

# VICTORIA'S PARLIAMENT AND CONSTITUTION: THE BRACKS/BRUMBY LEGACY

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*This is a review of the legacy of Victoria's Bracks/Brumby government, which held office from 1999 to 2010, in regards to public law – a review directed beyond the usual legal audience. For the Bracks/Brumby legacy is important and will endure, partly because it has entrenched a great deal of it. Its reforms to the Legislative Council are generally positive, and strike a good balance between making the upper house a serious partner in legislating and preventing obstruction, but the quota for election should perhaps have been lower. However, the government was less enthusiastic about complying with the lawful demands for government documents made by the upper house it had itself created.*

## I INTRODUCTION

The term of the Bracks government, in particular, saw far-reaching and largely positive changes to Victoria's constitutional arrangements. It was not, however, matched by a willingness to put one's money in anywhere near the same location as one's mouth. This review will show that the constitutional legacy of the Bracks/Brumby era is generally beneficial, but the Bracks/Brumby governments proved, unfortunately, no exception to the rule that governments will gladly talk about the need for transparency and openness, but are less keen to practise those virtues.

## II REFORM OF THE LEGISLATIVE COUNCIL

Victoria went into the Bracks/Brumby era with a Legislative Council that often was barely worth the trouble and expense, and emerged from it with one that was. That is the lasting legacy of that period of government as far as Victoria's constitutional arrangements are concerned. It is a legacy that will have a beneficial effect on Victorian constitutionalism for many decades, if not centuries, to come.

The Labor Party in this State had long aimed at achieving either reform or outright abolition of the State's upper house. It had had no opportunity to do so for the first 146 years of that House's existence because it never possessed a majority in the House for any length of time beyond a few weeks.<sup>1</sup> It was nevertheless clear that some type of reform was required. As well as the near-permanent majority in the Council for one side of politics, which is not acceptable in any democracy, the Legislative Council faced an identity crisis. It had no clear role. With the exception of its staggered terms (one half of the House only being renewed at each election) and the different electorate sizes, it was elected by the same voters and by almost the same method as was used for the lower house, and too often appeared to be the proverbial 'fifth wheel' in Victorian constitutional arrangements.

To its eternal credit, the Bracks government resolved to end this situation in a manner that brought long-term benefit, but was bound to lead to short-term pain. In order to explore options for change and attempt to build some consensus,<sup>2</sup> it set up, during its first term when it was in a minority in both Houses of Parliament, a Constitution Commission consisting of two former Liberal Party politicians and a retired Judge. This reported in July 2002.<sup>3</sup> Consideration of its recommendations was naturally postponed until after the election was held in that year, in which the government, to universal surprise, obtained a majority in both

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<sup>1</sup> Greg Taylor, *Constitution of Victoria* (Federation Press, 2006) 59.

<sup>2</sup> Nick Economou, 'Political Chronicles: Victoria January to June 2001' (2001) 47(4) *Australian Journal of Politics and History* 545, 546.

<sup>3</sup> Constitution Commission of Victoria, *A House for our Future: A Report* (2002).

Houses. It proceeded to implement the recommendations of the report. These called for an upper house elected by, in essence, the same method as the Federal Senate, with the State being divided into a number of ‘regions’, each of which should elect the same number of members, but, unlike in the Senate, the electorates should be of roughly equal population.<sup>4</sup> The term of the members of the Legislative Council was also altered. In the interests of its constituting an up-to-date reflection of Victorian public opinion, the previous arrangement under which only one half of the House retired at each general election for the lower house was abandoned, and all Legislative Councillors were elected at the one time.

Importantly, however, the government differed from the Constitution Commission’s preferred model: the government favoured an arrangement under which eight regions would elect five members each (rather than six regions with seven members). This had the effect of raising the proportion of votes required to win seats, after preferences, to 16.66 per cent instead of 12.5 per cent. Only three Councils have been elected under this system so far, of which one (elected at the end of 2010) has contained a narrow government majority (without there being an overwhelming vote of the electorate in favour of the government)<sup>5</sup> – for those four years, there was little or no improvement on the pre-Bracks position as far as concerns the assurance of a meaningful check on the government.

It was always going to be difficult to draw a balance between representation for a diversity of opinions, on the one hand, and, on the other, the avoidance of excessive multiplicity of views and the election, on the back of preferences, of micro-parties with very small primary votes, as has occurred federally and in New South Wales. And it would be premature to draw conclusions based on the results of three elections only and without in-depth study. But it may well be that the Constitution Commission’s wisdom has been vindicated and that the quota for election should have been 12½%. If that is so, one of the other constitutional changes of the Bracks Government – I do not say ‘reform’ – makes it unduly difficult to correct the situation.

### III ENTRENCHMENT OF THE CONSTITUTION

Entrenchment is the process by which legislative provisions are protected from alteration by Parliament unless some additional requirement is met in addition to the usual parliamentary procedures for altering legislation. This may be the holding of a referendum or especially high majorities in Parliament itself (three-fifths of its members, for example, rather than the ordinary majority).

In Australia the *Commonwealth Constitution*, having been approved by a referendum of voters in the first place, cannot be altered except by the same method. It is thus completely entrenched.<sup>6</sup> It is otherwise for State constitutions, for which the default setting is no entrenchment and being at the complete mercy of Parliament like the constitution of the United Kingdom.<sup>7</sup> In fact, the British tradition, along with binding rules of constitutional law set out in s 6 of the *Australia Act 1986* (UK) and *Australia Act 1986* (Cth), implicitly limit the extent to which State constitutions can be validly entrenched. Outside those limits, any attempt to prevent future alterations of the law by the usual parliamentary processes and majorities, though it appears in the statute books, is not itself the law. As a matter of law, it is simply ineffective and does not render invalid any changes passed in disregard of it.

The law on this point is complicated, and a detailed analysis of its application to the *Constitution Act 1975* (Vic) (*‘Victorian Constitution’*) has appeared elsewhere.<sup>8</sup> In brief, there are two requirements for an effective entrenchment: the subject-matter of the law to be protected from alteration in the usual way must be the constitution, powers or procedure of Parliament; and the protection offered to it must count either as a ‘manner and form’ rather than as a substantive limit on Parliament’s powers or, alternatively, be a referendum of the people. The Bracks Government’s attempts at entrenchment in 2003 travelled well beyond what the law permits, as demonstrated in the analysis just referred to. An example of what simply cannot be permitted

<sup>4</sup> See *Electoral Boundaries Commission Act 1982* (Vic) s 5(1).

<sup>5</sup> The final voting figures before the distribution of preferences were: Coalition 43.2% (21 seats); ALP 35.3% (16 seats); Greens 12.0% (3 seats); DLP 2.3% (no seats); others 7.1% (no seats); Nick Economou, ‘Political Chronicles: Victoria July to December 2010’, (2011) 57(2) *Australian Journal of Politics and History* 296, 303.

<sup>6</sup> Leaving aside, perhaps, the provisions referred to in s 51(xxxvi), a refinement that need not detain us here.

<sup>7</sup> *McCawley v The King* [1920] AC 691.

<sup>8</sup> Taylor, above n 1, ch. 9.

is pt VII of the *Victorian Constitution*, which, in conjunction with ss 18(2)(fa) and 18(2)(h), is stated to require water services to remain in public hands unless three-fifths of the members of each House vote for privatisation. However great the demerits of water privatisation may be, it is legally not possible for any side of politics to eliminate anyone else's capacity to implement policies unless it wins some arbitrary figure of the vote that is well above half. It requires no imagination to work out what would be done by both sides of politics if the law were otherwise: each side would attempt to have its dearest principles protected forever from amendment by democratic means.

There are many other purported entrenchments, some a less flagrant attempt at having the Labor Party's own policy preferences made unalterable than that just referred to, which also are ineffective because they did not – and having regard to their subject-matter could not possibly – comply with the applicable rules mentioned above. The changes of 2003 were, however, effective entrenchments to some extent, and certainly effective to prevent the alteration of the above-mentioned 'eight by five' system for the election of the Legislative Council without a referendum of the electors – which would be expensive, and must have an uncertain outcome. The entrenchment of this arrangement was a foolish step in advance of any experience of its operation. Few human systems work exactly as their designers expect, and this one should have received a trial before being thus entrenched.

It was also foolish to protect some other provisions by (effective) entrenchments – in particular the number of members of each House. While this entrenchment complies with the rules governing the validity of entrenchments and is therefore legally effective, this does not make it a good idea. It may well be difficult to persuade Victorians that the number of politicians ever needs to be increased, even in a couple of decades when the population to be represented will have increased greatly and each member of Parliament is required to service many more electors than is the case now.

On the broader issue of principle, views legitimately differ on the wisdom of immunising constitutional provisions from change. One view is that it is almost always unwise, as an attempt by the present to rule the still-unknown future from the grave. On the other hand, basic principles are unlikely to vary over time, and should, it may be argued, be protected from hasty change. Something may also depend on a variety of variables, such as the nature of the provision, the political culture of the polity concerned, the opportunities for amendments to be held invalid by judicial means and many other things.<sup>9</sup>

But even those who tend to favour rigidity might blanch at some of the entrenchments of the Bracks Government. Alongside the attempted but ineffective entrenchment of mere policy preferences as distinct from politically neutral principles of constitutional law just referred to, other effective entrenchments were trivial indeed, such as that of the provision<sup>10</sup> that a formal message of recommendation for all appropriation Bills must be provided by the Governor to the Legislative Assembly. There was no need for that to be done, for that requirement is a hangover from the days before the modern party and was designed to prevent the House's approval of irresponsible proposals for expenditure on the part of private members. There is no danger of that in today's world when tight party discipline means that nothing can get past the Legislative Assembly without the government's support.<sup>11</sup>

It should also be mentioned that, in passing these entrenchments, the government used to the full the loophole in the law that enables effective entrenchments to be passed by Parliament without passing them first through the proposed method of entrenchment. In other words, no referendum was required to confirm provisions of the *Victorian Constitution* before they were subjected to a requirement that they could not be changed without a referendum.<sup>12</sup> Indeed, there was very little public debate over the proposed changes to the *Victorian Constitution* at the time, and not because of any reluctance on the part of the government to publicise

<sup>9</sup> Jeffrey Goldsworthy, 'Questioning the Migration of Constitutional Ideas: Rights, Constitutionalism and the Limits of Convergence' in Sujit Choudhry (ed), *The Migration of Constitutional Ideas* (Cambridge University Press, 2006) 115, 120.

<sup>10</sup> *Constitution Act 1975* (Vic) s 63 ('*Victorian Constitution*').

<sup>11</sup> Taylor, above n 1, 362f.

<sup>12</sup> It has been argued that the Queensland Constitution has now, by inadvertent drafting, come to contain this requirement: Anne Twomey, 'Keeping the Queen in Queensland: How Effective is the Entrenchment of the Queen and Governor in the Queensland Constitution?' (2009) 28(1) *University of Queensland Law Journal* 81, 99f. Unfortunately the drafting of the *Victorian Constitution* s 18 is different, and the argument cannot be used here.

the entire package, which it considered, largely correctly, to be beneficial. Rather, the public seemed more preoccupied with the war in Iraq.<sup>13</sup>

In its defence, the government would plead that the Kennett years had shown the need for stronger constitutional safeguards that could not be overridden by temporary majorities in Parliament. The Constitution Commission had referred<sup>14</sup> to this need, but suggested that the *Victorian Constitution* should be put to the people for their approval before being made rigid – something which was very conspicuously not done.<sup>15</sup> Leaving aside that option, which is certainly not one that would come without its own difficulties, there is certainly much to be said for greater rigidity for basic principles, but more caution and discrimination should have been exercised in 2003. To the extent that the entrenchments are effective, Victoria has gone from the frying pan of a too easily amended constitution into the fire of a too rigid one.

#### IV DISPUTE RESOLUTION COMMITTEE

With the strengthening of the Legislative Council's democratic credentials by the Bracks Government there came, paradoxically enough, a weakening of its powers.<sup>16</sup> That may be explained by the need to have one legislative chamber, the Legislative Assembly, clearly predominant over the other, lest the process of maintaining a government should be impeded by competing claims to pre-eminence.

The headline reform of the period was the formal removal of the Legislative Council's power to block supply, although that had occurred de facto, through the introduction of semi-fixed terms for the two Houses (altered to fully fixed in 2003), much earlier.<sup>17</sup> The most significant change was the adoption of a formal process for the resolution of disputes about ordinary legislation that was slanted in favour of the Legislative Assembly. Nevertheless, the Legislative Council appears to have a significant delaying power and retains a sufficient level of power for it to be a serious house of review – no government wishes to have its plans delayed until after an election which it may or may not win. Speaking very generally, the Bracks reforms have so far proved to be well calibrated on this front and they have allowed the Legislative Council to perform a very useful role.

A Dispute Resolution Committee was created to attempt to reach a settlement on disputed Bills. If this fails, the Bill may be put to a joint sitting of both Houses in the following Parliament (after a general election) and is to count as approved if passed by a majority of the total number of members of both houses. An early election may be called to speed up the process, but it is not compulsory. Thus, a Premier who wins even an election held in the ordinary course may attempt to override the upper House's veto exercised in the previous Parliament by convening a joint sitting, and will win unless in possession of an unusually small majority in both Houses. But as the Brumby government was in office for only one term under the arrangements here described, the opportunity to take advantage of its own system in a second term and hold a joint sitting was denied to it. The following government, the Baillieu/Napthine Government, also lasted for only one term, so these arrangements were again not put to the test.

Furthermore, during its single term under the new arrangements the Bracks/Brumby regime shared power in the upper House with another left-wing party, the Greens, and the succeeding Liberal Government of 2010 – 2014 had a majority there. Thus, the opportunities for the Dispute Resolution Committee to function and for the system to be tested have not been great. In the last term of the Bracks/Brumby Government, the Committee considered only three Bills. All of them made it to the statute book after successful dispute resolutions<sup>18</sup> – in each case thanks to the combined votes of the two major parties over the dissent of the Greens – but two problems were revealed with the process. It was noticeable, though, that the government chose not to opt for delay and take the risk of not being re-elected, but rather compromised on the Bills in

<sup>13</sup> Nick Economou, 'Political Chronicles: Victoria January to June 2003' (2003) 49(4) *Australian Journal of Politics and History* 575, 576.

<sup>14</sup> Constitution Commission, above n 3, 70.

<sup>15</sup> This is correctly argued to be an abuse of power by Jeffrey Goldsworthy and Thomas Roszkowski, 'Symmetric Entrenchment of Manner and Form Requirements' (2012) 23(3) *Public Law Review* 216.

<sup>16</sup> As well as the faintly ridiculous and unenforceable plea in the *Victorian Constitution* s 16A.

<sup>17</sup> Taylor, above n 1, 55.

<sup>18</sup> *Planning Legislation Amendment Act 2009* (Vic); *Planning and Environment Amendment (Growth Areas Infrastructure Contribution) Act 2010* (Vic); *Transport Legislation Amendment (Ports Integration) Act 2010* (Vic).

question in order to see them on to the statute book within the one term. The delaying power is indeed a serious weapon in the hands of the Legislative Council.

The first difficulty revealed by the operation of the new system is that no resolution has yet been found for the claim of the Legislative Council that a Bill that has been rejected by it has ceased to be a Bill and, no longer being a disputed or any other type of Bill, accordingly cannot be referred to the Dispute Resolution Committee. This is not a meritorious claim, for it would go a long way towards frustrating on a technicality the clear intention of the scheme of the *Victorian Constitution* for the resolution of disputes between the Houses.<sup>19</sup> It is not in accordance with the definition of 'disputed Bill' in s 65A of the *Victorian Constitution*, which says nothing about any means by which a Bill could wholly cease to be a Bill. If taken to its logical conclusion, this view would mean that a Bill that had passed the Assembly would cease to be a Bill there also, which would be absurd. The Speaker of the Legislative Assembly has ruled against it<sup>20</sup> – correctly, in the view of the present author. However, nothing can compel the Legislative Council to give way on this point unless there is an amendment to the *Victorian Constitution* to clarify the point – which would also require a referendum given that this process is also entrenched – or the courts rule on the point. The latter step is not likely unless a Bill is passed at a joint sitting and then challenged, or an early election is called on a deadlocked Bill and someone seeks an injunction to prevent the election on the grounds that the constitutionally prescribed occasion for an early dissolution has not arisen.<sup>21</sup>

Secondly, dissent was expressed by the Liberal Party in the Legislative Council from the rule that the Dispute Resolution Committee must always meet in private.<sup>22</sup> This rule (like the process as a whole) can be found as a suggestion in the Constitution Commission's report,<sup>23</sup> possibly in the hope that it would help to break the hold of the party line on the Committee's members, but it was quite unnecessary for it to be prescribed by statute rather than standing orders, let alone a statute that cannot be changed except by referendum. It may well be that meeting in private is usually the best course to encourage free debate, but it is not inevitable that this will always be so. This problem is much more easily remedied if there is a will to do so, however. It would be very easy for a sub-committee of the Dispute Resolution Committee to be formed consisting of all its members, which could then meet as it wished.

## V BREACHES OF THE RULE OF LAW

It merely underlines the courage of the Bracks Government in creating an upper house with a serious culture of review of government actions and decisions that a serious and prolonged clash with the Legislative Council did come – not about legislation, but the production of documents and witnesses. Nevertheless, the government's reaction was to break the law, something that can hardly be praised. Executive defiance of the law is a most grave matter: it is a breach of the rule of law.

At first the argument concentrated on the demand for certain documents by a committee of the Legislative Council investigating the allocation of public lotteries licenses, a demand that was unarguably within its powers. When the government failed to comply, the largely symbolic step was taken of finding the Treasurer guilty of contempt of the House and suspending him from membership of the House for some hours. The government refused to consider engaging in the process, provided for by the Council's rules and analogous to that in New South Wales, for the vetting by an independent arbiter of claims of confidentiality that, as a matter of good government rather than strict law, should be allowed to prevail over the Council's powers. Given that this offer would have granted to the executive more than it is entitled to, having regard to the extent of the Council's legal powers, it should have been accepted.<sup>24</sup> Then, in 2010, during the Windsor Hotel affair, the Council demanded the production of a witness who was a media adviser to the Planning

<sup>19</sup> Cf *Clayton v Heffron* (1960) 105 CLR 214, 242.

<sup>20</sup> Victoria, *Parliamentary Debates*, Legislative Assembly, 11 August 2009, 2549-71.

<sup>21</sup> Sections 65E(4) and 65G(9) of the *Victorian Constitution* might also prevent the Court from determining the issue dealt with in the text. The effect of those provisions is beyond the scope of this discussion.

<sup>22</sup> Victoria, *Parliamentary Debates*, Legislative Council, 2 September 2009, 4318-26.

<sup>23</sup> Constitution Commission, above n 3, 59. Standing Order 12.20 of the Legislative Council now expressly permits the Council's representatives on the Committee to report the Committee's deliberations to the Council.

<sup>24</sup> Greg Taylor, 'Parliament's Power to Require the Production of Documents: A Recent Victorian Case' (2008) 13 *Deakin Law Review* 17.

Minister and the immediate source of a proposal for a sham process of consultation.<sup>25</sup> This was refused on the basis of a completely fictional ‘convention’ or unwritten rule of the constitution supposedly immunising ministerial staff from subpoenas to appear before parliamentary committees.

I have dealt with that incident, also, in another place.<sup>26</sup> Here it suffices to point out that the overarching difficulty is twofold. First, the enforcement of demands by the Council either for documents or witnesses is not confided to the courts, but rather is a matter for the House itself, which in turn results in the question becoming bogged down in claims of political partisanship with no clear and final arbiter of the law in place of the courts. Second, it is often thought that oppositions are reluctant to push the matter too hard lest they provide a precedent against themselves when next in government. There is a further difficulty in relation to demands for the appearance of ministerial advisers at committee hearings, namely that it is thought unfair to punish them, although clearly guilty of contempt, for acting according to the directions of the Minister.

Nevertheless, executive defiance of the law is a shocking thing. Many centuries of constitutional effort have been put into ensuring that the executive cannot claim to be above the law, and to ensure that mechanisms are in place to subject it to the law. It is rather depressing to see that, at the first opportunity, the executive gleefully evades the law with the most threadbare of legal arguments that even those who are putting them forward can hardly make with a straight face. It does nothing to lift one’s depression to find that, despite suggestions in high places by the present author, nothing has yet been done to ensure that it does not happen again. A variety of remedies would be available, such as a statute stating the law in unmistakable terms and the provision of criminal penalties, enforceable by the courts, for disobedience of an order of the House.<sup>27</sup>

The only comfort in relation to the media advisers – and it is not a small one – is that the government’s defiance merely prolonged the publicity given to the Windsor Hotel affair and gave even further weight to impressions that it had something to hide. It would probably have been better, even aside from the imperative to obey the law, to have released the documents and thus got the pain over quickly. The government merely ensured, by its defiance of the law, that it was subjected to months of pain. As an exercise of ‘soft power’, the Council’s demand for the witness accordingly achieved its political goals. The day for the vindication of its legal powers will come.

## VI OTHER MATTERS RELATING TO PARLIAMENT

Constitutional trivia buffs will note the issue of a writ of *supersedeas* by the Speaker on 14 September 2010 to cancel a by-election writ. The circumstances were that a member of Parliament resigned close to the election of 2010 with the apparent intention of embarrassing his party and causing a by-election only two weeks before the general elections were due. This stunt, which perhaps retrospectively suggests reasons why the member in question had lost his party’s preselection in the first place, was foiled by the issue of *supersedeas*.<sup>28</sup> Given the obvious potential for abuse, it would however be advisable if this power were abolished and by-elections could be cancelled only with the consent of the Leader of the Opposition, or by a special majority of the House<sup>29</sup> or some other such mechanism.

History was also made in the upper house by dispensing with by-elections not just on a single occasion, but permanently. The first joint sitting to fill a casual vacancy in the Legislative Council occurred in February 2009.<sup>30</sup> Proportional representation does not lend itself to by-elections for single seats, and the Senate’s method of filling casual vacancies was adopted for the new Legislative Council along with its voting system.

<sup>25</sup> For further information on this controversy, see Nick Economou, ‘Political Chronicles: Victoria January to June 2010’ (2010) 56(4) *Australian Journal of Politics and History* 643, 648.

<sup>26</sup> Greg Taylor review of Ian Killey, ‘Constitutional Conventions in Australia: An Introduction to the Unwritten Rules of Australia’s Constitutions’ (2010) 31(2) *Adelaide Law Review* 271. There is a recent comprehensive analysis of this topic in Yee-Fui Ng, *Ministerial Advisers in Australia: The Modern Legal Context* (Federation Press, 2016) ch 4.

<sup>27</sup> There are Australian precedents for this: *Criminal Code Act 1995* (Qld) s 58 and *Criminal Code Act 1913* (WA) s 59. Barry Wright, ‘Criminal Law Codification and Imperial Projects: The Self-Governing Jurisdiction Codes of the 1890s’ (2008) 12(1) *Legal History* 19, 46 states that the origin of these provisions is the law of New York.

<sup>28</sup> Victoria, *Parliamentary Debates*, Legislative Assembly, 14 September 2010, 3639; Economou, ‘Victoria July-December 2010’, above n 5, 298-303.

<sup>29</sup> Such a provision would require the passage of a resolution rather than legislation for the cancellation of a by-election, and thus would not be subject to the restrictions on entrenchment mentioned earlier.

<sup>30</sup> Nick Economou, ‘Political Chronicles: Victoria January to June 2009’ (2009) 55(4) *Australian Journal of Politics and History* 599, 603.

Although this system often works smoothly and as intended, there are good reasons to think that a better system should have been found, for this method of filling casual vacancies too frequently allows for blockades by the other side. In 1987 the Labor Party had itself been the victim of this at federal level. Under s 15 of the *Commonwealth Constitution*, casual Senate vacancies are filled by the State Parliaments, and when the Liberal Premier of Tasmania objected to the political stance of a Labor nominee on a particular question he argued that the Tasmanian Parliament was entitled to refuse to appoint him to the casual vacancy on that basis. This was, of course, completely contrary to the intent behind s 15 of the *Commonwealth Constitution* as amended in 1977, and the Premier's action was heavily criticised. Indeed, the Federal Liberal Party arranged a 'pair' to make up for the missing ALP Senator.<sup>31</sup> In 2016 the Victorian ALP lowered itself to using this device against the Liberal Party at State level. After the six-month suspension of yet another Labor Minister for refusal to provide documents to the Legislative Council (which had finally begun to take the enforcement of its powers in this respect seriously)<sup>32</sup> the ALP retaliated by refusing to hold a joint sitting to replace a Nationals MLC who had resigned in order to stand for Federal Parliament. The would-be MLC thereupon even went to the extreme of commencing and duly losing clearly hopeless litigation in order to attempt to force a joint sitting, for Parliament's internal workings are not subject to the supervision of the courts.<sup>33</sup> The matter was, however, quickly resolved thereafter because the ALP's Senator Stephen Conroy suddenly resigned, also necessitating a joint sitting of the Victorian Parliament under s 15 of the *Commonwealth Constitution*, and it became clear enough that the ALP would not succeed in having the departed Senator replaced if they did not replace the other side's departed MLC.

Reflecting on the federal experience of 1987, the ALP reformers of the *Victorian Constitution* in 2003 should have considered, at least, whether a time limit should have been put on the holding of a joint sitting to prevent this sort of thwarting of the balance of parties created by the voters at the election. Admittedly it is hard to think of an enforcement mechanism which could be put in place against Parliament should a time limit be breached, and nothing could force the members at a joint sitting positively to vote for any candidate nominated by the political party concerned, but a time limit would usually be obeyed, and the consequent actual holding of the joint sitting would exert powerful political pressure on a recalcitrant party to co-operate in the process. An even more radical option would be to cut out the middleman and allow an authorised and predetermined office-holder of the political party to nominate the replacement directly by some formal mechanism. Some people might object, however, to the symbolic aspect of allowing parties to appoint members to Parliament without even the fig-leaf of democratic legitimacy constituted by an appointment by the elected Parliament.

As far as the remaining opportunities for Victorians to cast their votes are concerned, pt 12 of the *Electoral Act 2002* (Vic) followed the federal lead of two decades earlier and introduced the public funding of political parties at State level. From February 2006, the Legislative Council experimented with an all-purpose Legislation Committee with a view to improving the scrutiny of legislation.<sup>34</sup> Its establishment looked forward to the reconstitution of the Council at the end of 2006 on the basis of proportional representation following the Bracks Government's reforms. A full analysis of the work of the Legislation Committee is yet to appear, but the half-dozen Bills it considered over its life of just over a single Parliament indicate that it did a modicum of useful work in combining the flexibility of the committee stage with the capacity to call witnesses.

At all events, the Council (just before the election of the Baillieu Government with its majority in the Council) was sufficiently satisfied with the experiment of the Legislation Committee that it decided that there should be three of them: one for Economy and Infrastructure; one for Environment and Planning; and one for Legal and Social Issues, in each case matched with a general-purpose committee for conducting enquiries

<sup>31</sup> On this incident, see 'Australian Political Chronicle January – June, 1987' (1987) 33(3) *Australian Journal of Politics and History* 279, 288.

<sup>32</sup> See Nick Economou, 'Political Chronicles: January – June 2016' (2016) 62(4) *Australian Journal of Politics and History* 620, 620–21.

<sup>33</sup> *O'Sullivan v Andrews* [2016] VSC 560 (21 September 2016).

<sup>34</sup> On other reforms to the procedures of the Council at this time, see Stephen Redenbach, 'Radically Revising the Rules?: Victoria's Legislative Council 2003–2006' (2007) 22(2) *Australasian Parliamentary Review* 90.

unrelated to pending legislation. The single Legislation Committee had not been extensively used, and this structure, based on that of the Federal Senate,<sup>35</sup> might permit the greater exploitation of the idea of legislative committee hearings. It is heartening to see such effort being put into the creation of an effective structure for conducting legislative scrutiny, but given that the new arrangement commenced in the Parliament elected at the end of 2010, in which the government had a majority in the Council, for a few years it would not bloom as much as its authors hoped.

## VII CHARTER OF RIGHTS

As is frequently stated, Australia is the only developed Western democracy without a national bill or charter of rights. This does not necessarily mean that Australia is wrong, merely that it is different. While no-one today would dispute the need for human rights to be respected, there are good arguments both for and against the adoption of a charter of rights – particularly one that radically changes the traditional balance between the unelected judiciary and Parliament, under which the former, as a rule, carries out the law enacted by the latter and does not consider objections to the making of the law itself except those based on federal considerations or deficient process.

But even those who, like the present author, believe that the arguments against a charter of rights are very weighty should welcome the enactment of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) ('*Charter*'). It is very right and proper that the functioning of a charter of rights should be tested in the Australian context. Victoria (alongside the ACT)<sup>36</sup> has selected itself as the testing ground for this innovation.

In Victoria the project was largely one of the Attorney-General of the Bracks/Brumby era, Rob Hulls, who in 2006 took the opportunity of the last months of the old, pre-proportional-representation Legislative Council, in which the government had a secure majority, to ensure the passage of the *Charter* without undue difficulty or discussion. There would have been no harm in taking the idea to the election held at the end of 2006, but this view clearly did not prevail. Instead, a consultation committee, headed by a known proponent of human rights charters, was formed and rather predictably recommended the enactment of the *Charter*.<sup>37</sup>

This is a very large topic and one to which justice cannot be done in the space available here.<sup>38</sup> It should be said, however, that the consultation committee recommended a form of charter that was suited to a trial period, namely one of only medium strength, and not entrenched in any way (even if this were possible in accordance with the principles discussed earlier). In particular, the courts were not empowered to invalidate legislation found to be incompatible with rights, but merely to announce by the making of an unenforceable declaration that it was so incompatible and thus call upon Parliament to remedy the problem. (This mechanism was borrowed from the United Kingdom's legislation).<sup>39</sup> The right to damages for a breach of the *Charter* was also expressly ruled out by it.<sup>40</sup>

So far only one such declaration has been made; it was set aside on appeal to the High Court of Australia.<sup>41</sup> The very long and complicated decision of that Court concluded that the legislation under challenge could be interpreted by ordinary methods, without any resort to the *Charter*, to ensure that the human right in question – the right to be presumed innocent – was adequately protected. The Court also confirmed the constitutional validity of the *Charter*, including the provision for declarations that statutes are incompatible with it, by a narrow margin. The impact of the *Charter* on other areas of Victorian law has also been very minimal.<sup>42</sup>

<sup>35</sup> Legislative Council Standing Orders Committee (Vic), *Final Report on the Establishment of New Standing Committees for the Legislative Council* (2010).

<sup>36</sup> *Human Rights Act 2004* (Vic).

<sup>37</sup> The process is described by George Williams, 'The Victorian Charter of Human Rights and Responsibilities: Origins and Scope' (2006) 30 *Melbourne University Law Review* 880.

<sup>38</sup> Discussions may be found, for example, in George Williams, *A Charter of Rights for Australia* (University of New South Wales, Press, 2007).

<sup>39</sup> See further R M W Masterman, 'Interpretations, Declarations and Dialogue: Rights Protection Under the *Human Rights Act* and *Victorian Charter of Human Rights and Responsibilities*' [2009] *Public Law* 112.

<sup>40</sup> *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 39(3) ('*Charter*').

<sup>41</sup> *R v Momcilovic* (2010) 25 VR 436; (2011) 245 CLR 1.

<sup>42</sup> The question is canvassed in the Scrutiny of Acts and Regulations Committee (Vic), *Review of the Charter of Human Rights and Responsibilities Act 2006* (2011) ch 4. The Baillieu Government decided not to act upon the recommendations for amendment of



## VIII THE CROWN

The failure of the referendum to convert Australia into a republic occurred early during the period under review. This was largely a national issue, but it had one effect on Victorian politics.

Under s 7(5) of the *Australia Act 1986* (UK) and *Australia Act 1986* (Cth), formal, binding advice to the Queen on the appointment and dismissal of the State Governors is to be given to Her Majesty by State Premiers (a provision that does not, however, preclude them from consulting anyone else about the topic). When the Bracks Government came to power, the Governor of Victoria was Sir James Gobbo, who had been appointed under the Kennett Government. There is no formal term of office for State Governors; they are appointed during Her Majesty's pleasure. However, an informal arrangement for a five-year term has become commonly accepted. Sir James, however, was initially appointed for four years only, pending the result of the referendum on the proposed republic, and the Bracks government declined to advise the Queen to extend his term for a further year despite a desire to that effect entertained by Sir James. This step was taken partly because he was perceived as too closely connected with the Liberal Party.<sup>43</sup>

Criticism of this decision was further blunted by the inspired appointment of John Landy in place of Sir James Gobbo. No-one could have accused the Bracks Government of making an unsuitable appointment or installing a 'mate'. And it was not as if the non-renewal of the Governor's term came in the midst of some constitutional crisis in which a 'mate' was needed in the highest office. Nevertheless, the general political situation must have played a role in the government's decision. While Sir James had correctly abstained from meddling during the difficult transition of 1999, until it won a majority in its own right in the elections of 2002 the government remained vulnerable to sudden reversals of fortune that might have raised questions about the use of the Vice-Regal reserve powers. It is probably fair to say that the government is entitled to have in the office of Governor a person whose political neutrality it does not, rightly or wrongly, distrust.

After John Landy's regulation five-year term finished in 2006, Professor David de Kretser became Governor. Both men kept the required low profile and confined themselves to good works and, as far as their public utterances were concerned, to 'governor generalities', as a former Governor-General of Canada memorably described them.<sup>44</sup> Perhaps the only exception was the occasional expression of the view by Professor de Kretser, a medical graduate, that the debate on 'climate change', a politically controversial issue, was not of sufficiently high standard for his liking, but given his own lack of personal expertise on the question and otherwise low profile, little attention was paid to this view.

The Governor's deputy in Victoria is the Lieutenant-Governor. In the early days the practice had grown up, in Victoria as in other jurisdictions, of appointing the Chief Justice as Lieutenant-Governor, but this had been abandoned more recently. The Lieutenant-Governor of Victoria from 2001 to 2006 was Lady Southey, and before that the role was filled by Professor Adrienne Clarke. On the changing of the guard from Landy to de Kretser, the decision was also taken, surprisingly, to reinstate the earlier tradition of the Chief Justice as Lieutenant-Governor. This means that the Chief Justice will, on occasion, act as the Governor, the nominal head of the executive government. Separation-of-powers purists cannot have been amused, and there is potential for the roles to be confused in the public mind. Given that the position carries no remuneration, it is also a shame to deprive one other person of a share in the glory in Victoria. But under modern conditions – rapid travel, easy communication and a merely vestigial Vice-Regal role – there is even less likely to be any serious practical problem with this arrangement than there was in earlier times; yet there remain good constitutional arguments that it may be invalid and/or undesirable.<sup>45</sup>

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the *Charter* in this report. See also *Travel Sisters* [2009] VCAT 2427 (17 November 2009); Stephen Tully, 'Kracke v Mental Health Review Board' [2009] VCAT 646 (2009) 16 *Australian International Law Journal* 289.

<sup>43</sup> Nick Economou, 'Political Chronicles: Victoria July – December 2000' (2001) 47(2) *Australian Journal of Politics and History* 258-259.

<sup>44</sup> John Buchan, *Canadian Occasions: Addresses by Lord Tweedsmuir* (Hodder & Staughton, 1940) 63.

<sup>45</sup> Matthew Stubbs, 'The Constitutional Validity of State Chief Justices Acting as Governor' (2014) 25 *Public Law Review* 197.

## IX THE JUDICIARY

Again lovers of constitutional trivia will note, and perhaps mourn the passing of the grand jury from the law of Victoria. The grand jury as a means of initiating private prosecutions which the State had refused to sponsor was included as a control mechanism in various iterations of the *Crimes Act 1958* (Vic) until finally deleted by the *Criminal Procedure Act 2009* (Vic).<sup>46</sup> It was very little used except by the occasional crank.<sup>47</sup> A South Australian Judge in the 19<sup>th</sup> century, himself a crank of the first order and ultimately dismissed for misconduct, had been willing to put forward the view that the grand jury was such a basic constitutional safeguard that ‘honest and wise persons in England would not bring their families out to a place’ which lacked it, for without it Englishmen would be ‘reduced to the state of subjects in the country of Italy.’<sup>48</sup> This is not the view taken today, and in 2009 the grand jury died unlamented in Victoria, its last Australian bastion.

Whatever its defects on other rule-of-law fronts may have been, the Bracks/Brumby Government, through its Attorney-General, Rob Hulls, was not one to criticise the judiciary or otherwise infringe the doctrine of separation of powers. Indeed, Mr Hulls could be found, even in an election year, publicly defending the judiciary from precipitate criticism of decisions on that perennial favourite, sentencing.<sup>49</sup>

During the period under review, the most important event for the personnel of the judicial branch was the appointment of Marilyn Warren as Chief Justice. Early on in the period, Chief Magistrate Michael Adams resigned after accusations of offensive behaviour towards his colleagues.<sup>50</sup> A pay dispute with the Judges, who were falling behind the rates to be had in comparable jurisdictions, was settled amicably by the *Judicial Salaries Act 2004* (Vic). A plan to appoint Acting Judges in order to help with the judicial workload was largely abandoned when the Judges objected as it might compromise judicial independence to have judicial officers who were dependent for their re-appointment on the executive’s favour; thus Victoria set a far better model than New South Wales.<sup>51</sup>

Although not strictly a judicial matter, a reaction to the Kennett years was constituted by the inclusion in the *Victorian Constitution* of provisions<sup>52</sup> protecting the independence of the Director of Public Prosecutions, Ombudsman, Electoral Commissioner and Auditor-General. The attempt was also made to entrench these provisions, but it is ineffective in accordance with the legal limitations on Parliament’s capacity to do this mentioned earlier. However, such provisions, including their entrenchment, may have a moral force to some, as yet unascertainable extent.

As far as the dismissal of Judges is concerned, a formal process involving the creation of an expert investigating committee was inserted into the *Victorian Constitution* as a means of informing and confining the discretion of the final decision-makers, the Crown and the two Houses of Parliament.<sup>53</sup> This was a desirable reform, but it may be hoped that it is a long time before it is tested by experience of its operation.

Unfinished business related to the legal system from the period of the Bracks/Brumby government was substantial: the creation of an anti-corruption commission, promised by that government after a late-term reversal of policy but not enacted before the election;<sup>54</sup> the related but different topic of an official judicial complaints commission, which also was proposed in 2010 but not made law before time ran out;<sup>55</sup> and the creation of a system for staffing and administering the courts that is less open to the influence of the executive,

<sup>46</sup> *Crimes Act 1958* (Vic) ss 354, 351; *R v Nicola* [1987] VR 1040, 1045; On the history of this provision see Elise Histed, ‘The Introduction and Use of the Grand Jury in Victoria’ (1987) 8(2) *Journal Legal History* 167.

<sup>47</sup> *Re Shaw* (2001) 4 VR 103.

<sup>48</sup> ‘Law and Criminal Courts: [Before Mr Justice Boothby] *R v Michael O'Donnell*’, *The South Australian Register* (Adelaide) 23 May 1866, 3. For Sir Redmond Barry’s view, see Sir Redmond Barry, *Address on the Opening of the Circuit Court at Portland* (B. Lucas, 1852) 7.

<sup>49</sup> Julia Medew, ‘Mercy for Drink-Driver Outrages Families’ *The Age* (Melbourne), 11 February 2006, 5.

<sup>50</sup> Economou, ‘Victoria: July to December 2000’, above n 43, 260.

<sup>51</sup> Report of the Supreme Court for 2002–2004, 5; Nick Economou, ‘Political Chronicles: Victoria January to June 2005’ (2005) 51(4) *Australian Journal of Politics and History* 590, 594.

<sup>52</sup> *Victorian Constitution* pt IIIA, pt V div 3 and pt VA.

<sup>53</sup> *Ibid* pt IIIA.

<sup>54</sup> Economou, ‘Victoria: January to June 2010’, above n 25, 647.

<sup>55</sup> Victoria, *Parliamentary Debates*, Legislative Assembly, 5 October 2010, 5085.

on the South Australian model.<sup>56</sup> These reforms were taken up, in one form or another, in the following Parliament by the Liberal government that succeeded it, and in the one after by the next Labor government.<sup>57</sup>

## X CONCLUSION

The constitutional legacy of the Bracks/Brumby government will endure. It set a bad example in its relations with the upper House, but on the whole its legacy is a positive one. Victoria emerged from the period 1999 to 2010 with a Constitution that was significantly improved, but far too rigid and largely incapable of responding to many future ideas for further improvements, and to future challenges, without going through unduly expensive and cumbersome procedures.

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<sup>56</sup> Marilyn Warren, 'What Separation of Powers?' (2005) 31(1) *Monash University Law Review* 1.

<sup>57</sup> *Independent Broad-Based Anti-Corruption Commission Act 2011* (Vic); *Court Services Victoria Act 2014* (Vic); *Judicial Commission of Victoria Act 2016* (Vic).

