusive power over treaties, impeachment and confirming the President's proposed senior appointments. Unlike Canada, while some states became unicameral they returned to the bicameral systems. The only exception is Nebraska which kept its Senate and abolished its lower house. But Nebraska put in place systems to slow the progress of bills and increase their scrutiny to compensate for the loss of the second house.

There were also authors from other Australian states. Bruce Stone tracks the progress of the relation between houses in each of the states. He notes that the upper houses were created with permanent members so they could take a 'longer view' of issues than lower house members tied to a three year electoral cycle. He concludes that while Australian state upper houses have not met their full potential, they are essential in the absence of 'radical electoral reform' of the lower houses. Stone suggests that Queensland could create an upper house by still having 89 MPs and taking a third into the upper house thus reducing the size of the Legislative Assembly. However, this would lead to major party control as there would not be small enough vote quotas for minor parties to be elected.

Brian Costar discusses the Victorian experience. He notes that proportional representation only works if the quota is small enough to provide diversity of members. He also opposes joint committees between houses because it reduces the independent review by the Senate. Macintyre and Williams, on the other hand, describe the South Australian Legislative Council as being far more successful, partly because no party has obtained a clear majority.

The next paper deals specifically with the Queensland case. The historian of the Queensland courts, Justice MacPherson, provides a detailed legal history of the abolition of the Queensland Legislative Council. He contemplates an alternative history had the Mungana Mines affair prevented the Premier Theodore and his compatriot McCormack from voting in the *Constitutional Act Amendment Act 1922 (Qld)* which was the Legislative Assembly's part in the abolition of the upper house. The Labor party only had a two seat majority in this Parliament. A 1917 referendum clearly opposed the abolition of the Legislative Council. He concludes after a study of the constitutional law and case law, including the ability of the Queensland government to act in this manner, that they would not have been excluded and finishes with the following statement:

The right to go ineluctably wrong is the true measure of complete political and legal independence, which, subject to the Commonwealth Constitution, Queensland now enjoys.<sup>1</sup>

Janet Ransley provides a scathing article on the ineffectiveness of reform since Fitzgerald. She concentrates on the Legislative Assembly based committee system and points out its ineffectiveness. For example, she looks at the responses by ministers to recommendations of the Scrutiny of Legislation Committee. She notes that they give little time or effort, none in some cases, to explaining their decisions to ignore recommendations. Estimates committee members are ill-prepared and do not understand their portfolios. Other than the Scrutiny of Legislation Committee, the other scrutiny committees 'do little real scrutiny'. She does not believe that upper houses in other states produce a significantly better result and suggest that extra parliamentary bodies may be the answer.

The conclusion was that Queensland would be better off with an upper house than without one, even though the existence of such an institution would not be a solution to accountability issues, but would offset elective dictatorship. If a house were to be established:

- It must be elected on a basis that allows the entry of members of the non-major parties into the Parliament. Ideally this would be a proportion vote from the whole of the state and with at least 20 members. This would result in a seat quota of 5% of the vote; a number which would ensure membership to parties with a following equal to the Greens, the Australian Democrats and Pauline Hanson's One Nation Party. It would also make it more difficult for a major party to obtain control over both houses as such a party would need 55% of the primary vote; a rare event in modern Queensland.
- The house must have the power to introduce and pass legislation in concert with the lower house. In other words, it must have equal power to the lower house.
- The house must have a strong committee system with powers equivalent to those of the Australian Senate, including the power to delay legislation while it is referred to committee and equal powers to call witnesses and documentation.

On the whole this book is an excellent introduction to the subject and a thorough coverage of the issues. It would not be a suitable textbook but a highly desirable reference for any research or course on the Australian or Queensland political system.

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<sup>1</sup> N Aroney, S Prasser and J R Nethercote, *Restraining Elective Dictatorship: The Upper House Solution?* (University of Western Australia Press, 2009) 243-4.