

## CHAPTER 1

### THE NEW SOUTH WALES SYSTEM OF GOVERNMENT

New South Wales is a parliamentary democracy based on the rule of law. The rule of law is the principle that governmental authority is legitimately exercised only in accordance with written, publicly disclosed laws enacted by the Parliament and the Sovereign and enforced in accordance with established procedure. The principle is intended to be a safeguard against arbitrary governance.

New South Wales is also a constitutional monarchy. The power to enact laws under the *Constitution Act 1902* is vested in the Legislature of New South Wales, which consists of the Crown, represented by the Governor of New South Wales, and the two Houses of Parliament: the Legislative Council and the Legislative Assembly. In turn, executive authority under the *Constitution Act 1902* is formally vested in a Governor, as representative of the Queen. In practice, the Governor exercises executive authority on the advice of the Premier and the Cabinet through the Executive Council. The Premier and ministers are appointed by the Governor, and hold office by virtue of their ability to command the support of a majority of members of the Legislative Assembly.

The two Houses of Parliament are elected by the people through a system of representative government. Hence, while every Act of the Parliament of New South Wales is carried out in the name of the Crown, the authority for those Acts flows from the people of New South Wales. Political parties play a crucial role in the New South Wales representative system of government. Parties are organisations, bound together by a common ideology or other ties, which seek political power to implement their policies. The competition for power is ongoing, but is ultimately decided at parliamentary elections.

Relations between the legislature and the executive (the Premier and ministers) are governed according to the system of responsible government, a form of parliamentary governance based on the model of the Palace of Westminster in the United Kingdom, known or referred to as the Westminster system. Under this system, a formal separation of powers between the legislature and the executive is

not observed, as it is in countries such as the United States of America. Rather, in New South Wales, the executive is formed out of members of either House of Parliament and is subject to the scrutiny and control of the Parliament.

## THE RULE OF LAW

At its heart, the rule of law is the principle that every person – regardless of their rank, status or office – is subject to the same law and the same legal and judicial processes. Just as citizens must obey the law, so must governments. Neither the sovereign, the sovereign’s representatives, nor government officials are above the law, and they cannot rule or act with arbitrary power.

In the most basic sense, the rule of law attempts to protect the rights of citizens from arbitrary and abusive use of government power.

Although the principle of the rule of law is not enshrined in the New South Wales Constitution or the Commonwealth Constitution or any other legislation, it is fundamental to the State’s and the nation’s system of government.

## A FEDERAL SYSTEM

Australia is a federation. The Commonwealth of Australia was formed when six British colonies – New South Wales, Victoria, Queensland, South Australia, Western Australia and Tasmania – joined in a federation in 1901 under the Commonwealth Constitution.<sup>1</sup>

The Commonwealth Constitution sets out the distribution of legislative power between the Commonwealth and the States. Broadly speaking, the Commonwealth Constitution confers express legislative power on the Commonwealth Parliament, with residual power belonging to the States.

The main Commonwealth powers are found in section 51 of the Commonwealth Constitution, which contains 39 separate heads of power, together with a small number of additional powers in section 52. Some of the crucial Commonwealth legislative powers are section 51(i) – the power over trade and commerce with other countries and amongst the States; section 51(ii) – the taxation power; section 51(vi) – the defence power; section 51(xx) – the corporations power; and section 51(xxix) – the external affairs power.

Some section 51 powers are exercised exclusively by the Commonwealth, together with section 52 powers. However, the majority of section 51 powers are concurrent powers, in the sense that they may also be exercised by the States.

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1 The Constitution of the Commonwealth of Australia was enacted as a section of the *Commonwealth of Australia Constitution Act 1900 (Imp)*, an Act of the Parliament of the United Kingdom. The Constitution came into force on 1 January 1901.

Traditionally, the Australian States have been responsible under the Commonwealth Constitution for law-making in areas such as education, health, law and order, and transport. However, in recent years, federal governments have increasingly moved into areas of traditional State responsibility. This is discussed in more detail in Appendix 1.

## A CONSTITUTIONAL MONARCHY

New South Wales is a constitutional monarchy. A constitutional monarchy is a form of government established under a constitutional system which acknowledges an elected or hereditary Monarch as head of state. In New South Wales, executive authority is vested in the Queen, represented by the Governor of New South Wales. However, while the Monarch is the head of state, other institutions of government, notably the Premier and Cabinet, exercise the executive power of government.

### The New South Wales Constitution

The New South Wales Constitution may be narrowly identified as the *Constitution Act 1902*. As such it is simply a New South Wales statute which provides, to a greater or lesser degree, for the system of government in New South Wales. However, the New South Wales Constitution extends beyond the terms of the *Constitution Act 1902*, and includes various other statutes and the common law. An example is the common law principle that the Houses of the New South Wales Parliament have such powers as are reasonably necessary for the proper exercise of their functions.<sup>2</sup>

The early institutions of government in New South Wales were established by Acts of the Imperial Parliament and Letters Patent:<sup>3</sup>

- The office of Governor was first established by Letters Patent on 12 October 1786.<sup>4</sup>
- The Executive Council was first provided for in 1825 by way of Letters Patent granting a new commission to Governor Darling.<sup>5</sup> Governor Darling appointed the first Executive Council on 20 December 1825 by proclamation.<sup>6</sup>

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2 Twomey A, *The Constitution of New South Wales*, The Federation Press, Sydney, 2004, p 25.

3 Letters Patent are a type of legal instrument in the form of an open letter issued by a Monarch granting an office, a right or status to someone or to some entity. In the United Kingdom, Letters Patent were issued under the Royal Prerogative and constituted a rare, if significant, form of legislation without the consent of Parliament.

4 Letters Patent, 12 October 1786. See *Historical Records of New South Wales*, Vol 1, Part 2, Government Printer, Sydney, 1893, p 24.

5 Letters Patent, 16 July 1825. See *Historical Records of Australia*, Series I, Vol 12, Australian Government Publishing Service, Canberra, 1919, pp 101-102.

6 Twomey, above n 2, p 1.

- The Imperial Parliament legislated in 1823 to authorise His Majesty, by Charters or Letters Patent, to establish a Supreme Court of New South Wales.<sup>7</sup> The Charter of Justice was issued in the form of Letters Patent on 13 October 1823, establishing the Supreme Court and appointing Francis Forbes as Chief Justice.<sup>8</sup>
- The first legislative body was established in New South Wales by an Imperial Statute of 1823, known as the *New South Wales Act*.<sup>9</sup> More details are provided in the following chapter.

Subsequently, in 1855, the *Constitution Act 1855*<sup>10</sup> established many of the remaining constitutional arrangements in place today, including a bicameral or two-house Parliament, comprising the Legislative Council and the Legislative Assembly.<sup>11</sup> It also provided for the appointment of public officers by the Governor on the advice of the Executive Council, except for those officers 'liable to retire from office on political grounds'.<sup>12</sup> These officers were the Colonial Secretary, Colonial Treasurer, Auditor-General, Attorney General and Solicitor General.<sup>13</sup>

The *Constitution Act 1855* was later repealed and replaced by the *Constitution Act 1902*. The new *Constitution Act 1902* 'did not establish a comprehensive constitutional scheme, or create new offices or institutions'.<sup>14</sup> It merely consolidated existing statutes relating to the Constitution of New South Wales which were brought into being before federation in 1901. For example, the legislative power conferred on the New South Wales Parliament by section 5 of the *Constitution Act 1902* was made expressly 'subject to the provisions of the Commonwealth of Australia Constitution Act'.<sup>15</sup>

Finally, in 1986, the Commonwealth Parliament, State Parliaments and the Parliament of the United Kingdom passed the *Australia Acts*, eliminating the remaining ties between the legislature and judiciary of Australia and their counterparts in the United Kingdom. In particular, the Acts resolved the anomalous power of the United Kingdom's Parliament to legislate over the individual Australian States, a

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7 4 Geo IV, c 96 (1823) (Imp), s 1.

8 Twomey, above n 2, p 2.

9 4 Geo IV, c 96 (1823) (Imp).

10 The *Constitution Act 1855* has a particular status. The Constitution Bill was introduced into the Council on 9 August 1853, reserved by the Governor on 22 December 1853 and sent to the United Kingdom for the signification of Her Majesty's pleasure. However, upon its receipt, the Constitution Bill, as passed by the Council and reserved by the Governor, was amended by the Westminster Parliament to remove certain provisions, before it was recorded as a schedule to an Imperial Act now known as the *Constitution Statute 1855*. It is thus somewhat doubtful whether the *Constitution Act 1855*, as curiously produced, was in strict legal order.

11 *Constitution Act 1855*, s 1.

12 *Constitution Act 1855*, s 37. See also s 51 and Sch B.

13 *Constitution Act 1855*, ss 18 and 51.

14 *Egan v Willis and Cahill* (1996) 40 NSWLR 650 at 658 per Gleeson CJ.

15 Twomey, above n 2, pp 23-24.

power that it had exercised since colonial times. The revamping of constitutional arrangements at both federal and State level required each State Parliament to pass its own enabling legislation. The New South Wales Parliament passed the *Australia Acts (Request) Act 1985* of New South Wales. Collectively the federal, State and British Acts were known as the '*Australia Acts*'.

The *Constitution Act 1902* makes reference to the following constituent parts of the New South Wales system of government:

- the Sovereign;
- the Governor;
- the Parliament, comprising the Legislative Council and the Legislative Assembly;
- the Executive Council;
- the Premier, ministers and parliamentary secretaries.

It is notable, however, that the Act is far from precise in defining some of the institutions of government of New South Wales. In particular, the Act does not make reference to the role or functions of Cabinet, which has no legal authority and operates by convention.

### *The Sovereign*

The *Constitution Act 1902* refers to 'His Majesty' or 'Her Majesty' throughout, depending on when the relevant provision was enacted. The Queen is now primarily confined to the role of formally appointing and removing the Governor, on the advice of the Premier, although she may exercise some executive powers while present in the State.<sup>16</sup>

### *The Governor*

The Governor is the representative of the Queen in New South Wales under section 7 of the *Australia Act 1986* (Cth). However, a curious aspect of the *Constitution Act 1902* is that there is no express power that vests the executive power of the State in the Queen or the Governor as Her Majesty's representative. In other words, there is no equivalent of section 61 of the Commonwealth Constitution which provides that '[t]he executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative'. Rather, in New South Wales, the executive power of the Governor must be implied from the overall structure of the *Constitution Act* and the continuation of the office of the Governor under section 9F.<sup>17</sup>

The Governor formally exercises statutory and prerogative powers, but does so on the advice of the Executive Council or the relevant responsible minister. The

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<sup>16</sup> See the *Australia Acts 1986*.

<sup>17</sup> Twomey, above n 2, p 625.

constitutional role of the Governor includes presiding at meetings of the Executive Council, appointing ministers, issuing writs for elections, opening Parliament, assenting to laws and making regulations, proclamations and appointments. In exceptional circumstances the Governor may exercise ‘reserve powers’ on his or her own discretion, according to convention.<sup>18</sup>

The power of the Governor to assent to laws and make regulations must also be implied. While section 8A of the *Constitution Act 1902* expressly provides that every bill be presented to the Governor for assent and becomes an Act of the legislature only when it is assented to by the Governor, it does not expressly confer on the Governor the power to assent to the bill. This must be implied from reference to the Governor giving assent to every bill and the role of the sovereign as part of the legislature under section 3, discussed below.<sup>19</sup>

Section 9B of the *Constitution Act 1902* provides for a Lieutenant-Governor of the State and an Administrator of the State. Under section 9C, the Lieutenant-Governor or Administrator assumes the administration of the government of the State if there is a vacancy in the office of Governor or the Governor is unavailable.

### *The Parliament*

Section 3 of the *Constitution Act 1902* defines ‘The Legislature’ as:

The Legislature means His Majesty the King with the advice and consent of the Legislative Council and Legislative Assembly.

The titular head of the executive government, the sovereign, is part of the legislature and joins in the exercise of legislative power.

The Parliament has powers to enact laws under section 5 of the *Constitution Act 1902*:

The Legislature shall, subject to the provisions of the Commonwealth of Australia Constitution Act, have power to make laws for the peace, welfare, and good government of New South Wales in all cases whatsoever: Provided that all Bills for appropriating any part of the public revenue, or for imposing any new rate, tax or impost, shall originate in the Legislative Assembly.

The Parliament has some additional powers conferred on it directly by the Commonwealth Constitution, Commonwealth legislation and the *Australia Acts*.<sup>20</sup> The *Australia Act 1986* (Cth) extended the general legislative power of the Parliament of each State to include ‘all legislative powers that the Parliament of the United

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18 For example, in 1932, Governor Sir Philip Game exercised his reserve powers to dismiss Premier Jack Lang after the Premier sought to prevent the Commonwealth Government from seizing New South Wales revenues for interest owed by the New South Wales Government to foreign bondholders. See Twomey, above n 2, pp 583-584, 622.

19 *Ibid*, p 625.

20 For additional details, see Twomey, above n 2, pp 171-173.

Kingdom might have exercised before the commencement of this Act for the peace, order and good government of that State'.<sup>21</sup>

The two Houses have equal powers in the making of laws, save in one respect. Bills that appropriate any part of the public revenue, or which impose any new rate, tax or impost, must originate in the Assembly – the Council cannot initiate such bills. Furthermore, should the Council fail to pass a bill appropriating money for the ordinary annual services of the government, or pass it in a form unacceptable to the Assembly, section 5A of the *Constitution Act 1902* allows for the bill to be submitted to the Governor for assent without the Council's concurrence. Bills other than money bills are covered by section 5B, which provides that after certain other measures have been tried and have failed, the bill may be submitted to a referendum of the people to resolve the deadlock.

### ***The Premier, ministers and parliamentary secretaries***

Section 35E of the *Constitution Act 1902* provides for the appointment of the Premier and other ministers of the Crown from amongst the members of the Executive Council, and stipulates that they hold office during the Governor's pleasure. Collectively, the Premier and ministers are known as the Ministry or Cabinet. There is no constitutional requirement for a minister to be a member of Parliament but conventionally they have been a member of one or other of the Houses of Parliament.

The role of ministers includes the administration of departments and agencies within their portfolio, participation in the decision-making processes of Cabinet, advising the Governor through the Executive Council, together with parliamentary duties such as answering questions in Question Time, sponsoring bills and representing the government in Parliament.

Parliamentary secretaries are appointed by the Premier rather than the Governor under the provisions of section 38B of the *Constitution Act 1902*.<sup>22</sup> They may be appointed from the members of either House under section 38B(3)(c). As parliamentary secretaries are appointed by the Premier, section 38D(1)(b) provides that they cease to hold office if the Premier ceases to hold office.

Section 38C provides that a parliamentary secretary has such functions as the Premier determines. In practice, the role of a parliamentary secretary is to provide assistance to ministers by fulfilling functions such as signing correspondence, attending meetings and receiving deputations and officiating at functions. Under section 38C(2), parliamentary secretaries are not to perform functions under statutes that may only be performed by some other person, notably ministers.

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21 *Australia Act 1986* (Cth), s 22(2).

22 Section 38B was inserted into the *Constitution Act* in 1975, and amended in 1988.

### *The Executive Council*

Under sections 35B to 35D of the *Constitution Act 1902*, the Executive Council is the body that advises the Governor on the formal exercise of executive functions. In doing so it fulfils the decisions of Cabinet or the relevant responsible minister. The Executive Council holds weekly meetings, usually on Wednesday mornings. The usual practice is for the Governor to attend accompanied by two ministers who are rostered for duty.

Section 13B(3)(b) specifically provides that a person who holds or accepts the office of Vice-President of the Executive Council is capable of being elected and of sitting and voting as a member of either House of Parliament. By convention, the Vice-President of the Executive Council is a minister in the Legislative Council. The Vice-President of the Executive Council presides at meetings in the absence of the Governor.

### **Cabinet**

While the *Constitution Act 1902* defines the above institutions of the State, it makes no reference to Cabinet, although it is central to the operation of the executive. In New South Wales, Cabinet is comprised of all ministers of the Crown. As ministers are appointed from among the members of the Executive Council under section 35E, all members of the Cabinet are also members of the Executive Council.

While the Executive Council may be regarded as the formal manifestation of executive prerogative presided over by the Governor, the Cabinet is the real core and essence of the executive. Murphy J, a former Commonwealth Cabinet minister, observed that ‘in theory, the Governor in Council, and in practice the Cabinet, is the highest political organ of the State’.<sup>23</sup>

In New South Wales, the Cabinet usually meets once a week on either Monday or Tuesday, depending on whether or not Parliament is sitting. Amongst other things, Cabinet makes decisions on policy issues, addresses financial issues, approves the preparation of legislation and approves appointments.

## **A WESTMINSTER SYSTEM**

The New South Wales political system is based on the traditions of the British Parliament at Westminster. Important features of the Westminster system in New South Wales are:

- a head of state who is the nominal or theoretical source of executive power, holds numerous reserve powers, but is in practice largely a ceremonial figurehead;
- an elected Parliament;

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<sup>23</sup> *FAI Insurances Ltd v Winneke* (1982) 151 CLR 342 at 373 per Murphy J.



- a de facto executive branch made up of members of Parliament;
- ministers who are appointed from among the members of the Executive Council and who exercise executive authority;
- the formation of the government by the political party or coalition of parties which have a majority of seats in the Assembly;
- the ability of the Assembly to dismiss or pass a motion of no confidence in the government, forcing a general election, unless a new government is formed.

An important concept of executive government centres on the notion of the separation of powers<sup>24</sup> which describes a model of governance under which the legislative, executive and judicial functions are carried out separately and independently of the other two.<sup>25</sup> Moreover, each is able to place specified restraints on the powers exerted by the other.

The New South Wales Constitution, unlike the Commonwealth Constitution, does not include in its structure or wording any formal separation of powers. Although section 5 of the *Constitution Act 1902* confers a legislative power on the Parliament, there are no express provisions which vest, exclusively or otherwise, executive power on the executive government or judicial power on the judiciary. Nor is there any history of such a formal separation of powers in the Constitution.<sup>26</sup>

Nevertheless, by convention, a strict separation of powers is maintained in New South Wales between the Parliament and the executive on the one hand, and the judiciary on the other.<sup>27</sup> One of the principles of the rule of law in New South Wales is that the courts in New South Wales and ultimately the High Court of Australia have the responsibility for interpreting legislation and determining whether it is within the powers conferred by the *Constitution Act 1902*.

By contrast, a separation of powers is not maintained between the executive and the legislature or Parliament. Under the Westminster system, as adopted in New South Wales, the executive government is formed out of the members of Parliament and is subject to the scrutiny and control of the Parliament.

The separation of powers in New South Wales is discussed further in Chapter 16 (Relations with the Executive) and Chapter 20 (Relations with the Judiciary).

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24 Or *trias politica*, a term coined by French political Enlightenment thinker Charles-Louis de Secondat, Baron de La Brède et de Montesquieu.

25 This is sometimes expressed in terms of the Parliament which makes the laws, the executive ministry which implements the laws and the courts which interpret and apply the laws.

26 *Building Construction Employees and Builders' Labourers Federation of NSW v Minister for Industrial Relations* (1986) 7 NSWLR 372 at 400-401 per Kirby J.

27 In New South Wales, judicial power is exercised by the Supreme Court of New South Wales and a system of subordinate courts, although the High Court of Australia and other federal courts have overriding jurisdiction on matters that fall under the ambit of the Commonwealth Constitution.

## POLITICAL PARTIES

A political party is an organisation of people who have similar political philosophies and ideas who endorse candidates to contest elections with a view to forming government in order to realise their political philosophies and policies.

Political parties are central to an understanding of the system of government in New South Wales and indeed other jurisdictions in Australia. In a Westminster style parliamentary democracy with a representative system of government, parties are the chief means by which political power is exercised. They fulfil a number of functions:

- Parties select candidates to contest elections for public office through the preselection process. Much of the choice of candidates offered to electors depends on the candidates offered by parties. Electors tend to vote for parties rather than for individual candidates.
- Within the Parliament, political parties provide the government and the opposition. As noted previously, the party or coalition of parties which wins a majority of seats in the Assembly forms the government. The party or coalition of parties which win the second largest number of seats is known as the official opposition.<sup>28</sup>
- Parties develop policies and present them to the electorate during election campaigns through means such as branch party meetings and party conventions. In government or opposition, parties utilise these policy-making processes to determine their attitude towards issues of the day.
- Parties are an avenue for interest groups to influence the decision-making process both during elections and in the day-to-day administration of government. Prominent interest groups include trade unions, employer and business groups, farming organisations, environmental organisations, church and social welfare groups, human and legal rights advocates, and consumer advocates.

Political parties are not mentioned in the *Constitution Act 1902*. However, as is discussed in more detail in Chapter 4 (Elections), political parties are defined in other statutes for administrative and electoral purposes. In particular, the *Parliamentary Electorates and Elections Act 1912* provides for the registration of political parties in New South Wales.

Since around the beginning of the 20th century, the essential characteristic of Australian politics has been the contest between the Labor Party on the one hand and conservative parties on the other.

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<sup>28</sup> The *Constitution Act 1902* does not refer to the opposition.

## REPRESENTATIVE GOVERNMENT

The New South Wales political system is one in which the people elect members of Parliament to represent them. This is called a system of representative government where the people delegate the task of government to representatives chosen at regular elections. In its 1997 decision in *Lange v Australian Broadcasting Corporation*, the High Court found that:

[A]t federation, representative government was understood to mean a system of government where the people in free elections elected their representatives to the legislative chamber which occupies the most powerful position in the political system.<sup>29</sup>

Elections are the central mechanism for delivering representative government. Accurate representation requires these elections to be full (everybody is represented), fair (equal representation for all), free (from intimidation, corruption and artifacts of the electoral system) and regular (in order to respond to changing opinions).

Representative government in New South Wales dates back to the *Australian Constitutions Act (No 1) 1842 (Imp)*, which provided that the colonial New South Wales Legislative Council, first formed in 1823, should comprise 36 members – 24 members elected by a limited franchise granted to male property owners and 12 members appointed by the Crown.<sup>30</sup> In electing those 24 members, the franchise was limited to men owning freehold property of a value exceeding £200 or leasing property with an annual value exceeding £20. The first elections were held in 1843.

Notable developments in the evolution of representative government in New South Wales include the introduction of secret ballots and adult male suffrage for the Assembly in 1858,<sup>31</sup> payment of members of the Assembly in 1889,<sup>32</sup> female suffrage in 1902,<sup>33</sup> compulsory registration of voters in 1921,<sup>34</sup> compulsory voting in 1928<sup>35</sup> and universal adult suffrage for the Council in 1978,<sup>36</sup> discussed in the following chapter.

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29 (1997) 189 CLR 520 at 559.

30 Twomey, above n 2, p 3.

31 Introduced under the *Electoral Act 1858*.

32 Before 1889, members did not receive any salary or allowance, although certain ministers received allowances under the *Constitution Act 1855*. They were provided with free transport on State rail and trams and free stationery and postage. In 1889, after considerable debate, the *Parliamentary Representatives Allowance Act No 2* provided for Assembly members to be granted an allowance of £300 per annum for parliamentary duties.

33 Several bills for female suffrage were proposed between 1891 and 1901, generally being passed in the Assembly but defeated in the Council. Women received the right to vote in federal elections in 1902, the same year as the vote was extended to women in New South Wales under the *Women's Franchise Act 1902*. Women could still not stand for the Assembly in New South Wales until 1918 and admittance to the Council was not possible until 1926.

34 Introduced under the *Parliamentary Electorates and Elections (Amendment) Act 1921*.

35 Introduced under the *Parliamentary Electorates and Elections (Amendment) Act 1928*.

36 Universal adult suffrage was extended under the *Constitution and Parliamentary Electorates and Elections (Amendment) Act 1978*.

## A BICAMERAL PARLIAMENT

A bicameral parliament consists of two Houses or chambers.

The *Constitution Act 1855* established a bicameral Parliament, comprising the Legislative Council and the Legislative Assembly. This was continued in the *Constitution Act 1902*.

The Legislative Council is also called the upper House, the second chamber or the 'House of Review'. There are 42 members of the Legislative Council, called members of the Legislative Council or MLCs. They are elected according to a system of proportional representation with the entire State as a single electorate. They serve an eight-year term, with one-half of the Council elected every four years at a periodic Council election.

The Legislative Assembly is also called the lower House. There are 93 members of the Assembly, called members of the Legislative Assembly or MPs. Each is elected from one of the 93 single-member electorates in New South Wales for a term of four years according to a system of optional preferential voting. Generally speaking the Premier and a majority of the ministers are members of the Assembly.

One of the principal arguments for a bicameral parliament, with a second chamber elected under a different system to that of the lower House, is that it improves the representativeness of parliament by broadening the range of views and opinions that it may reflect. Modern society, with its geographic, social and economic variety, may be better represented in a bicameral parliament with different electoral systems for each House than can be achieved in a unicameral or single House Parliament elected through single member constituencies.

This is reflected in the membership of the New South Wales Parliament. The majority of members of the Assembly are usually from one of the major political parties. This is because under the preferential voting system used for the Assembly, elected members require the support of at least one-half of voters in their electorate once preferences are distributed. This is often difficult for candidates from minor parties or independents to achieve.

By contrast, under the system of proportional representation used for the Council, the quota required for election to the Council is around 4.55 per cent of the total votes cast State-wide.<sup>37</sup> This means that representatives of minor parties and independents are more likely to be elected to the Council to represent their constituents than they are likely to be elected to the Assembly. Representatives of the minor parties and independents sit on the cross-benches in the Council chamber.

As a consequence it may be argued, that the Council can make an alternative claim to democratic legitimacy, different in kind from that of the lower House

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<sup>37</sup> It should be noted that the Council membership and electoral arrangements have changed considerably and on a number of occasions since responsible government in 1856. This is discussed in more detail in Chapter 2.

which is elected on a majoritarian first past the post basis. The Council provides a second, complementary dimension to the representation of interests and opinions, thus enhancing the democratic quality of the Parliament.

According to its proponents, proportional representation facilitates a more accurate reflection of the electors' choices and gives a substantial proportion of the electorate the only effective voice they have in Parliament. Against this view, it is sometimes argued that the representation of minority interests in the Council can obstruct the will of the more substantial body of electors who voted for the government in the lower House.<sup>38</sup>

Alongside this representation-based justification for bicameralism, modern upper Houses, including the Council, also have a function as a 'House of Review', acting as forums of sober deliberation and providing the checks, balances and mutual controls essential to parliamentary systems in which lower Houses are likely to be controlled by a government majority. This is discussed further in the following chapter.

In Australia, the role the federal Senate has played since the adoption of proportional representation for Senate elections in 1949 has been something of a model for the operation of bicameralism in the States. From an apparently failed 'States' House at the mid-point of the 20th century, the Senate has gradually transformed itself through electoral system change and consequent representation of minor parties, to the point where it is now regularly described as the most vital element in the parliamentary system.<sup>39</sup> Among Westminster-derived democracies especially, with their tendency towards executive-dominated lower Houses, a product of single-member electoral systems, the Australian Senate offers a model for recovering something of the textbook functions of Parliament.<sup>40</sup>

The evolution of the Council over the past several decades has in many ways followed the evolution of the Australian Senate. It combines the key attributes of democratic legitimacy, well-defined constitutional powers and a strong element of minor party representation based on an electoral system of proportional representation. In fact, no government has had a majority in the Council since 1988. This has in turn provided opportunities for legislative review and amendment, scrutiny of public accounts and documents and questioning of government ministers and officials, in some cases through the mechanism of a strong and evolving committee system. Moreover, this has been achieved within the broad parameters of the doctrine of responsible government, as discussed below.

The contemporary functions and roles of the Council are discussed in more detail in the following chapter.

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38 Griffith G and Srinivasan S, 'State Upper Houses in Australia', Background Paper No 1, New South Wales Parliamentary Library Research Service, 2001, p 14.

39 Stone B, 'The recent evolution of bicameralism in the Australian States', paper presented at the Australasian Political Studies Association Conference, Canberra, 3-6 October 2000.

40 *Ibid*, para 1.2.

## RESPONSIBLE GOVERNMENT

The system of responsible government adopted in New South Wales describes the political arrangement where the executive government – the Cabinet and Ministry – is drawn from the Parliament and owes its primary responsibility in the administration of government to the Parliament. In practice, the task of the Parliament is not only to pass laws but also to watch and control the government through questions to ministers and through debate in the House and committee inquiries. In that sense, securing the accountability of the government is the very essence of responsible government.

Responsible government was formally established in New South Wales by the *Constitution Act 1855* and subsequently extended in the *Constitution Act 1902*. However, the expression of responsible government in the 1902 Act is somewhat muted and oblique. The 1902 Act does express some aspects of responsible government in New South Wales:

- under section 13B(3)(a), a person who holds or accepts the office of minister of the Crown as an office of the executive government is capable of being elected and of sitting and voting as a member of either House of Parliament;
- under section 13B(3)(c), a person who holds or accepts the office of parliamentary secretary is capable of being elected and of sitting and voting as a member of either House of Parliament;
- section 35E provides for the appointment of the Premier and other ministers by the Governor from amongst the members of the Executive Council.

However, the Act is silent in relation to other aspects of the system of responsible government in New South Wales. The Constitution makes no mention of Cabinet, whose advice the Crown is bound to follow, except in exceptional circumstances. Nor is there any express requirement that ministers be members of Parliament. Additionally, the Constitution does not express the constitutional understanding that Cabinet and the government must resign the moment the government loses the confidence of the Assembly. Nor does it recognise the conventions of individual ministerial responsibility to Parliament and Cabinet solidarity.

It has been argued that this muted and oblique expression of responsible government is not uncommon in former colonial jurisdictions. Constitutions established by the British traditionally concentrated on the formation of colonial legislatures and were usually ‘silent, or almost silent, as to the relations between the legislature and executive’.<sup>41</sup>

Nevertheless, there are several judicial statements recognising the system of responsible government in New South Wales. In 1920 in *Amalgamated Society of*

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<sup>41</sup> Jenkyns H, *British Rule and Jurisdiction beyond the Seas*, Clarendon Press, Oxford, 1902, cited in Twomey, above n 2, p 27.

*Engineers v Adelaide Steamship Company Ltd* the High Court described responsible government as:

The greatest institution which exists in the Empire, and which pertains to every Constitution established within the Empire - I mean the institution of responsible government, a government under which the Executive is directly responsible to - nay, is almost the creature of - the Legislature.<sup>42</sup>

In 1931 in *Victorian Stevedoring and General Contracting Committee Pty Ltd and Meakes v Dignan* it was observed:

[P]rior to the establishment of the Commonwealth of Australia in 1901, responsible government had become one of the central characteristics of our polity.<sup>43</sup>

In 1960 in *Clayton v Heffron* it was observed:

[A]t the same time [as the creation of the new legislature by the *Constitution Act 1855*] the principles of responsible government were introduced and with that came the principles and conventions and general tradition of British parliamentary procedure.<sup>44</sup>

However, the most recent and detailed statement of the system of responsible government in New South Wales is found in the *Egan* cases. The *Egan* cases were a series of three cases between 1996 and 1999 concerning the powers and privileges of the Council in respect of its power to scrutinise the executive and to demand the production of documents.<sup>45</sup>

The High Court, in *Egan v Willis*, defined responsible government in the following terms:

A system of responsible government traditionally has been considered to encompass 'the means by which Parliament brings the Executive to account' so that 'the Executive's primary responsibility in its prosecution of government is owed to Parliament'. The point was made by Mill, writing in 1861, who spoke of the task of the Legislature 'to watch and control the government: to throw the light of publicity on its acts'. It has been said of the contemporary position in Australia that, whilst 'the primary role of Parliament is to pass laws, it also has important functions to question and criticise government on behalf of the people' and that to secure accountability of government activity is the very essence of responsible government'.<sup>46</sup>

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42 (1920) 28 CLR 129 at 147.

43 (1931) 46 CLR 73 at 114.

44 (1960) 105 CLR 214 at 251.

45 See the decision of the New South Wales Court of Appeal in *Egan v Willis and Cahill* (1996) 40 NSWLR 650, the High Court decision in *Egan v Willis* (1998) 195 CLR 424 and the decision of the New South Wales Court of Appeal in *Egan v Chadwick* (1999) 46 NSWLR 563. These cases are discussed in more detail in Chapter 17 (Documents).

46 (1998) 195 CLR 424 at 451 per Gaudron, Gummow and Hayne JJ.

The High Court also reaffirmed in *Egan v Willis* the integral role of upper Houses in a system of responsible government by scrutinising the actions of the executive and holding it to account:

It is true, of course, that governments are made and broken in the lower House of Parliament – in New South Wales, the Legislative Assembly. But that does not mean that the Legislative Council has no power to seek information from the government or the Minister who represents the government in the Legislative Council. It is part of the Legislature of New South Wales. If it is to carry out one of the primary functions of a legislative chamber under the Westminster system, it must be entitled to seek information concerning the administration of public affairs and finances. The Legislative Council is not, as Queen Elizabeth the First thought the House of Commons was, a chamber that merely says ‘Aye or No’ to bills presented to it. It is an essential part of a legislature which operates under a system of responsible government.<sup>47</sup>

A fundamental aspect of a system of responsible government in New South Wales is that the executive, through its ministers, is responsible to Parliament, and through Parliament to the electorate.<sup>48</sup>

## CONCLUSION

The institutions and practices of government in New South Wales are founded on the British Westminster model, but are nevertheless uniquely Australian. The fundamental tenets of government in New South Wales include the rule of law and freedom of speech, the division of legislative power between the Commonwealth and State Governments, a written Constitution establishing a constitutional monarchy with a largely ceremonial head of state, the absence of any written or formal separation of powers between the executive and legislature, a government which is representative of the people based on frequent elections and a bicameral Parliament.

Within this system, the Council plays a key role as a representative body, as a law-making body and as a mechanism for holding the executive to account. It is notable that the Council has strong legislative powers and the democratic legitimacy to use them, in keeping with the Australian tradition of strong upper Houses. As a result, the government of the day requires the confidence of both Houses of the Parliament, and not just the lower House as is the case in the United Kingdom, in order to implement its legislative agenda.

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<sup>47</sup> *Ibid* at 476 per Gaudron, Gummow and Hayne JJ.

<sup>48</sup> *Egan v Chadwick* (1999) 46 NSWLR 563 at 571-572 per Spigelman CJ.