



## LEGISLATIVE COUNCIL FACT SHEETS

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### **FACT SHEET 1: A BRIEF HISTORY OF THE LEGISLATIVE COUNCIL OF NEW SOUTH WALES**

#### **The first legislature established, 1823**

In 1823 the British Government passed an Act 'for the better administration of Justice in New South Wales and Van Diemen's Land, and for the effectual Government thereof ...', in line with a general policy which had been developed allowing controlled legislatures in the colonies.

The Act, which is usually called 'The New South Wales Act', dealt with the court system and the judiciary. There was also provision for 'His Majesty to constitute and appoint a Council, to consist of such Persons resident in the said Colony, not exceeding Seven and not less than Five, as His Majesty, His Heirs and Successors, shall be pleased to appoint ...'. The members of this first Council were the Lieutenant-Governor, the Chief Justice, the Colonial Secretary, the Principal Surgeon and the Surveyor-General.

The five councillors were appointed to advise the Governor but they had no real law-making power - only the Governor could initiate a bill. The proposed laws were then discussed in private with the councillors, but the Governor could override the Council completely if he thought the need of the colony required the law.

With Governor Brisbane presiding, the Legislative Council held its first meeting at the then Government House on 25 August 1824. The first Act, a Currency Act, was passed by the Council on 28 September 1824.

#### **The Legislative Council expands, 1825-42**

In July 1825, the Legislative Council was restructured to consist of seven members. The formation of a Legislative Council marked a turning point in colonial government. Four of the seven members of the Legislative Council were to be 'official' members on the Executive Council. John Macarthur was one of the three non-Executive members and represented the landed interests, the wealthy free settlers and squatters who were to be so influential in the colony and the Council.

In 1828 the colony of New South Wales shrank somewhat when Van Diemen's Land (later renamed Tasmania) was separated to become a separate colony with a similar structure of government.

The Governor's power was further eroded in 1829 following another Act of the Imperial Parliament. The Legislative Council was increased to a maximum of fifteen and a minimum of ten members. The official members, who were members of the Executive Council, now numbered seven and there were seven non-official members.

In this year too, the Legislative Council began to hold its meetings in a room of the Surgeon's Wing

of the Sydney 'Rum Hospital' in Macquarie Street. Over the next decade or so, as its need for space expanded, the Council gradually took over the entire building. This historic building, completed in 1816, remains the central element of the facade of the modern Parliament House.

### **Constitution Act of 1842**

In England in 1837-38, a House of Commons committee inquired into the effectiveness of transportation of convicts as a means of punishment and reform and came to the conclusion that the system should be ended. In October 1840, Governor Gipps announced to the Legislative Council that transportation had ceased.

Many felt that now transportation had ended, the Colony should be seen in a different light and the stigma previously attached to it as a penal colony could be removed. By 1842 the growing demands resulted in the British Parliament passing New South Wales' first Constitution Act. It made the first significant step towards responsible government in New South Wales. Membership of the Legislative Council was increased to 36. The duration of each Legislative Council was to be five years from the return of the writs. Twelve members were nominated by the Crown and appointed by the Governor. Of these no more than six were to be members of the Executive Council. Two-thirds (24) of the members, including six from the Port Phillip district (later to be Victoria), were elected by landowners and householders who fulfilled the property qualifications. In 1843 the Governor ceased to be a member of the Council and one of the members was elected Speaker, to preside at meetings. The Speaker was paid, making the Speakership the first salaried Parliamentary officer in New South Wales.

The Governor still, however, had more power than the Council. If the Council proposed a bill with which the Governor disagreed, the Council could be dissolved and the bill referred to the British Government. This was, of course, an excellent delaying tactic. Nevertheless, the period from 1843 to 1856 was an important stage in democratic development as the expanded and partially elected Legislative Council discussed and generated further discussion of the issues of government. Political parties did not exist at this stage; Councillors tended to align on specific issues and vote according to their particular interests or philosophies.

### **The Executive Council**

During the first seventy years of New South Wales colonial history, the Executive was not subject to the control of parliament. Its members were appointed by the Governor and the Secretary of State for the Colonies, in London. They did not have equal status with the Secretary of State or the Governor, but were subordinates. After the first Legislative Council was set up in 1823 they were members of the Council. After this, the legislature could criticise, but not control the governors. All this changed with the introduction of responsible government in 1856.

### **Towards responsible government**

In 1850 the *Australian Colonies Government Act* was passed by the Imperial Parliament. In New South Wales it expanded the Legislative Council so that by 1851 there were now 54 members - again, with two-thirds elected. The Act also permitted the creation of three other self-governing colonies with Legislative Councils on the New South Wales model: South Australia (never part of NSW); Tasmania (which had been separated from NSW in 1828); and Victoria (now separated from NSW by this Act).

In 1853 a select committee chaired by William Charles Wentworth began drawing up a constitution for responsible self-government. The Committee's proposed Constitution was placed before the Legislative Council in August that year and, on the whole, accepted. Not accepted were proposals for a lower House electoral distribution which would heavily favour the country and squatting interests, and an upper House of Hereditary Peers, like the English House of Lords. The revised Constitution, with an upper House whose members were appointed for life, was sent to the British Parliament and, with some further amendments, passed into law on 16 July 1855.

### **The new Parliament and Executive Council, 1856**

The new Parliament of New South Wales was a bicameral (two house) legislature, similar to that of England, consisting of an upper House (the Legislative Council) and lower House (Legislative Assembly). The new Legislative Council was to consist of no fewer than 21 members appointed by the Governor on the advice of his Executive Council, initially appointed for five years and thereafter for life.

On 22 May 1856, the bicameral New South Wales Parliament opened and sat for the first time. A second meeting chamber for the Upper House had to be added quickly to the Parliament building in Macquarie Street, not an easy task when building materials and skilled labourers were rare and expensive because of the gold rushes. The solution was found in a prefabricated iron hall sent to Melbourne from Britain for the goldfields. It was purchased for £1,835 and shipped up to Sydney and erected in the position where it still stands as home to the Legislative Council.

### **An appointed Legislative Council, 1856-1934**

The original Legislative Council of New South Wales appointed by the Governor was established in 1824 as the first legislative body in Australia. As noted earlier, it became a more representative body in 1843 when two thirds of the members were elected. The old Council continued until 1855, growing in influence as the single legislative body in New South Wales. With the establishment of responsible government in 1856, most of the old Council's functions were absorbed by the new Legislative Assembly, and the new Legislative Council was created as the upper House of a bicameral Parliament.

From 1856 the new Council was to consist of not less than 21 members, appointed by the Governor on the advice of the government of the day, for a term initially of five years and, from 1861 until April 1934, for life.

Under the Constitution Act of 1855, the Council had almost the same powers as the lower House and it used them fully. The use of these powers however, was contrary to the popular belief that the people's will was expressed by the elected Lower House which should, therefore, be predominant. This attitude became stronger after the granting of manhood suffrage in 1858, a bill which the upper House had strongly opposed. The new Council members tended to be prominently wealthy and older citizens with views that were more conservative than most members of the Legislative Assembly. The Council could amend or reject any Bill sent from the Assembly, even money bills. As a result, popularly elected governments were often frustrated in their attempts to pass laws based on public demand. Partly as a result of this, six ministries fell during the years 1856 to 1861.

## The Council under threat

Attempts to reform, reconstruct or abolish the Legislative Council began as early as 1860 when Premier William Forster's bill to reconstruct the Council was defeated. In 1861 when the upper House refused to pass Robertson's Land Bill under Premier Charles Cowper, the tactic of 'swamping the House' began to be used by governments. In this instance 23 new appointments were made to the Legislative Council in order to get legislation passed. Similar tactics were used at later times so that the numbers in the House fluctuated but tended upward, reaching 126 by 1932.

Liberal governments came to realise that the conservative, obstructionist nature of the Council was not in the best interests of stable government. Conservative governments feared that an unreasonably hostile Council could lead to its abolition. Reform, however, was consistently rejected, eight attempts at reconstituting the Council having failed by 1900.

During this period, the Council performed the characteristic roles of a House of review, considering lower House legislation, investigating social and political issues through committees, and amending or delaying hasty or ill-advised legislation. It saw itself as the final safeguard of the constitution and a counter-balance to the often faction-torn Lower House.

### *Background to the 1934 reconstitution*

The period from 1925 to 1934 was one of tumultuous change and conflict concerning the constitution, powers and very existence of the Legislative Council.

The Lang Government came to office in 1925 with a program of social and economic reform. Faced with what he viewed as an upper House hostile to that reform program, Premier Lang asked the Governor to appoint 25 Labor members to the Council. It has been stated that before agreeing to make the appointment the Governor sought an undertaking from Lang (which Lang refused to give) that the new members would not be used to abolish the Legislative Council.<sup>1</sup> In January 1926 legislation was introduced to abolish the Council.<sup>2</sup>

However, following prorogation, the question that the Bill be re-introduced was defeated 47 votes to 41<sup>3</sup> – a number of Lang's new appointees had in effect voted against abolition of the Council! In March 1926 (following the enactment of legislation to enable the appointment of women to the Legislative Council) Lang unsuccessfully asked the Governor to appoint a further ten members to the Council. The Governor refused to make the appointments (apparently on the grounds that Lang was not able to demonstrate that he had an electoral mandate for such fundamental constitutional change as abolition of the Council).<sup>4</sup> The question of abolition of the Legislative Council was not further pressed during the remainder of the first Lang Government, which was defeated at the October 1927 election.

In response to Lang's attempts to abolish the Legislative Council, the new Conservative

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1 Turner K, *House of Review? The New South Wales Legislative Council, 1934-68*, University of Sydney Press, p 12; Hogan M & Clune D (eds), *The People's Choice: Electoral Politics in 20<sup>th</sup> Century New South Wales*, Parliament of NSW and University of Sydney, 2001, p 329.

2 *LC Minutes* (20/1/1926) 2.

3 *LC Minutes* (23/2/1926) 2.

4 Hogan & Clune, *op cit*, p 329.

Government of Premier Bavin moved to safeguard the existence of the Council. The Constitution (Legislative Council) Amendment Bill, introduced in May 1928<sup>5</sup>, used section 5 of the *Colonial Laws Validity Act 1865* to introduce a ‘manner and form’ requirement into the NSW *Constitution Act 1902*, providing that, before a bill for the purpose of abolition of the Council or alteration of its powers could be presented for assent, it must be put to the people at a referendum.<sup>6</sup> Following its passage through both Houses, the Constitution (Legislative Council) Amendment Bill was reserved for assent by the monarch, which occurred in November 1929.<sup>7</sup> The legislation came into force on 1 October 1930.<sup>8</sup> It has been suggested that the delay in the proclamation of the *Constitution (Legislative Council) Amendment Act 1929* was to provide a window of opportunity for the Bavin Government to enact legislation to reconstitute the Legislative Council and codify its powers before the requirement for a referendum came into effect, but that disagreement within the Government as to the content of the proposed reforms prevented this outcome.<sup>9</sup>

The Constitution (Further Amendment) Bill 1929 was introduced in September 1929. It provided for a Legislative Council of 60 members, elected indirectly by the members of the Council and the Assembly. The Bill also dealt with the powers of the Council and included detailed provisions concerning the resolution of deadlocks with the Legislative Assembly. The bill as introduced, provided that, ‘The Legislative Council may reject but may not alter a bill for appropriating any part of the public revenue or for imposing any new rate, tax or impost.’<sup>10</sup> The Constitution (Further Amendment) Bill was the subject of detailed debate and was amended in each House. Most attention was focussed on the powers of the Council in relation to money bills.<sup>11</sup> After a number of amendments were made by each House<sup>12</sup>, a final form of words was agreed upon providing, in part, for Appropriations Bills to be able to be presented for assent even where rejected, unacceptably amended or failed to be passed by the Council.<sup>13</sup> During debate on the bill, Premier Bavin gave a commitment that the Bill would be submitted to the electors<sup>14</sup> and the bill was not presented for assent.

The machinery legislation to provide for the referendum on the Bavin Government’s legislative reforms to the Council, as amended, was put in place in the *Constitution Further Amendment (Referendum) Act 1930*, which provided for the referendum to be held on 17 May 1930. However, in the context of the economic crises caused by the start of the Great Depression, the referendum was postponed, initially to be held in conjunction with the next general election and, finally, to a date to be fixed by the incoming government.<sup>15</sup>

Following his Government’s return to office at the November 1930 general election, Premier Lang again approached the Governor to seek the appointment of additional members of the Legislative Council. In an effort to demonstrate the need for the appointments, Lang introduced bills into the Legislative Council to repeal section 7A of the *Constitution Act 1902* and to abolish the Legislative

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5 *LC Minutes* (9/5/1928) 2.

6 Section 7A. It was also provided that this new section 7A could only be repealed or amended with the approval of the electors at a referendum.

7 *LC Minutes* (19/11/1929) 2.

8 Proclamation published in GG No 144 of 26/9/1930 p 3779.

9 Turner, *op cit*, pp 14- 15.

10 Clause 4 (2).

11 See *LC Debates* (24/9/1929) 208, (25/9/1929) 263; *LA Debates* (6/10/1929) 1076 per Bavin, (7/10/1929) 1115 per Lang.

12 See *LA Debates* (19/11/1929) 1472 per Bavin, *LC Debates* 3/12/1929 p 1893, *LA Debates* (4/12/1929)

13 *LA Debates* (19/11/1929) 1481; *LC Minutes* (4/12/1929) 2.

14 *LA Debates* (6/11/1929) 1085.

15 Turner, *op cit*, p 17.

Council.<sup>16</sup> The Bills passed without a division being called and reference was made in the brief debate to the likelihood of the matter being tested in the courts.<sup>17</sup> On 10 December 1930 proceedings were commenced in the Supreme Court of NSW seeking a declaration that that the Bills could not be lawfully presented to the Governor for assent until approved by the electors at a referendum as provided for in section 7A, and seeking injunctions to restrain the presentation of the Bills for assent. Following the granting of the injunctions, section 7A was upheld by the Full Court of the Supreme Court, the High Court and, ultimately in 1932, by the Privy Council.<sup>18</sup> During the intervening period before the fate of the 1930 bills was determined by the courts, Premier Lang continued to push for further appointments to the Council. In November 1931 a further 25 members were appointed. By 1932 the membership of the Council had increased to 126.

Finally, in perhaps the most dramatic constitutional event in the State's history, Governor Sir Philip Game exercised his reserve powers as guardian of the laws and conventions of the Constitution to dismiss Lang from office on 13 May 1932 after Lang sought to prevent the Commonwealth Government from seizing New South Wales revenues for interest owed by the New South Wales Government to foreign bondholders.

Following its dismissal, the Lang Government was replaced by the Conservative Stevens Government at the 1932 general election. In September 1932 legislation was introduced to reform the constitution and powers of the Legislative Council, based upon Bavin's 1929 reform bill.<sup>19</sup> Following detailed debate and amendment the bill was agreed to in December 1932. The machinery was then put in place for the holding of a referendum on 13 May 1933. The electorate approved the referendum by a narrow majority of 40,904 (716,938 votes to 676,034).

### **An indirectly elected Legislative Council, 1934-1978**

As well as arousing public concern about the role of the Governor, the dismissal of Lang also raised concerns about the Legislative Council's role in the State's political process. There was general agreement that the Council should be reconstituted. The new Stevens-Bruxner coalition government held a referendum on 13 May 1933 at which the electorate approved of an elective Council based on the system of proportional representation. The Legislative Council was now to be a House of 60 members, elected by the members of both Houses of Parliament. Members of the Legislative Council were to be elected for a term of 12 years, with 15 members (one quarter) retiring every three years.

The indirect method of election was favoured because of fears that the Council would rival the Assembly if it was elected on an equal mandate. Concerns were expressed that it might claim equal financial powers and be able to unmake governments. The idea of giving a longer term of office to members of the upper House was to protect parliamentary democracy from sudden swings of opinion.

Under the changes, bills for appropriating revenue or imposing new taxes (money bills) had to originate in the Legislative Assembly. The Legislative Council could reject, fail to pass, or return money bills to the Legislative Assembly suggesting amendments, but they could still be presented for royal assent. If there was a 'deadlock' over other types of bills, a referendum could be held.

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16 *LC Minutes* (2/12/1930) 2

17 *LC Debates* (3/12/1930) 125

18 *Attorney-General for New South Wales v Trethowan* [1932] AC 526.

19 *LC Minutes* (13/9/1932) 2

The reconstituted Council met on 24 April 1934. Its independence was intact but it could no longer influence government monetary policy. It could delay legislation to allow time for expressions of public opinion; provide an opportunity for ministers to tidy up bills that may have been hastily drafted before passing the lower House; undertake a more inquiring level of debate on bills referred to it than often possible in the larger lower House; act as a watchdog on the Constitution; and be a defender of minorities and the fundamentals of democracy.

There were three, unsuccessful, attempts to reform or abolish the Legislative Council during the period 1934 to 1978. The first two occurred during the period in which Labor, in the form of the McKell Government, was faced with a conservative controlled upper House.

The Constitution (Legislative Council Reform) Bill 1943 sought to reform the Council, potentially as a first step towards its abolition, which remained official ALP policy. Under the 1943 Bill the House would have been directly elected, with the state divided into 30 electorates (each made up of three LA seats) each returning two members. The deadlock provisions in section 5B of the *Constitution Act* were to be amended and, most ominously, it was proposed to repeal section 7A. The Bill was defeated in the Council when the question that the Bill be now read a second time was amended, on the motion of Sir Henry Manning by deleting the word 'now' and the addition of the words 'this day six months', on division by 34 votes to 21.

The Legislative Council Abolition Bill 1946 simply sought to abolish the Council. The Bill was defeated when, with the numbers being equal at 29 Ayes and 29 Noes on the question that the Bill be now read a second time, the President, referring to the practice and precedent as set out in relevant parliamentary authorities, cast his vote with the Noes 'in order to preserve the status quo of the Legislative Council.'

Commentators have expressed varying views as to the seriousness of the Government's intent with its reform and abolition attempts in 1943 and 1946. On the one hand, the timing of the introduction of the Bills, close to the end of a session preceding an election, and the difficulty this posed in terms of the operation of the deadlock provisions in the *Constitution Act* in relation to the 1943 bill, and the fact that the 1946 Bill was introduced in the Council, thereby obviating the deadlock provisions, suggests that these attempts may not have been pursued with great vigour. This fits with the thesis that the existence of the conservative dominated upper House, with which accommodation could be reached on most important legislation, was useful to McKell as a means of keeping in check the expectations of more radical supporters. On the other hand, it has been argued that the timing of the 1946 abolition attempt and the fact that the Bill was introduced in the Council was due to the Government's desire to seize the opportunity provided by the granting of leave of absence to three members of the Opposition to possibly get the legislation passed by the Council.

The third attempt to abolish the Council during this period came in 1959 when the Heffron Government introduced the Constitution Amendment (Legislative Council Abolition) Bill. This attempt at abolition raised numerous issues of significance in terms of parliamentary practice, law and politics, and was accompanied by great drama.

When the Bill initially reached the upper House, the Council resolved by 33 votes 25 to send a message to the Assembly that the Council declined to take the Bill into consideration (on the grounds that a Bill affecting the constitution of the Council should have originated in that House). Seven ALP Members who had voted against the Government were subsequently expelled from the Labor Party. When the Bill was returned to the upper house in 1960 the Council again resolved to

send a message to the Assembly to the effect that that the House declined to consider the Bill and further that, as the Council had neither rejected or failed to pass the bill within the meaning of section 5B of the *Constitution Act* the Council did not consider any situation had arisen whereby a free conference of managers of the two Houses was either necessary or proper.

On 13 April 1960 both Houses received messages from the Governor convening a joint sitting on 20 April. The Council resolved, by 33 votes to 22, that it did not consider that a situation had arisen conferring constitutional power on the Governor to convene such a joint sitting, and informing His Excellency in the Address-in-Reply that the Council had decided not to attend the joint sitting. However, a joint sitting of Members, including 85 members of the Assembly and 23 government supporters in the Council took place on 20 April. On 12 May, the Assembly resolved that the bill be submitted to a referendum. Later that day legal proceedings were instituted by Colonel Clayton, Leader of the Opposition in the Council, seeking an injunction to prevent the referendum being held.

The full bench of the Supreme Court found for the defendants by a majority of four to one. Subsequently, an application for special leave to appeal to the High Court was refused, with the application of section 5B of the *Constitution Act 1902* and a number of related matters being dealt with in the leading judgment, and the Government's handling of the constitutional requirements upheld.

In January 1961 Premier Heffron announced that the referendum would be held on 29 April 1961. The conservative parties led a spirited campaign opposing abolition of the Council. The referendum was defeated with 57.6% of the vote favouring retention of the Legislative Council.

### **An elected Legislative Council, 1978**

In 1977, the Wran Labor Government introduced a bill to reform the upper House but it was not passed by the Legislative Council. After two months, the Bill was re-introduced. At a free conference of managers, proposals and counter proposals were considered and agreement was finally reached on amendments to the Bill which allowed it to pass both Houses. The amended Bill was presented to the people and approved at a referendum in June, 1978. Under this 1978 Act, the *Constitution and Parliamentary Electorates and Elections (Amendment) Act, No. 75*, the Legislative Council became a House of 45 members directly elected by the people by a system of proportional representation. One third (15) of the members retired at each general election which, given the maximum three year terms of Parliament meant a term of up to nine years.

The transitional arrangements for the reconstituted Council provided for the pre-existing House of 60 members to be replaced by a popularly elected House of 45 Members, over the course of three elections (which took place in 1978, 1981 and 1984).

Following the 1984 election, the House was fully popularly elected and consisted of: 24 Government, 18 Opposition, three Cross bench members. Following the 1988 election the make up of the House was: 19 Government, 21 Opposition, five Cross bench. No government has had majority control over the Legislative Council since 1988.

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### **Subsequent electoral and membership reforms**

Since the 1978 reconstitution, further modest reforms have been made to the constitution and method of election of the Council.

In 1981, the three-year term of the Assembly was increased to four years, consequentially increasing the term of Council members from nine years to 12 years.

In 1987, a system of 'group voting ticket' or 'above the line' voting was introduced similar to that used in the Australian Senate. Under this system, a voter could vote for individual candidates below the line. Alternatively, a voter could indicate a preference for a group by voting above the line and the voter's preferences were distributed in accordance with a 'group voting ticket' lodged by the party with the Electoral Commissioner. This system gave parties greater control over the flow of preferences.

Further changes in 1990 provided for the registration of political parties; groups were allowed to lodge three group voting tickets for the Council, instead of one or two; and party names were added to ballot papers for the Council.

In 1991, as the result of a referendum called by the Greiner Liberal-National Party Government, the number of members in both Houses were reduced and the Legislative Council was restructured to 42 members, half of whom (21) were to retire or stand for re-election at each general election (a maximum of four years). By increasing the number of members elected at each periodic election, the quota required for a candidate to be elected was reduced. Party names were also added to ballot papers from 1991.

Following the 1991 election the make up of the House was: 20 Government, 18 Opposition, 4 Cross bench. At the two subsequent elections, in 1995 and 1999, cross bench membership of the Council significantly increased reaching a peak of 13 in 1999, while the numbers of government and coalition opposition members declined or remained the same. The increasing cross bench membership reflected earlier electoral reforms, such as the introduction of proportional representation in 1978, and the reduction in the quota for election to the Council in 1991, as well as the partial de-alignment of voters from the major parties.

Further proposals for reform of the Council arose out of the 1999 periodic election, which saw a record 264 candidates, representing some 80 groups or parties, stand for election to the Council. This produced the so called 'tablecloth' ballot paper, which attracted a good deal of public consternation and anger on election day, as well as bringing the electoral system and even the House itself into disrepute.

The 1999 election saw three independent candidates elected with less than 1 per cent each of first preference votes, one of whom was elected with only 0.2 per cent of first preference votes. On the other hand, another candidate with 50 per cent of a quota of votes was not elected. This outcome was the result of the ticket voting system and preference flows agreed to by the various groups.

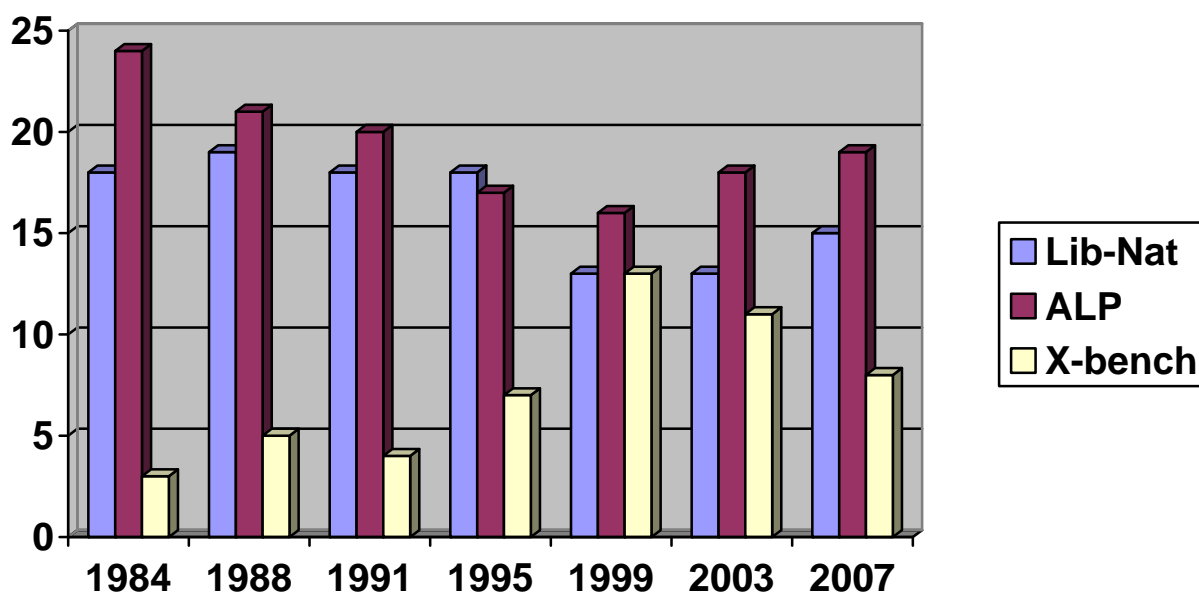
Following the 1999 election, criticism of the manner and method of voting for the Council proliferated. Calls for reform of the Council were made with renewed vigour, fuelled in part by a

media release issued by the Treasurer and Leader of the House, the Hon Michael Egan, on 2 June 1999. In this release, the Treasurer proposed reducing the number of members in the Council from 42 to 34, thereby increasing the quota required for election to 5.55 per cent and making it more difficult for candidates to be elected on preference deals as had happened at the 1999 election. Deadlocks were to be resolved by a joint sitting of both Houses at which bills could be passed by a majority of votes (except for money bills to which section 5A applied) – a reform which would have significantly diminished the power of the Council to amend or reject legislation. In addition, the Treasurer proposed imposing more stringent requirements for registration of parties, together with an increase in the amount of the registration fee.

While the Egan proposals never came to fruition, further changes were introduced to the Council election system by the Carr Ministry in November 1999 through the Parliamentary Electorates and Elections Amendment Act 1999. These changes included the abolition of group voting tickets, which had enabled parties to control the distribution of the preferences of electors voting ‘above the line’; the introduction of provisions permitting voters to record more than one preference for parties or groups ‘above the line’; and stricter requirements for the registration of political parties, including setting a minimum number of members for registration, a substantial application fee for registration, and the requirement for a party to be registered for 12 months before an election.

Since the introduction of the changes in 1999, total cross bench membership of the Council has dropped to 11 following the 2003 election and to 8 following the 2007 election. It remains the case, however, that the political strengths in the Council give a majority to neither the government nor the largest opposition party, and that minority groups control the balance of power in the House.

The changing make-up of the House over time is shown in the table below:



Current party representation in the Council is as follows:

**PARTY REPRESENTATION: HOUSE OF 42 MEMBERS  
(as at November 2009)**

Australian Labor Party	19
Christian Democratic Party (Fred Nile Group)	1
The Greens	4
Independent	1
Liberal Party of Australia (NSW Division)	10
The Nationals	5
Shooters Party	2

**Other significant developments since 1978**

*Salary parity with members of the Legislative Assembly*

In 1985 the Parliamentary Remuneration Tribunal determined that there should be parity in the salaries of members of the Legislative Council and the Legislative Assembly. This meant that for the first time all members of the Council were able to devote their full time energies to parliamentary duties.

The *Parliamentary Remuneration Act 1989* is the current basis for the system for the determination of members' salaries, allowances and additional entitlements. Under the Act, members are provided with a basic salary for the performance of their parliamentary duties, fixed at the salary payable under the law of the Commonwealth to a member of the House of Representatives who is not entitled to any additional salary, less \$500. Certain recognised officers are also provided with an additional salary and expense allowance as a specified percentage of the basic salary of a member.

Under the Act, the Parliamentary Remuneration Tribunal makes determinations of additional entitlements that are to be available to members or recognised office holders.

*Committee system*

In 1985 the House appointed the grandly titled 'Select Committee on Standing Committees' to investigate and report upon a structured system of standing committees for the Legislative Council. The Committee's report recommended the establishment of four standing committees. Following the 1988 election, two standing committees were created, dealing with Social Issues and State Development. In 1995 a third standing committee, on Law and Justice, was established, (together with a Standing Committee on Parliamentary Privilege and Ethics). These standing committees remain an important aspect of the work of the House. The focus of the inquiries conducted by these committees is on public policy and they have developed a strong reputation for the quality of their

work. Many recommendations have been taken up by governments and they have had a significant influence upon public policy. These committees generally operate in a non-partisan manner and it is rare for there to be a dissenting report.

In 1997 the House established a second set of standing committees, known as General Purpose Standing Committees. There are five of these committees, and between them each ministerial portfolio is covered. The membership of these committees reflects the make up of the House and the Government does not have a majority on these committees. These committees have tended to be focussed upon accountability, conducting inquiries into matters of immediate topical and political interest, or into areas of public administration. Some of the inquiries conducted by these committees have attracted a high public profile and have had a significant impact (eg Olympic Ticketing, Cabramatta policing, Cross City Tunnel, and Royal North Shore Hospital). These committees also conduct the budget estimates hearings each year.

The level of activity of Legislative Council committees has grown, almost exponentially, in recent years. In 2005-2006, for example, there were 39 committee inquiries, 1,021 submissions received, and 774 witnesses who gave evidence at hearings. In recent years, committees have been an avenue by which the Legislative Council has been taken to the people of country NSW, with site visits and hearings held in a range of regional centres and country areas generally.

#### *Orders for Papers*

Between 1856 and 1934 the Council ordered the production of documents to the House on numerous occasions. In the vast majority of cases, the Government complied with these orders and produced the documents as required. From 1934 until 1995 the practice of ordering the production of documents fell into disuse. However, in 1995, the practice was revived, although the power of the House to order the production of documents was challenged by the Government in the Egan cases, as outlined below.

In 1995 and 1996 the Government sought to resist a number of orders for papers on the ground of an asserted lack of power on the part of the Council. In response, the Legislative Council asserted that it possessed an inherent, common law power to make these orders for the production of state papers, and to take action to enforce them. (The House invoked common law powers because unlike other jurisdictions, NSW has never comprehensively legislated in relation to the powers and privileges of Parliament.)

On 2 May 1996, following repeated calls for compliance, the Legislative Council suspended the Treasurer and Leader of the Government for the remainder of the sitting for his failure to produce all the documents required. The Treasurer brought legal proceedings challenging the validity of the suspension (and his removal from the precincts).

Both the NSW Court of Appeal<sup>21</sup> and the High Court<sup>22</sup> upheld the validity of the Legislative Council's suspension resolution. The High Court held that the Legislative Council possesses such inherent powers as are 'reasonably necessary' for the proper exercise of its functions. To apply that principle, the Court first found it necessary to identify the functions of the Council. These were found to be: firstly, a law making function as a legislative body; and secondly, to review executive conduct in accordance with the principle of responsible government. The Court effectively found

<sup>21</sup> *Egan v Willis and Cabill* (1996) 40 NSWLR 650

<sup>22</sup> *Egan v Willis* (1998) 195 CLR 424

that responsible government included the principle that a minister in the upper house is liable to scrutiny by that house in relation to the conduct of the executive government. The power to require the production of state papers was reasonably necessary for the performance of the two functions of the House, and the House may impose a sanction on a Minister for the purpose of enforcing such an order (but not so as to punish the Minister).

Further legal proceedings followed in relation to orders for papers in 1998-99 over the extent of the Council's powers to require the production of documents in respect of which the Government claims public interest immunity or legal professional privilege.<sup>23</sup> Again, the Court of Appeal found that it was reasonably necessary for the Legislative Council to have the power to make orders for the production of such papers. The only limitation upon the power was held to be in relation to Cabinet documents.

Since June 1999 the House has made numerous orders for the production of state papers, the vast majority of which have been complied with by the government. There have also been occasions where committees have made formal orders for papers using the same procedure and terminology as the House. Some of these orders have resulted in the production a single folder of documents. Others have resulted in the production of many boxes of documents. Except where there is a claim of privilege and the documents are able to be inspected by members of the Legislative Council only (if the claim of privilege is not disputed or adjudged to be inappropriate), the documents may be inspected by members of the public. Often an interest group which has lobbied members to have the order made will send representatives in to review the documents in detail. Sometimes, orders for the production of papers have operated in conjunction with, or as a prelude to, a committee inquiry.

#### *Amendments to Bills*

In addition to its role in scrutiny of the executive government and contributing to public policy through its committees, the Legislative Council's law making role has also been evolving.

In the 48<sup>th</sup> Parliament from 1984 to 1988, the last Parliament in which the government of the day had a majority, there was a total of 357 amendments moved to bills. In the 51<sup>st</sup> Parliament (1995-99) there was a total of 2733 amendments and in the 52<sup>nd</sup> Parliament (1999-2002), a total of 3102 amendments. In the 53<sup>rd</sup> Parliament (2003-2007), there was a reversal of the trend, reflecting changes in the membership of the House, only 1859 amendments having been moved.

Aside from amendments to bills, there have been very few bills actually defeated in the Legislative Council: 10 in the 49<sup>th</sup> Parliament (1988-91), 2 in the 51<sup>st</sup> Parliament (1995-99), 14 in the 52<sup>nd</sup> Parliament (1999-02) (all private members' bills), and 10 in the 53<sup>rd</sup> Parliament (2003-07) (all private members' bills).

#### **Conclusion**

Never a stranger to controversy, the Council has had its fair share of critics over the years, including those who have called for, or sought to bring about, its abolition. However, the Upper House has withstood all such efforts to date. Through its legislative work and its scrutiny of the executive government, the House plays a unique role and remains an essential part of the system of

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<sup>23</sup> *Egan v Chadwick* (1999) 46 NSWLR 563

representative and responsible government in this state.