BICENTENARY OF THE LEGISLATIVE COUNCIL

SEMINAR 2

THE SPARK: THE ACT THAT BROUGHT PARLIAMENT AND THE SUPREME COURT TO NSW

Monday 13 November 2023
Tuesday 14 November 2023

First Day

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INTRODUCTORY REMARKS

Mr DAVID BLUNT [Clerk of the Parliaments]: Good morning, everyone. My name is David Blunt. I am Clerk of the Parliaments and Clerk of the Legislative Council. It is my pleasure to be able to welcome you to the second in our series of bicentenary history conferences exploring the origins and development of the Legislative Council and the Parliament of New South Wales. Today, of course, we focus on the New South Wales Act of 1823, which brought into existence not only the Legislative Council but also the New South Wales Supreme Court. Whether you are here with us in person or joining us online, it is great to have you with us. Your interest in and passion for the history of this great institution is greatly appreciated.

It is my honour this morning to introduce the President of the Legislative Council, the Hon. Ben Franklin, to open proceedings. Ben Franklin grew up in regional New South Wales before attending the University of Sydney and settling in Sydney for work. He later relocated to the North Coast of New South Wales. Having been state director of one of Australia's oldest political parties for seven years, Ben Franklin was elected to the Legislative Council in 2015. He was very soon appointed as a Parliamentary Secretary with a range of responsibilities, including, in 2018, steering major legislation concerning the transition to renewable energy through the Legislative Council in some of the longest sitting days in recent memory. In 2021, Ben Franklin became the Minister for Tourism, Minister for Aboriginal Affairs, Minister for Regional Youth, and Minister for the Arts. In the month of May 2023, he was elected President of the Legislative Council. He is the twenty-third President since the advent of responsible government in New South Wales. Please welcome Mr President, the Hon. Ben Franklin.

The PRESIDENT [The Hon. Ben Franklin]: Thank you very much, David, for that incredibly warm welcome. It's my great pleasure to welcome you all here today to the Parliament of New South Wales for the second in our series of bicentenary conferences commemorating the very fast-approaching 200th anniversary of the Parliament of New South Wales. Having been elected as the President of the Legislative Council in May this year, I feel particularly privileged to be the custodian of this office as the Council fast approaches such a significant milestone.

Before I begin, I would like to acknowledge and pay my respects to the traditional custodians of the land upon which we all meet today, the Gadigal people, and extend those respects to Elders past and present, and thank them for their custodianship of this land for many tens of thousands of years—land that always was and always will be Aboriginal land. I am mindful that this Parliament has a complex and varied history with Aboriginal people. Some of the decisions made in this place have had serious ramifications for Aboriginal communities, while others have signalled positive change and ensured that Aboriginal voices have been heard. As we move towards our bicentenary year in 2024, I look forward to supporting a range of events that will provide an important opportunity to explore First Nations perspectives, including some of the difficult and challenging aspects of our history.

As a former Minister for the Arts and a former Minister for Aboriginal Affairs, I am also particularly pleased that this conference has coincided with a special commemorative exhibition to mark the twenty-fifth anniversary of the Reconciliation Wall, a space dedicated to the display of Aboriginal art in recognition of the Parliament's commitment to reconciliation with Aboriginal people. For the exhibition we've partnered with the Boomalli Aboriginal Artists Co-operative, our very first Reconciliation Wall exhibitors back in 1998. It is fitting that the word "boomalli" means "to strike, to make a mark" in the Bundjalung, Gamilaroi and Wiradjuri languages, because Boomalli's founders did just that when they helped launch our Reconciliation Wall exhibition program 25 years ago. It is this Parliament's privilege to have this new exhibition on display to commemorate the anniversary, and I strongly encourage you all to take a close look over the next couple of days.

We've chosen the theme "Reflect, Celebrate, Imagine" to mark our bicentenary, inviting our community to reflect on the Council's 200-year history, celebrate the Council's development into a robust, modern house of review and imagine how it will continue to evolve into the future. This conference provides the perfect platform to reflect, celebrate and imagine, and I am genuinely delighted to be joining you at the launch of these proceedings today. Last year's conference placed us firmly in the 1820s, exploring the early history of New South Wales and the people, events and politics that prompted the call for a curb on the power of the Governor and, ultimately, the establishment of the Legislative Council. Today we pick up that story, with the adoption of the New South Wales

Act 1823, and delve further into how empire and international practices helped shape the early history of the Legislative Council.

Yet we are not alone in celebrating this very significant milestone this year. As alluded to in the conference title, the New South Wales Act also brought the Supreme Court to New South Wales, and we are honoured to be joined by luminaries of the legal profession as they guide us through the constitutional significance of the Act and the unique early case law that differentiated New South Wales from England. However, this was not the only legacy of the Act. With this spark of good governance, New South Wales soon benefited from the establishment of the Treasury and the Audit Office, ensuring a check and balance on the use of public resources. We are, however, mindful that change does not often come easily. The Council itself, while designed to temper the power of the Governor, did not bring the representative democracy desired by the populace. Over time this prompted agitation for greater representation and an elected council—a theme which we will conclude the conference with tomorrow.

The next two days promise to be an illuminating and what could arguably be called a once-in-a-lifetime experience, bringing together recognised experts in their fields and building a lasting scholarly legacy that will add to the rich tapestry of our understanding of the impact of the New South Wales Act 1823. With that in mind, I would now like to introduce Mr David Blunt, AM, Clerk of the Parliaments, and Ms Jenelle Moore, Clerk Assistant and Usher of the Black Rod, as we revisit the first bicentenary conference before we move forward and ignite that spark. Thank you all so much for being here with us today. I hope you have a genuinely fulfilling two days.

Mr DAVID BLUNT: Thank you, Mr President, for that warm welcome and for your acknowledgement of country. As Mr President indicated, we have an absolutely stand-out program of speakers planned for the next two days and we are keen to get the program underway, but first, some quick housekeeping items. Each of the sessions over the next two days will be held here in the Theatrette, except for this afternoon, when we go over the road to the Supreme Court. Each session will be introduced by a member of the Legislative Council or a Presiding Officer and will be delivered by an expert in their field.

At the end of each session, there will be a question-and-answer component for 15 minutes, so make sure you save up your questions. To indicate that you would like to ask a question during that Q and A, please raise your hand and someone with one of the two roving microphones will make their way to you. For those of you following online, please write your questions into the comments function on the screen and our moderators will read them out during that Q and A session. For those of you sitting in the front two rows, you may see a number of people with handheld cameras make their way towards the stage at different times during the day. Please don't be alarmed; they are simply capturing images and footage of the day.

This morning we will commence with a look back at our learnings from last year's—the first—bicentenary conference, The State of the Colony: People, Place and Politics in 1823. That will be led by myself and the Usher of the Black Rod, Ms Jenelle Moore. We will then learn about New South Wales' place in the world of empire from Professor Stephen Garton before breaking for morning tea at 11.00 a.m. We will meet back in the Theatrette for our next session after morning tea, in which Bret Walker and Lynn Lovelock will guide us through the tumultuous process by which the 1823 Act was enacted through the British Parliament, before we break for lunch at 12.45 p.m.

For those of you who have opted for the included lunch, your conference passes have been marked with a blue dot on the back. We will be gathering in the members' lounge to enjoy a delicious meal that incorporates a selection of native Australian flavours grown in the rooftop garden here at Parliament House. Crikey, that should be quite a treat. I don't think all the produce came from the rooftop garden, but there will be some flavours from the rooftop garden. At 2.00 p.m. we will depart for the special panel session at the Supreme Court across the road, where we will hear from Chief Justice Andrew Bell, Virginia Bell, AC, and Keith Mason, AC, KC, about the Chief Justices of New South Wales over the past 200 years. Following this, we will tour the original court building and hear about its colourful history before finishing for today.

To ensure each session runs to time, we ask that everybody comes back and is in their seat approximately five minutes before each session is due to start. The main exit is to your right as you exit and up the ramp to Macquarie Street. Thank you all for bearing with us with the unusual entry and exit arrangements today. They are as a result of really important, absolutely essential heritage restoration works taking place to this building. We are very thankful to our wonderful Facilities team, which is completing that excellent work not only on budget but ahead of schedule for some big events coming up later this year.

In case of an emergency, please follow the directions of the parliamentary staff. Bathrooms can be found outside in the foyer and also upstairs in the Fountain Court on the left-hand side. You will also find water jugs in the Theatrette foyer and a water fountain near the bathroom upstairs. If you need assistance, just speak to one of

our team. They are all wearing a Legislative Council nametag or a Black Rod pin, and they will be stationed in the foyer and in the Fountain Court during the course of the day. That's enough for housekeeping.

Let's set the scene with a very quick recap of what we covered during last year's conference, The State of the Colony: People, Place and Politics in 1823. The goal of last year's conference was to explore the context and conditions that led to the passage of the New South Wales Act in 1823. Our intention with each of these three conferences—last year's, this year's and next year's; yes, there will be another next year—is to leave a lasting legacy of serious scholarship and new perspectives on our early colonial history and the establishment of the institutions of government in New South Wales.

We began last year with a really special session. Danièle Hromek is the first Aboriginal person in Australia to receive a PhD in spatial design, and she is also the director of Djinjama, which offers cultural design and research for projects in the built environment. Danièle took us through a beautiful and insightful visual-verbal history. It was a visual-verbal essay which explored the landscape, and the relationship with and responses to the landscape, on which this building sits—the relationship with that landscape over tens of thousands of years, as well as more recent responses from contemporary community members. It was a treat for those of us who were fortunate enough to be present.

The day continued with a conversation—that is, a conversation between Dr Paul Irish, historian, archaeologist and director of Sydney firm Coast History & Heritage; and Ray Ingrey, chairperson of the Gujaga Foundation, an organisation leading language, cultural and research activities within the La Perouse Aboriginal community. Paul and Ray, in conversation, discussed their research, which links together the oral stories passed down by Ray's people and written historical records to explore the lives of Sydney's coastal people. What was the story that they told? Following the initial, tragic impact of smallpox, which decimated the local Aboriginal population shortly after 1788, the story evolved into one of strategic relationships between the community and early governors and members of Parliament, including members of Parliament who proved to be valuable allies throughout the nineteenth century, ahead of the misguided and damaging policies implemented during the twentieth century. Notwithstanding the ongoing legacy of those policies, the story they told was one of the extraordinary ingenuity and resilience of Sydney's coastal people. Jenelle, would you like to continue the story?

Ms JENELLE MOORE [Usher of the Black Rod]: We concluded the first day with an esteemed panel of academic experts, who explored the inquiries of John Thomas Bigge, who arrived in New South Wales in 1819 to report to Britain on every aspect of the colony. Professor Kirsten McKenzie is a professor of history at the University of Sydney. Kirsten explained that Bigge's inquiry was part of a huge stocktaking investigation undertaken by the British government at the time, across the empire, to foster good governance and to prevent the revolutionary upheaval it had seen in Gulf America, France and Haiti. Kirsten observed that while Bigge's commission into New South Wales proved to be transformative, it was actually an inquiry designed to control change rather than unleash it.

David Andrew Roberts is an associate professor of history at the University of New England, and we will have the privilege of David joining us again tomorrow. Last year David took us through the mechanics of the Bigge inquiry, how the investigation was conducted, who Bigge spoke to and, more importantly, didn't speak to, and the monumental body of evidence behind his reports and recommendations that was left in archives until relatively recently, owing to its political sensitivity. Dr Matthew Allen is a senior lecturer in historical criminology at the University of New England. Matthew spoke to the role of public opinion and gossip, first, in informing the decision-makers who sent Bigge to New South Wales in the first place, and then its influence on the views Bigge formed during his investigations. Matt suggested that the Bigge reports demonstrate that this convict colony was in some sense already becoming a democracy by virtue of what he calls an emerging democratic imaginary—a shared connection among the colonial public that they had the right to voice their views and influence decision-making.

Professor Lisa Ford is a legal historian whose prize-winning work explores ideas and practice of order in the British Empire and the early national United States from 1763 to 1850. Lisa underscored a fundamental point: The Legislative Council was not Bigge's idea. He actually had a much more inclusive model in mind that would see every law the Governor made verified by an Attorney General and a council comprised of every magistrate in the colony, and laws passed by a majority vote. Lisa then touched on some of the potential sources and influences that prompted the establishment of the Legislative Council and the final model chosen, and we will pick up on those today with Professor Stephen Garton, Bret Walker and Lynn Lovelock.

That should have taken us to day two. However, at 4.30 that morning I awoke to a text from the President's chief of staff advising me that Her Late Majesty the Queen had passed away. This prompted the former President and the Clerk to make the very difficult decision to postpone the second day of the conference so that we could

prepare for a large-scale ceremony to proclaim the new King two days later. It drew thousands of people in attendance. You can see some of the people on screen now. But in November the conference reconvened.

Mr DAVID BLUNT: When day two got underway in late November, we dived straight into the politics and people of the 1820s. Kirsten McKenzie spoke again, this time exploring scandal as an entry point into politics and the way in which, in the absence of a legislature in which political contests could be played out, the press and the courtroom were the stages on which men, and occasionally women, of influence settled scores and agitated for constitutional reform. Penny Russell is a Professor Emerita at the University of Sydney, where, from 1990 to 2021, she taught Australian and gender history. Also relying on sources from the press and the courtroom, Penny described the experiences of women in the colony in the early nineteenth century. In a male-dominated culture, the experience of the women whose stories Penny highlighted was one of danger and violence.

James Dunk is a research fellow in the school of humanities and the Sydney Environment Institute at the University of Sydney. He is the author of *Bedlam at Botany Bay*, which won the Australian History Prize and the 2020 NSW Premier's History Award. James continued the dark and sobering theme, exploring the incidence of suicide in the colony in the 1820s. He asked whether this was a spreading contagion, the consequences of dissipation and climate or, rather, the natural consequences of a deliberate government policy, post-Macquarie, to make the colonial experience—at least that of the convicts—one of sheer terror.

We then stepped back in time to the decade before the 1820s to consider the last Governor to wield unchallenged power in New South Wales, Lachlan Macquarie. Reverend Dr John Harris is the author of *Judging the Macquaries: Injustice and Mercy in Colonial Australia*. John has spent much of his life with Aboriginal people, as a child, teacher, linguist and advocate, and he holds a PhD in Aboriginal languages as well as a ThD in theology. John discussed Macquarie's enlightened treatment of convicts and the opposition to this policy which he faced from influential colonists against the backdrop of theological differences. John also addressed the difficult subject of Macquarie's interactions with, and impacts upon, Aboriginal people. Caleb Cugley, a history teacher with a particular interest in Australian colonial history, continued the examination of Macquarie and his legacy, as well as the notion of a Legislative Council as a restraint upon autocratic Executive power.

Ms JENELLE MOORE: This brings us to two of my favourite sessions. Westpac Group archivist and historian Kim Eberhard is a passionate advocate of records, archives and the stories that they hold. Kim spoke to the role of Governor Lachlan Macquarie as architect of the now famous holey dollars and dumps, bringing Australia's very first currency to the colony. Kim also discussed how the disputes that occurred over the multitude of different currencies that began circulating in the colony ultimately prompted the establishment of the Bank of New South Wales and Governor Macquarie proclaiming the use of the sterling medium of monetary exchange. We were very fortunate to then have Westpac loan us some of those early currencies for display in our first bicentenary exhibition last October. If you would like to see the coins and the other stories from our exhibition, please feel free to collect one of our commemorative booklets. They will be available in the Fountain Court at morning tea.

Next followed a wonderful session with author Jessica North. Jessica has worked at the Australian Research Institute for Environment and Sustainability at Macquarie University for the past 15 years, including five as its director. Jessica opened our eyes to the volume of unwritten histories that are yet to be told from the early years New South Wales—tales of women of influence, clever women, resilient women and bold women. But most people have never heard of them. Jessica shared the stories of Esther Abrahams, a convict single mother who became the first woman to manage a large agricultural estate—note, it wasn't Elizabeth Macarthur; Susannah Kable, the subject of the very first civil law case in Australia; Sarah Wills, the instigator of the first prenuptial agreement; and Mary Ann Piper, the child of convicts who became a society queen, promoting Australia to the world. Jessica and other speakers like Ray, Paul and Danielle underscored how important it is that the perspectives of women, Aboriginal people and other groups previously silenced are now being shared.

Mr DAVID BLUNT: How to close such a fascinating and enlightening two-day conference? The answer: with a very personal and inspiring presentation from one of Australia's living treasures, Ita Buttrose, AC, OBE. Ita needs no introduction. Beginning with personal reflections on her own childhood spent in the vicinity of Vaucluse House, and playing in the grounds of Vaucluse House, she described it as the home of leading colonial political figure and press baron, William Charles Wentworth. Ita's speech then touched upon the initial foundations of the separation of powers, democratic governance and, not surprisingly, the early days of an extraordinarily free press in the colony, before concluding by returning to Vaucluse House for the story of the raucous party hosted by Wentworth at that place to mark the departure of his nemesis, Governor Darling. Ita's speech was a rousing call to explore the past in our efforts to perfect our still imperfect democratic institutions, whilst engaging in the ever-evolving battle of ideas—truly inspirational. That's last year; now to this year and today's conference.

NEW SOUTH WALES IN THE WORLD OF EMPIRE

Professor STEPHEN GARTON, AM, Principal Adviser to the Vice-Chancellor, and Professor of History, University of Sydney

Mr DAVID BLUNT [Clerk of the Parliaments]: To introduce our first speaker, can I welcome the Hon. Chris Rath, MLC. Mr Rath is a member of the Liberal Party and the Opposition Whip in the Legislative Council. He is also the Deputy Chair of the Standing Committee on Law and Justice and of the Selection of Bills Committee. He has a chapter published in the book *The Forgotten People: Updated—Liberal Essays on Modern Australia*, and he enjoys marathon running, sailing, skiing, opera and, of course, history. Please join me in inviting to the stage the Hon. Chris Rath.

The Hon. CHRIS RATH [Member of the Legislative Council]: Thank you, David, for that introduction. Thank you to the Clerk of the Parliaments, together with the President, Ben Franklin, the Usher of the Black Rod, Jenelle, and all of the staff here at the Parliament for making these very important bicentenary celebrations possible.

Ladies and gentlemen, before we delve into the historical circumstances that led to Parliament and the Supreme Court being introduced in New South Wales, it is vital that we first understand the geopolitical context of the early New South Wales colony. This morning's first session, New South Wales in the World of Empire, will help deepen our understanding of New South Wales' place in the world of the 1820s and how colonies like New South Wales became places of extraordinary international vitality and, importantly, sites for the development of novel experiments in political and administrative institutions.

To help us explore New South Wales' place in the world of empire, it is my pleasure to hand to our first speaker of the day, Professor Stephen Garton, AM. Stephen is currently a professor of history and principal adviser to the Vice-Chancellor at the University of Sydney. He's the author or co-author of seven books and over 80 articles and chapters on various aspects of Australian social and cultural history, and also the history of British dominions and aspects of American history, focusing on such themes as the history of madness, crime, masculinity and the aftermath of war. He is a fellow of the Australian Academy of Humanities, the Academy of Social Sciences in Australia, the Royal Australian Historical Society, and the Royal Society of New South Wales.

Stephen has also had a long career in the university administration at the University of Sydney, serving as head of the history department from 1996 to 1998, dean of the arts faculty from 2001 to 2009, Deputy Vice-Chancellor from 2009 to 2019 and Senior Deputy Vice-Chancellor from 2019 to 2021. He was also interim Vice-Chancellor and Principal from 2020 to 2021. Please join me in welcoming Professor Stephen Garton, AM.

Professor STEPHEN GARTON: Thank you. Before I begin, let me also acknowledge that we're on the lands of the Gadigal people of the Eora nation and pay my respects to Elders past and present. I also acknowledge the graciousness with which Indigenous Australians have managed the last 12 months, which have been difficult for everyone. I'd also like to note the President's acknowledgement of country, which I thought was particularly nuanced and gracious as well.

The seed for this paper was planted nearly 50 years ago. In the mid-1970s I was a harried honours student at the University of Sydney history department, writing a thesis on British attitudes to India in the late eighteenth and early nineteenth centuries—specifically, the impact of British utilitarian philosophy on racial ideas and colonial policies, most evident in the six-volume *History of British India* written by James Mill, disciple of Jeremy Bentham and father of John Stuart Mill. I'm not going to strain your patience by explaining the argument; suffice to say Mill's impact on European attitudes to Indian culture was profound. It was one of the key intellectual and cultural streams helping to erode the former, albeit orientalist, appreciations of Indian culture and replace them with representations of India as backward, depraved and in great need of Western enlightenment—attitudes to many subject peoples that pervaded Victorian views of race thereafter.

I needed to read widely into British literature on India in the period, and I was told that the library of the New South Wales Parliament had an excellent collection of important works, some of which were held at no other library in Australia. I of course needed a special introduction to get access to the parliamentary library, which was generously granted, and I spent a pleasant couple of weeks in the library, which was then right at the very front of the building in a room facing onto Macquarie Street, working my way through those sources. While there, as a callow youth I remarked to the Parliamentary Librarian, "What a wonderful collection." He kindly explained in a polite way my ignorance, saying, "It's not so surprising. After all, New South Wales had been part of the Archdiocese of Calcutta until the 1850s." The link between Sydney and Calcutta was actually a very strong one.

These days historians are attuned to the transnational dimensions of nations, peoples, places, ideas and policies. It will come as no surprise to anyone here today to know that New South Wales was part of a wider British world, a link in a vital chain of trade routes; economic ties; military, administrative, political and religious institutions; laws; rituals; habits of thought; and familial ties across continents that shaped the evolution of early colonial society. On an occasion when we are here to explore colonial society and, more importantly, the political and institutional culture of the early colony, especially around 1823 with the formation of the Legislative Council and the Supreme Court, it's hopefully helpful to attempt to place the evolution of Australian institutions in their wider transnational context. Here I propose to cast a wide net and explore how a number of colonists came bearing their experiences of other places and cultures. Equally importantly, many of those who settled here and prospered did so because they sustained vital economic, social, political, familial and religious networks within that larger British world.

While New South Wales was a settler colony in the age when the monopoly of the East India Company was increasingly being dismantled—first in 1813 and further in 1833, ushering in an era of what historians have called "free-trade imperialism"—colonial prosperity was dependent on the ability of colonists to capitalise on the economic opportunities afforded by British trade and commerce. The evolution of colonial institutions also drew on examples of governance arrangements throughout the wider empire, seeking to configure and reconfigure British institutions to best position colonists and the colony to thrive in this wider imperial environment. Naturally, there were intense political conflicts around competing visions, priorities and strategies for the creation and maintenance of wealth, respectability and power in the colony. But many of the novel outcomes of these differences drew on ideas and institutions from the wider British world and, equally, sometimes fostered innovations that impacted that wider world.

As we know, early colonial administrators were largely drawn from a cohort of soldiers, naval men and administrators who travelled around the empire and the wider world serving British interests. Governor Phillip, a naval man, saw action in the Seven Years War and the war against the American colonies. He also served in Havana, South America, France and India before commanding the First Fleet. His friend Phillip Gidley King, another naval man—it was reputedly easier for a man of humble origins to rise in the navy than in the army—spent time in the East Indies, the American colonies and India before joining Phillip in New South Wales. Macquarie, an army man, served in Nova Scotia, New York, Charleston, Jamaica, India and Egypt before becoming Governor of New South Wales.

Similarly, many of his successors were men of wide experience in empire administration, where they adapted British civil and military administrative arrangements, reconfiguring them to suit the particular conditions of each place. Thomas Brisbane had experience in Flanders, Jamaica, India, America and Europe. More germane to our concerns here, Ralph Darling, the Governor of New South Wales during the establishment of the Legislative Council and the Supreme Court, was another army man who had served in Spain and the West Indies and was actually the administrator of the colony of Mauritius before becoming Governor of New South Wales. And the list could go on and on with respect to senior administrators of the early colony.

Men of the cloth mostly had less varied experience of empire but, nonetheless, were embedded in wider international networks. The early Anglican archdeacon of the colony, Thomas Hobbes Scott, who first came to New South Wales in 1819 with Commissioner Bigge and returned as archdeacon in 1824, was a member of the Legislative Council, like his successor from 1829, William Grant Broughton. Both were English born, bred and trained, although Broughton briefly worked for the East India Company in London. As we know, in these early years, the Sydney archdeacons reported to Canterbury through the Calcutta archdiocese.

Although there were a few Irish Catholic priests who arrived as convicts after the 1798 rebellion, the Catholic Church didn't send out priests until 1820, with the arrival of John Joseph Therry and Philip Conolly. Although Therry and Conolly were Irish, English Benedictines dominated the early Catholic hierarchy in New South Wales. In the 1830s, William Ullathorne, a Yorkshire man, and John Bede Polding, a Lancashire man, led the Catholic Church in New South Wales as Vicar General and Archbishop respectively. Catholic priests in the early colony obviously owed their allegiance to Rome and much of their experience to Ireland, itself part of the empire. Officially—and as many in this audience will know—these early Catholic leaders reported through the Vicar Apostolic of Mauritius, Madagascar and the Cape Colony, William Placid Morris.

Evangelicals were also prominent in the colony. From its formation in 1795, the non-denominational Protestant but largely Wesleyan and Anglican London Missionary Society sent over 1,800 missionaries to China, India, Africa and the South Pacific. Sydney was termed part of the South Pacific before World War II. Many of those sent to the South Pacific came through Sydney, and a few, such as William Pascoe Crook and Lancelot Threlkeld, settled in New South Wales, becoming major influencers in the early evangelical history of the colony, although they quickly ran into trouble with the society's principal agent in New South Wales, the Reverend Samuel Marsden—well, they weren't alone in that.

We can also go to the other end of the social scale. There were 11 convicts of African descent on the First Fleet, including Australia's first bushranger, Black Caesar. Others followed. One, Billy Blue, was a well-known figure in the early colony. His name to this day is recorded as an iconic feature of Sydney Harbour. Many early colonists, including governors, brought Indian and Chinese servants to New South Wales, and some landowners brought Asian labourers to work their properties. The gold rushes brought more. As Henry Reynolds has argued, colonial Australia was a remarkably multicultural society. During the gold rushes, 20 per cent of the adult male population of Victoria were Chinese. Nineteenth-century Australia had many of African, Afghan, Pasifika, Chinese, Indian, North and South American and South-East Asian descent. The later White Australia policy was an effort to turn back the tide—a tide that, in some respects, had already washed ashore.

By 1820, as it became evident that New South Wales was to be much more than a convict colony—with an increasing proportion of free settlers and many emancipists, and significant profits possible through the burgeoning trade in whaling, sealing, and later wool and agriculture—the economy became an attractive place for social advancement. Institutions promoting British culture and cementing ties between the emerging middle class were established. In 1814, the Reverend Samuel Marsden persuaded a number of benefactors in Britain to donate a substantial collection of books to establish a circulating library. Strangely, all those books found their way into Marsden's private collection. But it's not until 1826 that prominent colonists established the first subscription library. The person who convened that meeting was a barrister and public servant, John Mackaness, who in the same year convened another public meeting of "gentry, magistrates, merchants, landholders, farmers, traders and other free inhabitants" to petition Governor Darling for a part-elected legislative council and trial by jury.

A few years earlier, in 1821, the Philosophical Society, charged with promoting the study of natural philosophy in the colony—what we call science now—was established by prominent citizens, including Supreme Court Justice Barron Field, Colonial Secretary Francis Goulburn and a Scotsman, Francis Irvine, who had served in the British Army in India and spent 15 years in Bombay and Calcutta, where he was a prominent member of the Bombay Literary Society and the influential oriental society in Calcutta, established by Sir William Jones, Britain's foremost scholar of Indian languages and culture in the eighteenth century. This effort at scientific uplift in New South Wales didn't last long, but many of the founders became members of the new agricultural society, established the following year, to promote the scientific study of agriculture and pastoralism in the colony. We could multiply these examples many times.

A relatively prosperous, independent-minded middle class was growing and seeking to create the institutions of civil society befitting men of substance. Wealth and a desire for respectability and recognition fired up colonists on many fronts, not least the desire for political representation and a check on the power of governors. Land and trade were the keys to colonial wealth, and New South Wales' mercantile economy was a critical area of engagement with this wider British world. As Australia's foremost historian of colonial shipping, Frank Broeze, has explained, until 1850, when the Navigation Acts ceased to operate, all British shipping routes in the empire were reserved for ships registered in Britain or its colonies. British shipping dominated Australian trade, bringing essential cargoes to the colonies—initially convicts and supplies and later free settlers and goods in high demand.

In the early decades of the nineteenth century, however, there was insufficient tonnage to take back home, despite the growing whaling and sealing trade—until wool exports really began to take off in the late 1830s—which created a significant trade imbalance in the route between Britain and New South Wales. Colonists had to grow the whaling, sealing, wool and pastoral industries to reduce that burden. Another option was for Australian shipping to plug gaps in the market, developing intra-colonial routes to bring goods from smaller ports to Sydney, providing more goods for ships returning to Britain.

Colonial merchants also developed their own trade routes, focusing especially on the South Pacific, China, India, South-East Asia and as far west as Mauritius, bringing to the colony—as the lovely book by James Broadbent, Margaret Steven and Suzanne Rickard shows in beautiful detail—goods such as tea, sandalwood, lacquerware, silks, rugs, furniture, porcelain and spices. This thriving trade with Asia and the Pacific speaks to the growing prosperous middle classes in the colony. But as the work of Grace Karskens and others investigating the Cumberland site in The Rocks shows, objects such as porcelain plates could be found in some of Sydney's poorer districts, indicating that demand for goods traded from India and China and elsewhere was intense and widespread.

Sydney merchants had to navigate—if you'll forgive the pun—the complexities of imperial trade and shipping to thrive. Many of the colony's wealthy citizens were pastoralists and agriculturalists who profited from the lands acquired through the dispossession of Indigenous peoples and then granted through the grace and favour of governors and the buying and selling of property. A merchant class also emerged in the colony. Of course there was a symbiotic relationship between the two. Producers needed to sell their produce; merchants needed produce to sell. More importantly, many merchants became prominent landowners, and landowners diversified their holdings by entering trade and commerce, thus enmeshing many colonists in the larger needs of empire trade. So

the products of land, sea and trade and the production and circulation of capital required other institutions for their ongoing survival—financial institutions, forms of insurance, banks, brokers, lenders, guarantors and more.

Again, the wider empire networks often underwrote early colonial enterprises. This was the age of banks. By 1813, Britain had 761 banks. Some of them were based in India and some of them were also merchant houses which added lending to their list of services. The Bank of New South Wales, founded in 1817, survived difficult economic winds because it had vice-regal support, but the ill-fated Bank of Australia, established in 1826 with many leading Sydney merchants on the board, was dependent on British and Indian merchant houses and banks extending credit facilities for their colonial clients. One reason why it collapsed was that those lines of credit were not forthcoming when the imperial economy suffered a major downturn in the 1840s and others during the nineteenth century. The first colonial insurance firm, the Derwent and Tamar Company, was established in Tasmania in 1838. But for many decades colonial merchants, traders and producers were reliant on taking significant risks with each voyage and often had to rely on lines of credit from other merchants or banks in England, India or other parts of the empire to survive.

When we look at the prosperous colonial middle class before 1850, we can glimpse extraordinary crossovers and interdependencies in land, trade, commerce and finance. Some of these ties were also cemented by family connections. Family ties crisscrossed the empire. Robert Campbell's brother was head of a major Calcutta merchant company. Edward Riley lived and worked in Calcutta for a number of years; his first wife died in India. He remarried there the daughter of a British colonel in Calcutta and, together, they settled in New South Wales in 1816, with Riley becoming a leading merchant in the colony. Caroline Chisholm lived in Madras for six years before arriving in Sydney in 1838 with her husband, a military man, and three sons. He was recalled to India in 1840 while Caroline remained to become a prominent philanthropist and charity worker.

Harriet Blaxland, wife of John Blaxland, prominent landowner, merchant and persistent irritant to successive governors of New South Wales, was the daughter of a prosperous French merchant in Calcutta. Harriet Mary, their daughter, spent a considerable portion of her childhood with relatives in India, married a partner in a mercantile firm and lived in Agra within sight of the Taj Mahal. Widowed, she later married Sir James Dowling, the second Chief Justice of New South Wales and member of the Legislative Council. Here were family connections across New South Wales, England and India. Mother and daughter were by no means unusual in having family links scattered across the empire.

From these prominent families came many of the early colonial politicians, integral to the birth of democracy in New South Wales. Just look at some of the early members of the New South Wales Legislative Council: Almost all of them were substantial landowners and had a stake in a thriving economy based on land, sea and trade. Amongst the judges, Anglican ministers, administrators and government officers—most of them also landowners—are the merchants who acquired substantial landholdings, a number of whom thrived and sometimes crashed and burned in the boom-and-bust economies of the free-trade empire.

Take Richard Jones, for example, widely known as China Jones. He was a member of the Legislative Council from 1829 to 1843 and briefly again between 1850 and 1852. Born in 1786, Jones arrived in Sydney in 1809 and quickly established himself as an agent for Forbes and Co, a Bombay-based company trading in spirits. Later he went into partnership with Edward Riley, and by the 1820s this merchant house—now known as Jones, Riley and Walker—was the most prosperous in the colony, with extensive trading links with China, the East Indies, India, Mauritius, New Caledonia, New Zealand and Van Diemen's Land, trading in goods such as tea, porcelain and furniture from China; hence his nickname.

Jones also owned five whaling ships plying the seas around Australia, New Zealand and South Africa. He knew how to get the full economic network working together. With his growing wealth and extensive connections, he became a significant pastoralist with nearly 20,000 acres granted and purchased over the years, pioneering the Saxon breed of sheep. Nomination to the Legislative Council soon followed. He was a noted conservative who opposed Governor Bourke's liberal reforms instituting greater civil rights for emancipists. Jones, however, was an influential member of the early Council, sitting on almost all the select committees of the period.

Alexander Berry, member of the Legislative Council from 1828 to 1856, was another merchant and landowner, largely in the Shoalhaven, who had extensive commercial relationships with British firms and in the wider colonial South Pacific and Asian region. Berry, born in Scotland, was a surgeon's mate on various ships plying their trade in India, the Cape Colony and the East Indies before arriving in Sydney in 1808. He engaged in a number of trading ventures, with voyages to the Cape Colony, South America, New Zealand, Fiji and back to various ports in Europe. Later, in partnership with Edward Wollstonecraft, they became a major trading firm. He was granted 10,000 acres in the Shoalhaven district by Governor Brisbane and he expanded his holdings significantly over coming years, buying up a number of local farms. By the 1860s he had 40,000 acres. A noted

conservative like Jones, he was much less active than Jones, but he still held his seat in the Council for many years.

There are others with similar stories of mercantile and pastoral interconnections: Robert Campbell, for one, and of course the Macarthurs—John, James and Hannibal. I don't need to go into their careers. They are all well known, and we have wonderful books by Alan Atkinson and others on the Macarthurs that enrich the story I am trying to tell here. But it's worth noting that, in 1824, when John Macarthur and James Ebsworth called a meeting in London to establish the Australian Agricultural Company, in attendance was a representative of the Bank of England and four directors of the East India Company, as well as a number of East India Company shareholders.

Turning back to the heartland of Britain itself, people moved around the empire and had commercial, religious, political and familial connections that traversed vast swathes of imperial territory. Early colonists lived in an empire, not just a colony. We can glimpse some of the impact of this wider imperial world in the evolution of Australian democracy in the early years of the colony. There were models in the empire that stood as examples for those crafting the formation of key institutions in New South Wales, such as the Supreme Court, the Legislative Council and, later, the Legislative Assembly.

The East India Company, established in 1600, was essentially a body of shareholders established by royal charter to expand England's trading routes in India and the East Indies, although it appointed a governor and a council in each of its major presidencies. It was a model that influenced new colonies in North America, notably the Virginia Company in 1606 and the Massachusetts company in 1629. Both of these were, like the East India Company, joint stock companies. The Virginia colony was governed by a council appointed by the King. In Massachusetts, the great and grand court began as an elected body from amongst the shareholders but, a few years later, expanded its constituency to incorporate elected representatives from each of the districts in the colony, with the qualification being that only Puritans of substantial means could vote.

From 1689, however, the Massachusetts Governor was appointed by the Crown, although the General Court remained an elected body, acting as a check on the power of governance. It was the General Court that tore down these institutions in 1776, establishing a provincial congress and, from 1779, writing its own constitution, now free of the British yoke. Company and Crown yokes that were thrown off were the beginnings of an important shift in the nature and character of British imperialism. It's not just that forms of commerce changed in this period but also forms of governance in the transition to free-trade imperialism. Indeed, I think we need to unpack this term "free-trade imperialism" a bit.

Up until the nineteenth century, British interests were largely advanced by what Philip Stern has called corporate or venture colonialism. Numerous joint stock companies were formed from the seventeenth century with Crown and parliamentary approval and, sometimes, funding. Sometimes the Crown bought large shares in these companies, and members of Parliament were large shareholders in these joint stock companies as well. Occasionally, to protect their shareholder interests, the Crown sent armies to support some of these companies. They spread across the globe, becoming, in many respects, company states. Almost every American colony before 1776 largely began as a company state. When we look more widely, there was the East India Company, the Hudson's Bay Company and the Sword Blade Bank, which was the seventh biggest corporation in the world in the late eighteenth century.

Between 1750 and 1800 the English Parliament approved 648 stock companies just to operate canals, rivers and harbours. That just gives you one sense of the gigantic nature of the joint stock company ethos of the eighteenth century that fuelled British imperial growth. These companies remained very powerful till the early to mid nineteenth century as Britain gradually transitioned to the Crown taking over governance from companies and then opening up those areas to broader free trade. But the free trade, I think, has to be seen in its governance as well as its trade connotations, and this had a significant transformation. One of the interesting things about New South Wales is it's very early the Crown establishes the colony, not a company. The companies come later. It's interesting why we always think of South Australia as different; South Australia was established by a company. So there are some subtle and interesting differences there in the evolution of Australia. I don't think we've come to recognise the importance of that venture capitalism and venture imperialism as a context in which New South Wales emerges, in an unusual and different way that has important connotations.

Obviously the British Parliament was all too aware of the American colonies' revolt when shaping governance for the colony in New South Wales. That, and the fact that it began as a penal colony, cemented the power of early governors, largely unchecked by any authority other than the Crown and the Parliament, and there were certainly no corporations; they come later. But the growth of free settler and emancipated populations meant the push for a say in the governance of the colony obviously gathered momentum, with the first significant

milestones being—as we celebrate today and as we will hear in papers later today in much greater detail—the establishment of the Legislative Council and the Supreme Court.

There are other examples of colonial governance that Australian colonists could draw on, especially as prominent colonists in New South Wales began to urge checks on the governor's power and a voice for prominent citizens. As I've said and explained, they had connections all around the empire. Canada is an interesting case, where many administrators and colonists had some experience of those North American colonies. Nova Scotia established its Legislative Council, appointed by the governor, in 1719. But from 1758 the Council was transformed into an upper House, with an elected House of Assembly holding executive and legislative duties.

New South Wales may have been a British colony, drawing on British laws of institutions of governance, but like other colonies in the empire it could never be a carbon copy. Institutions had to adapt to local circumstances and conditions. An appointed Legislative Council had echoes elsewhere in the Empire but was original in its constitution and appointment here. The push for elective representatives gained traction. Gradually the Council, and subsequently the Assembly, became bodies of elected representatives, as did many similar institutions in other settler colonies. Colonies could be places of innovation, the places where citizens looked beyond Britain for inspiration or to develop their own models of governance and public administration.

In looking at the full nineteenth century, fingerprinting, for example—for the identification of criminals— was first trialled in India. The concentration camp originated in South Africa for the control of Boers. Nearly 100 years after Alexander Maconochie first introduced his mark system in Norfolk Island in the early 1840s, penal experts at international penitentiary conferences and congresses in Europe and North America were still citing this as one of the key innovations of modern Western penology. And let's not forget Australia's great contribution to democracy, the secret ballot, first trialled in Tasmania in 1856 and adopted by all the other colonies in the next couple of years, or the unusual idea of compulsory voting in 1922. Let's not overlook Australia's own constitution, fundamentally drawing on the Westminster system but with elements of the American constitution in the framing of Australia's upper House.

Australian public administrators of the nineteenth century actually had a remarkably global outlook. They corresponded with and often took extensive visits overseas to shape public administration in the colony. In 1868 New South Wales funded the tour of Frederic Norton Manning to lunatic asylums throughout Britain, Western Europe and North America—who would fund a full 12-month tour for a public servant these days?—to bring back the best international practices for the administration of lunacy in the colonies. They sent him off again in 1875 to refresh his ideas. In the 1880s George Tucker—who was a very good friend of Henry Parkes, but also the proprietor of Bayview House, a private lunatic asylum in Tempe—spent a year overseas, travelling to over 800 lunatic asylums in Britain, Western and Eastern Europe, North Africa, Asia, North and South America to bring back the latest thinking on treatment. His 1887 book, *Lunacy in many lands*, is the best and most comprehensive guide to nineteenth-century lunacy administration in the world that's ever been published.

There were similar grand tours by bureaucrats interested in fields such as technical education in 1887 and again in 1904, solutions to industrial strife in 1891, neglected children in 1913, workers' houses in 1913, and agricultural skills in 1914. Other colonies followed suit. Victorian bureaucrats travelled overseas to report on charitable institutions in 1862, prisons in 1878, schoolrooms in 1880, railway construction in 1876, and technical education in 1899. Frederick William Neitenstein, the comptroller-general of prisons in New South Wales, in the 1890s corresponded with leading criminologists all around the world, including Lombroso, and visited prisons overseas.

In the first decade of the twentieth century, Sir Charles Mackellar spent some time overseas visiting juvenile reformatories because he was in charge of juvenile reformatories in New South Wales. His daughter, Dorothea, accompanied him and started to draft her most famous poem, reflecting her homesickness while staying in dreary England while her father toured borstals. Nineteenth-century New South Wales was really a remarkable experiment in governance and administration, shaped by its position and the experience of many of its citizens in the wider imperial and international networks of commerce, law, administration and politics. Democracy in Australia is a distinctively Australian story, but one profoundly influenced by its international context.

The Hon. CHRIS RATH: Thank you, Stephen, for that incredibly insightful presentation. We now have time for questions from the audience—both the audience here in person as well as those watching online. The staff will read out the questions coming from online. If you do have a question, please raise your hand and I will call on you to ask your question. We will start with the President.

The PRESIDENT: I promise, this isn't a set-up. I was fascinated when you mentioned that the American Constitution impacted the New South Wales Legislative Council. Could you speak a bit more about that?

Professor STEPHEN GARTON: No, the Australian Federation.

The PRESIDENT: Yes. Could you speak a bit more about that?

Professor STEPHEN GARTON: Just the notion of a Senate, the upper House. You can't do the House of Lords, obviously, in the colonial context, so they're looking around. If you look at some of those Federation debates in the 1890s, they're looking around at models for an upper House because they believe an upper House is very important—a house of review—which it is, very much, in the Westminster system. They do an adaptation of the American model of having an equal number of senators from each State. So there's a rich historiography now on some of those influences in the nature of the Australian Constitution. Now, there are plenty of other differences between what happens in Australia and America, not least in what powers are granted to the Commonwealth in the Australian Constitution.

I'm actually on a research project at the moment looking at the impact of World War II on Australian higher education. Under the Australian Constitution, the Commonwealth has no powers over education until 1943, when they exercise the defence powers in order to intervene in universities. Then there is a referendum—one of the eight that succeed—in 1946, which gives the Commonwealth limited powers over education. But until 1943, the Commonwealth had no powers in the sphere of education. They were entirely State-based entities. So the Australian Constitution is fascinating in what it gives to the Commonwealth and what it doesn't give to the Commonwealth. But, again, the upper House draws on models like the American notion of a Senate with an equal proportion across.

QUESTION: During this time of borrowing ideas from around the empire, can I just ask about slavery? Were any of the colonial administrators and settlers and merchants and so on who came via other colonies exposed to slavery? That is the first question. The second is what part, in the development of democracy in New South Wales, did the rapid unwinding of the Atlantic slave trade and views towards slavery have in their thinking here in New South Wales?

Professor STEPHEN GARTON: Very good question. Actually, this is a big debate going on at the present point in time. Now, there are a couple of nuances. The thing that has really transformed the historical discussion of slavery in the last decade or so is the going online or digitisation of the 1833 slavery compensation. The British Parliament decided that it had to stop slavery—more than the earlier abolition—but it needed to compensate slave owners. So it actually established an extraordinary system of compensating slave owners according to the number of slaves they had. That was one big payment. It was millions and millions of pounds. We now have a database of everyone who received compensation through that system. Historians are trawling through that as we speak, with forensic attention to the detail.

There is some evidence emerging that some of that money flowed into Australia. Now, they did not own slaves, but their wealth in part comes from slaves that either their family or their forebears owned, and that fuelled some of the wealth inside the colony. The more tricky aspect that you have alluded to is did we actually have slaves in the colony itself? Now, there is some debate about coolie labour being imported by some of those early pastoralists, and there were efforts, but there was resistance to some of that in the colony because, again, you've got missionaries and evangelicals—abolitionists who don't want that happening. But you've got Kanaka labour coming into Queensland in the later nineteenth century. This is a real area of current historical investigation.

Universities are currently going through a bit of a rethink: Did they receive money from donors whose wealth derived from that Slave Compensation Act of 1833? There was a recent article published that compared Adelaide, Melbourne and Sydney. Of course, we all at Sydney thought, "Sydney is bound to be the worst", but Adelaide was the worst, which was very comforting. Sydney didn't come out too badly at all. But this is an important area of investigation. No, we don't have a form of slavery unless you start thinking about the Kanaka stuff. But there is some evidence there that there were some slavery issues embedded in early colonial culture, and certainly some money that we need to investigate more closely.

The Hon. JEREMY BUCKINGHAM [Member of the Legislative Council]: Professor, the early governors of New South Wales—Macquarie, Brisbane, William Stewart for a couple of weeks, and Darling—were all veterans of imperial wars. They fought in the War of American Independence, the Napoleonic Wars and in the Caribbean, South America and India—very violent, brutal campaigns of conquest. How do you think their experiences of war and conquest informed their administration of the growth of the colony into the Aboriginal lands around Bathurst and beyond?

Professor STEPHEN GARTON: Very good question. They are military and naval men who believe in authority and, when pushed, obviously would resort to arms. There is some interesting stuff about restraint in some of those early governors not wanting to resort to arms because, remember, the First Fleet are actually given instructions to make friends with the Indigenous peoples. But obviously, under threat, there are issues. Now, there is some interesting stuff that has been done more recently about those early interactions, and some linguistic stuff has been, where words which we've traditionally interpreted as being words of aggression—Aboriginal language

linguists are saying, "Well, actually they're not words of aggression. They're words of surprise: 'Who are these people?' and 'Are they ghosts?' kind of stuff."

That mismatch between culture—we don't understand their culture, they don't understand our culture—and how that can lead to conflict is a really important area of understanding and exploring those sorts of issues. But, undoubtedly, as military men, if they see colonists under threat, they're going to—when spears are thrown, they fight back. Again, it leads to bloodshed, very unfortunately, partly because of that cultural misunderstanding or lack of knowledge and understanding and ability to navigate those incredibly complex cross-cultural things—and there we have it.

Remember, many of those wars that they fought in India and elsewhere—not in the Peninsular Wars, or any of those, but in India and other areas—they're fighting partly for the Crown but partly for the company. They are also fighting for joint-stock companies, and joint-stock companies have that really interesting mix of being governing entities and trading, profit-making entities, and protecting trade routes and protecting vital capital resources, in many of which, as I explained, the Crown is a major shareholder, and parliamentarians. That whole eighteenth-century issue of British imperialism is enormously complex. It becomes a bit more clarified in the nineteenth century, and the Crown says, "Ah, we're just taking over. We've got to have much more control over what is going on", whereas in the eighteenth century they kind of feed it into these joint-stock companies to kind of do what they want.

QUESTION: We were influenced a lot. We took influences from other parts of the empire and the Americas, but Australia also developed its own innovations in governance, which ultimately had influence elsewhere in the world. How did those ideas arise in Australia—such as the secret ballot, and that kind of thing—and how did they come to influence other democracies?

Professor STEPHEN GARTON: Again, it's colonists sitting around, thinking through the issues that they face at this particular point in time and what's the best way of dealing with it. They're obviously looking at exactly what's happening back in the UK and what's happening in legislation. But if you look at nineteenth-century legislation, there are British Acts that the colony refuses to enact because it doesn't feel that it's appropriate to colonial conditions. And then there are other things where you've got an emerging middle class keen for political representation and keen for a broader representation than is possible or currently enacted in the UK: to have a say in the governance of the colonies. So, there you go—the secret ballot. You don't want those situations in the USA, and sometimes in the UK, where you get up before all the villagers, give your speech, are pelted with rotten tomatoes and then the vote goes and people are subjected to violence and being beaten up if they're voting the wrong way. The secret ballot is genuinely a kind of—and it catches on, suddenly, because there are so many acts of violence at public voting situations, that it's a really unique and interesting thing.

The other puzzling aspect is compulsory voting. While it's compulsory to register from 1901, it's not actually compulsory to vote until 1922, and I haven't quite discovered the full reasons why it waits until 1922 for the actual compulsory vote. Strangely, I found this piece of evidence in an African American newspaper of the 1920s where they were commenting on the strangeness of the Australian legislation. Looking at those forms of legislation is a fascinating historical enterprise—to just look at the Acts that we did not pursue. We have a difference from the UK, for example, over the age of consent. The age of consent is higher in the UK than it is in New South Wales. I hate to say this but the New South Wales parliamentarians said, "Girls ripen quicker in the tropics, so it has to be lower." There are all those kinds of issues about what is the nature of colonial society and how is it different.

Of course, there are debates about the convict inheritance and that you might need stronger policing. Our police force draws a lot on the Royal Irish Constabulary model in the nineteenth century, and so on and so forth. It is about colonists thinking through the nature of their colony, and it is different to everywhere else in the world. There are examples, and they pick and choose what works for them. They bring in things for themselves that they think fit their circumstances that don't fit the circumstances of other colonies.

QUESTION: Professor, when you talk about free trade, can you elaborate on the meaning of the word "free"? What does that relate to?

Professor STEPHEN GARTON: It's a long debate within the history of British imperialism, talking about the "free-trade empire". What they are meaning there—it's a complicated thing because there's also "gunboat diplomacy", and various other aspects of the English forces will enforce "free" trade. But, really, it's about the shift away from those joint-stock companies being the basis for British advancement in the world. They break down those joint-stock companies. The East India Company is really, effectively—it's purely an administrative machinery for India from 1833 onwards. It's breaking down those monopoly companies and opening it up to anyone who can prosper in that environment.

QUESTION: Professor, when you're talking about the global influences on our society in New South Wales, did you discern anything that was influenced by our Indigenous population in the governance or other areas of colonial administration? Was there anything that they particularly influenced us in?

Professor STEPHEN GARTON: I'm not an expert on nineteenth-century Indigenous history, so I can't really answer that with any authority. When I look at all of those public administrators who are running the major departments in New South Wales and other colonies, they're really looking overseas. And not just to the UK—not just to England and Scotland in particular. They're travelling widely, looking at best practice internationally. I do think this is a kind of an interesting hallmark of Australian cultural life.

When I think about twentieth-century universities and twentieth-century academics, Australian academics are much more broad-ranging in their thinking. If you're in America, you only read what Americans write. If you're in England, you only read what people in England write—and, occasionally, what an American might write. If you're an Australian academic, you read all the stuff that is being done in Britain, all the stuff that is being done in Europe and all the stuff that is being done in America. I just think the nature of being a colony on the kind of edge of the world gives you a global outlook and gives you a sense that you need to draw best practice for your circumstances.

I think a kind of interesting hallmark of Australian culture is its international perspective, and I think that continues to this very day. I go to American conferences and British conferences, and they're so insular. They don't know what is being read elsewhere. I do think those bureaucrats set this fantastic precedent of wandering around the world. They go to central Europe and they go to Russia and they go to North Africa just to find out is there something there that is interesting, is important and could be adapted to Australian conditions. One of the really nice aspects of Australian culture is our kind of international perspective.

QUESTION: Governor Sir George Gipps had been on a commission of inquiry in Canada and then, when he was here as Governor, the Durham report came out. I haven't read enough about it yet, but I assume the Durham report came up with some solutions to the problems in Canada. Do you think the Durham report had an influence on the staged evolution of independence here in New South Wales?

Professor STEPHEN GARTON: I have no formal proof, but I know that they're reading it. Again, they're reading all of this stuff that's coming out of the broader imperial context, and they find Canada interesting. A lot of colonists have had some experience of Canada. If they haven't had personal experience of Canada, they're looking at Canada. Particularly after the American colonies become—they're really looking at what's happening in Canada. Of course, Canada's got some fascinating differences to the Australian context. Of course, it's got the issue of the French and Quebecois independence and all those sorts of tensions that Australia doesn't have. But they're reading what's happening elsewhere in the Empire. They're looking at what's happening in South Africa, in Cape Colony in particular. They're looking wherever they can to get ideas and inspiration—and concerns about things they shouldn't do.

Again, I think that broader international framework is kind of plugged into colonial thinking. Unpicking that, we do them a disservice by focusing just on the colonial context. They're broad thinkers who are looking around for things that are important that they think they can do something with. They're practical; they're pragmatic; they're solutions oriented. Again, as a historiography on Australian utilitarianism, Australian nineteenth-century political culture was very utilitarian—greatest good, greatest number—what works, really. They're very pragmatic and happy to pick and choose bits and pieces, taking them out of context and adapting them because they think it's going to work in the colonial context.

The Hon. CHRIS RATH: Unfortunately, we are out of time. Thank you to everyone who contributed with your questions, and please join me in thanking Stephen for his excellent presentation and Q&A.

Mr DAVID BLUNT: Thank you very much, Professor. Thank you very much to Chris Rath for facilitating such a great opening to the conference and such fantastic questions from the audience. Can I just indicate that I have a sense that we might be hearing some more by way of answers to a couple of those questions tomorrow. We've got a couple of the professors who will be addressing us tomorrow here in the audience—so welcome, David Roberts and Frank Bongiorno.

I also acknowledge the members of Parliament who are here in addition to Mr President and the Hon. Chris Rath: the Hon. Jeremy Buckingham; Mr Gareth Ward, MP; and Mr Hugh McDermott, MP. It's excellent to have you here with us. In relation to the question from Jeremy Buckingham, that's a topic that I suspect we'll be exploring in a little bit more detail next year in the course of further bicentenary activities.

(Short adjournment)

THE 1823 ACT: FROM DEBATE TO ENACTMENT

Mr BRET WALKER, AO, FAAL, SC, Barrister

Ms LYNN LOVELOCK, Former Clerk of the Parliaments, appearing via videoconference

Ms JENELLE MOORE [Usher of the Black Rod]: Welcome back, everybody. I hope you enjoyed morning tea. To introduce our next session, I welcome the Hon. Penny Sharpe, MLC, a member of the Labor Party and the Leader of the Government in the Legislative Council. Ms Sharpe is Minister for Climate Change, Minister for Energy, Minister for the Environment, and Minister for Heritage. Her policy interests include public transport, the environment, education, women, LGBTI reform and e-democracy. Please join me in welcoming Minister Sharpe to the stage.

The Hon. PENNY SHARPE [Member of the Legislative Council]: Thanks, Jenelle. I'd like to start by acknowledging that we gather on the land of the Gadigal people of the Eora nation and pay my respects to Elders past and present. I also acknowledge that when the colony of New South Wales was being established, it was created without sovereignty being ceded by the Aboriginal nations that continue to exist with strong connections to country to this day. I'm glad to see a few of my parliamentary colleagues. Gareth Ward is here, Hugh McDermott is here, and I thought I saw Chris Rath before. Thanks to the Usher of the Black Rod, Jenelle Moore, and her team for their work in planning and developing this conference. I know how much work has gone into this.

I'd also like to take this opportunity to acknowledge the work of the Clerk of the Parliaments, David Blunt, and his team, who form the heart and soul of what we do in the Legislative Council every day. As well as keeping MLCs out of trouble, they provide the foundational knowledge and advice on the rules, policies and practices of our democracy that—while being little understood and sometimes referred to as a little niche—ensure that the Legislative Council fulfils its role as the house of review, holding the executive government of the day to account.

The stories gathered and shared throughout the commemoration of the bicentenary and development of the New South Wales Legislative Council tell us so much about where we have come from and give us some of the clues to where we find ourselves today. I like to think that we've learnt some of the lessons of the past, but I'm sometimes not so sure. This session takes us to the very heart of this conference, the 1823 Act that brought Parliament and the Supreme Court to New South Wales. In 1823 the British Parliament passed an Act:

> … for the better Administration of Justice in New South Wales and Van Diemen's Land, and for the more effectual Government thereof …

Between 12 June and 18 July 1823—this is what Lynn has told me—the bill had a dynamic passage through the British Parliament, often in the early hours of the morning. The bill was subject to postponements, divisions and petitions—an experience that those of us who serve in the current New South Wales Legislative Council are very familiar with. The bill polarised opinion in the House and, to that extent, reflected the prevailing and varying attitudes of members towards law, order and punishment. Like all politics, in the end it was a compromise, with a sunset clause, that finally passed in the closing hours of the session on the same day that Parliament was prorogued. Again, I can hear the history still coming down to this day in some of the operations we undertake as we head into our last two weeks of Parliament for the year.

To explore the intent of the Act and the complex processes around its passing, it is my pleasure to welcome our next guest speakers: Mr Brett Walker, AO, SC; and Ms Lynn Lovelock, who is joining us online. Bret Walker was admitted to the New South Wales bar and as a practitioner of the High Court of Australia in 1979. He was appointed Senior Counsel in 1993 and served as the President of the Law Council of Australia from 1997 to 1998, and later as the President of the New South Wales Bar Association. Bret was Australia's inaugural Independent National Security Legislation Monitor and was the Chairman of the Law Council of Australia National Criminal Law Liaison Committee from 1998 to 2001 and continues to act as a constitutional law adviser to the council. He has been appointed to several inquiries as a commissioner, including the Special Commission of Inquiry into Sydney Ferries in 2007 and the Special Commission of Inquiry into the Ruby Princess in 2020. Closer to home, Bret has been a trusted legal adviser to the Legislative Council, including when he represented the House in the famous *Egan v Willis* cases in the 1990s, which confirmed the power of the Council to order the production of documents from the Government.

Lynn Lovelock is a former Clerk of the Parliaments. Lynn joined the New South Wales Department of the Legislative Council in 1987, becoming the first female Usher of the Black Rod in 1988, Deputy Clerk in 1991, and the first woman to hold the distinguished role of Clerk of the Parliaments in 2007 until her retirement in 2011.

She was the Clerk to the Legislative Council Privileges Committee from 1991 until 2007 and was actively involved in the establishment of a parliamentary code of ethics and the development of procedures to safeguard returns of privileged papers before the House. Lynn has written widely in the fields of parliamentary law and practice, including as a co-author of the *New South Wales Legislative Council Practice*, the definitive record of the Council's rules and procedures—again, very niche but extremely important, and something that I use very regularly.

Recently, Lynn has spent time in the UK scouring early records to help chart the birth of the first Legislative Council in New South Wales while working on her second novel. To tell us more, I welcome the first woman to be the Clerk of the New South Wales Parliament. As the first woman in our 200-year history to serve as the Leader of the Government in the Legislative Council, I welcome and thank Lynn Lovelock for all of her great work and mentorship. I cannot wait to hear her session.

Ms LYNN LOVELOCK: Thank you very much, Penny. I am assuming that you can all hear me, because I can't quite see what's going on there. I would like to begin by acknowledging the traditional owners of the land on which we meet today, the Gadigal people of the Eora nation, and pay my respects to Elders past and present. When I was asked by the former President, Matthew Mason-Cox, if I would be willing to research the parliamentary debates on the bill establishing the first Legislative Council and, in particular, the reason it was included in the bill establishing the colony's first Supreme Court when it had not been one of Commissioner Bigge's recommendations, it seemed like a good idea. I was interested, and how hard could it be in reading over some debates and checking out a few records of the proceedings? Little did I realise the large rabbit hole I was about to fall down.

The passage of the bill itself was fairly straightforward. Known as the New South Wales Jurisdiction Bill, it was introduced into the House of Commons towards the end of the session on Thursday 12 June 1823 by Robert Wilmot Horton, the Under-Secretary of State for War and the Colonies. It was read a first time, printed and set down to be read a second time a week later on Friday 20 June. However, by the time the order of the day on the bill was read, it was after midnight. Rather than proceeding at that time, the bill was deferred for another week. It was finally read a second time on Friday 27 June, though no debate took place at that time, and it was set down for consideration in Committee the next Friday, on 4 July. Later that same night, or rather in the early hours of the following morning, the House resolved to send an address to His Majesty George IV requesting a copy of Governor Macquarie's report of his administration of the Government of New South Wales.

The following week, on 2 July 1823, Sir James Mackintosh presented a petition from Edward Eagar, a merchant of New South Wales, against certain provisions in the bill and praying that his counsel be heard at the bar of the House during the Committee stage, a request to which the Government objected. First, the attempt to refer the petition to the Committee and the prayer to be heard at the bar were defeated on division. The next day, Thursday 3 July, the House resolved to send another address to His Majesty, this time requesting a copy of the instructions given by Earl Bathurst to Commissioner Bigge on his proceeding to New South Wales. According to the House of Commons journals, on 4 July the House resolved itself into the Committee of the Whole for some time, and when the Speaker resumed the chair, Mr Brogden reported that they had gone through the bill and made several amendments. Those amendments were read to the House and an amended bill was ordered to be printed. Further consideration in Committee of the Whole was set down for Monday 7 July. Nothing of these proceedings has been reported in *Hansard* or in the newspapers, and the journal does not include details of the amendments.

The first recorded debate on the bill occurred late in the evening of Monday 7 July on the motion that the bill be recommitted. After Wilmot Horton explained the principal provisions of the bill, a heated debate took place, principally concerning the merits of trial by jury. During this debate, Mr Bright indicated his intention to move a "this day six months" amendment in an attempt to kill off the bill. According to the journal, the amendment was withdrawn by leave and the original question to resolve into Committee of the Whole to consider the bill was agreed to.

When the Speaker resumed the chair, it was recorded by Mr Brogden again that the Committee had made progress and sought leave to sit again. It was midnight, according to the journal. Shortly before the House adjourned at 2.15 a.m. Wilmot Horton presented returns for the annual expenditure of the colony of New South Wales and the instructions given by Earl Bathurst to Mr Bigge, as requested by address the previous week. When the House sat again later that day, Sir James Macintosh presented a petition from a body of emancipated colonists complaining of certain disabilities. According to Sir James, the petition had been sent several weeks earlier but withheld until now in the expectation that the bill would address their concerns. It plainly didn't.

Further consideration of the bill was set down for later that day, but the House adjourned before doing so. It was not until late in the evening of 9 July that the Committee stage resumed, at which time Mr William Peel—Robert Peel's younger brother—proposed an amended clause to confine to New South Wales those granted

pardons by the Governor. Despite opposition, the amendment was agreed to. The next day, 10 July, Mr Brogden reported the bill with amendments and the third reading was set down for Friday 11 July. It was read and then sent on to the House of Lords.

Proceedings in the House of Lords were more expeditious. The bill was reported on Friday 11 July, read a second time on Monday 14 July and taken into consideration in Committee on Tuesday 15 July, for which it was reported without amendment by the Earl of Shaftesbury, and the third reading was set down for the following day. On the third reading they tinkered with a few words, then promptly passed the amended bill and returned it to the Commons for concurrence. The Commons agreed with the Lords' amendments on 18 July and the bill was sent off for royal assent, which was granted the following day, the same day as the Parliament was prorogued.

Efforts to find the original petitions, the tabled bill, any of the subsequently amended bills or the marked-up Committee bill were unsuccessful. It seems they were victim to the Great Fire of 1834, which saw the Palace of Westminster, including both Houses of Parliament and much of the parliamentary estate, destroyed. It was the third largest conflagration in London and it was caused by tally sticks, the use of which had become common in medieval Europe to record bilateral exchange and debts. I am showing you a picture of what the tally sticks looked like in case you were unaware of them.

In 1782 an Act of Parliament decided that the records of the Exchequer, who had offices in the Palace of Westminster, were from now on to be recorded on paper, rather than on these tallies. But it took until 1826 before the tallies were finally phased out—something described by Charles Dickens in an 1855 speech to the Administrative Reform Association as "obstinate adherence to an obsolete custom". However, two cartloads of tallies were left languishing in the bowels of the parliamentary estate. In 1834 the Clerk of Works was directed to dispose of them. Rather than give free firewood to the parliamentary staff, he engaged two Irish labourers to burn them in the underfloor stoves located in the basement of the House of Lords. Unfortunately, these stoves were designed to burn coal, not wood. Wood does have a lower heat, but it has a higher flame, and the resultant flames melted the copper lining of the flues and started a fire in the chimney.

The fire didn't go unnoticed. People in the House of Lords noticed the hot floor and smoke coming up. The Clerk of Works, when he went down to check on proceedings, didn't realise there was a fire in the flue, couldn't see any problem with what the workmen were doing and said it was all under control. By the evening, though, the House of Lords was on fire—a fire which quickly spread to the rest of the palace. Despite repeated warnings over many years that the palace was a fire hazard, including from a committee of members and in a report of 1789 by 14 architects, which included Sir John Soane, nothing had been done to introduce fire stops or party walls. The fire destroyed both Houses of Parliament, along with most of the other buildings on the site. The only buildings to survive the blaze were Westminster Hall, the undercroft chapel, the cloisters, the chapter house of St Stephen's church and the Jewel Tower, where, since 1621, the House of Lords records were kept.

The Jewel Tower had been built into the palace's defensive walls but was detached from the main building, which is why it survived. This was crucial to the preservation of records such as Charles I's death warrant, but it also preserved the copy of the New South Wales Jurisdiction Bill which was introduced into the Lords on 11 July 1823. The House of Commons records were mostly destroyed, including, as I understand it, all the Committee bills from 1810 to 1834. Interestingly, as you can see from these paintings, the fire was observed by Turner, who made sketches using both pencil and watercolour in two sketchbooks from different vantage points, including from a rented boat, while John Constable sat in a hansom cab that had only been designed and patented that year on Westminster Bridge to render his famous sketch, which is the one in the centre.

The other factor that made the research difficult was the *Hansard* record itself. Much of what follows comes from *The History of Hansard* by John Vice and Stephen Farrell. Although today we recognise *Hansard* as an almost verbatim transcript of what is spoken in the House, this hasn't always been the case. For a long time, the Houses jealously guarded their proceedings, prohibiting notetaking and taking legal action against those who attempted to report on them. Nonetheless, by the early nineteenth century, reporting was a matter of accepted fact, although the reporters themselves had to contend with some serious limitations.

There were no reporters' galleries. In the House of Lords, reporters were required to stand below the bar and were not allowed to take notes. It is unclear when notetaking was eventually permitted but, according to anecdote, sometime in the early 1820s Lord Eldon accidentally knocked a reporter's notebook out of his hand near the bar of the House and, rather than remonstrating with him, bent down to retrieve it and handed it back. This was taken as a sign—particularly by the doorkeepers, who would otherwise have enforced the ban on taking notes—that the reporter and his colleagues would not be hindered in their work.

In the Commons, on the other hand, it seems that reporters were allowed to take notes from at least the last two decades of the eighteenth century, although they had to contend with members of the public to access the galleries, where the acoustics were notoriously bad and where they often had difficulty identifying the member

speaking. In this painting by Hayter you can see the gallery up above, where the members are. The reporters, both from the newspapers and from Hansard, are in the back row because that's where the acoustics are much better. It meant that often they could not see who was speaking. This, of course, led to problems of accuracy. Not only did much of the reporting depend on memory, but there was disagreement over the use of longhand versus shorthand. Some argued that parliamentary reporting required a higher calling that demanded greater powers, including literary talent, and that the reporter:

> … should take down notes in abbreviated longhand as rapidly as he can for aids to his memory. He must then retire to his room and, looking at these, recollect the speech as it was delivered, and give it with all fidelity, point and spirit, as the speaker would write it out as if preparing it for the press.

With the likes of Dr Samuel Johnson, Samuel Taylor Coleridge, William Hazlitt and Charles Dickens reporting, it's small wonder that some members' speeches from the period are so eloquent. It has been said, especially in relation to parliamentary reports from the eighteenth century, that the speeches feel more like essays than the words of politicians debating an issue and that Johnson did not give so much what the speakers respectively said as what they ought to have said. Johnson, on his deathbed, allegedly recanted all his parliamentary writings, and there were significant doubts about the accuracy of his reporting.

In 1819, just four years before the New South Wales Jurisdiction Bill was debated, Peter Finnerty, a reporter for *The Times*, was reprimanded by the Speaker for sitting in the front row of the gallery and telling the messenger who ordered him to stop writing to go to hell. John Payne Collier, later convicted of literary forgery, had to apologise for serious misreport in a previous debate. His excuses, among many, were that he could not follow the member's argument because of the number of persons passing and re-passing his seat, being misinformed about what had happened by a stranger seated in front of him, and the inconvenience arising from one of the reporters going on in the middle of the speech.

This could explain why *The Times* journalist covering the debate on Monday 7 July decided to play it safe, reporting that Mr Wilmot Horton then addressed the House on the order of the day for the further consideration of the New South Wales Jurisdiction Bill. He said, "From the low tone of voice, however, in which the hon. gent spoke in moving the recommitment of this bill, we were unable to collect the purport of by far the greater party's observances." It is possible that Wilmot Horton provided his speech notes to the reporters, for both *The Times* and the *Hansard* are almost identical from this point. However, *The Times* did add, at the end, "The hon. gent proceeded to describe other parts of the bill, but he spoke in so low a tone that we cannot undertake to report what he said, and he concluded by moving that the bill be recommitted."

Reporters were eventually allocated dedicated seats in the galleries in the new parliamentary Chamber rebuilt after the fire. *Hansard* itself, though, only became the official record of debate in 1878 and verbatim reporting only began in 1909. So what do we have of the debates? The first one that was recorded was in relation to the petition that was presented by James Mackintosh from Edward Eagar. In presenting it, he explained that it raised two main concerns: firstly, that the bill would deprive the colony of its most important privilege by taking away the right to a trial by jury and substituting instead a sort of court of martial imposed by a prescribed number of army and navy officers, which was "by a strange perversion of language most facetiously called a jury"; and, secondly, that it gave the Governor the extraordinary power of arbitrarily sending to England anyone who might be objectionable to him, on the affidavit of an unknown informant, without trial or any defence allowed.

Sir James was willing to stop speaking then if there was no objection to the prayer being heard at the bar of the House. But if there was, he felt he needed to say more. Of course, Wilmot Horton indicated that there were the strongest objections to allowing the prayer of the petition, so Sir James laid out the following arguments. He said the colony was no longer a mere receptacle for convicts but the largest group of Europeans in Britain's Asian colonies; that, in legislating for the rights of the colony, there should not entwine around such a principle the shoots of tyranny and arbitrary power but remember what had been the fate of America whereby, importing early the free institutions of England, the State of America had risen to a degree of power which, for the rapidity of its growth, was unequalled among mankind; and that the Government's original intention had been to give trial by jury and governors Hunter, Bligh and Macquarie, as well as Justice Bent, had anticipated such.

He also said there were sufficient numbers of landholders to provide for a jury, whereas there would likely be a deficiency of naval and military officers due to the regulations of service; that the Governor's extraordinary power to arbitrarily transport a person to Britain on charges of sedition and treason, which he was at liberty to keep secret, without trial or defence, was a power now almost unknown even as civilised despotism and which was only used in the most barbarous tyrannies; and, finally, that the equal administration of justice was one of the greatest encouragements to men in departing from the irregularities of their past lives to become useful members of civil community.

Wilmot Horton felt this was not the time to discuss the bill—don't forget, we've just presented a petition—and, in declining to follow what he called "so inconvenient a precedent", claimed the bill was necessary for the

purpose of giving effect to the report of the parliamentary commission. He did not see that there were any grounds for hearing the petitioner at the bar. Those supporting the petition argued variously that the real question was whether the colony was to remain to them a useful auxiliary or become a source of inquietude and danger, that the right to trial by jury was an invaluable privilege which brought the rich and poor into honourable contact, that seven of the proposed regulations were harsh and injurious to the principle of civilisation, and that they needed more time to consider the bill.

Others suggested that perhaps it was the wrong time to proceed, that the colony was not yet ready for trial by jury, and that the House should at least hear from counsel at the bar. One went so far as to suggest that the instructions to Bigge should be laid upon the table to see how far he had complied with or exceeded his instructions. As we know, that was when the address was sent—the next day—to get those instructions. Similar arguments were advanced on the motion for counsel to be heard at the bar of the House, with Sir James claiming the bill would see 8,000 free men liable to be transported without trial at the will of the Governor. Wilmot Horton, though, said:

> It was intended … to introduce a clause by which the operation of the bill would be so limited, that instead of extending to 8,000 individuals, it would scarcely extend to as many hundreds. In fact, it would operate only on those who had just completed the term of their transportation—

which, according to one member, would deny rights to any person who'd completed their punishment when they ought to have those rights returned. It was agreed that the petition be laid upon the table, but the motion to refer the petition to the Committee of the Whole and for the counsel to be heard at the bar was defeated on division by 47 to 60. The next debate was on 7 July on the motion to recommit the bill, when Wilmot Horton explained the bill's provision in more detail. That is the one where he spoke so low that they couldn't hear him. He indicated that, until now, the settlement had been treated as a place to send convicts, but that following the commissioner's report, three places had been designated as proper for the foundation of the new settlement—including Norfolk Island, which was already being trialled—where they could combine what he called "the two great and sometimes incompatible advantages of imposing punishment while rendering the punished useful to themselves and the State".

He went on to say that "too many guilty offenders look to transportation not as a punishment for their crimes but as a better condition and a more fortunate existence", and that the new place would establish a "penitentiary on a great scale" where convicts would "cultivate the land and raise and manufacture produce for their subsistence and clothing" without the "leisure or temptations of vicious indolence", which he argued would have the effect of reforming their habits and character.

The bill also contemplated securing the employment of convict labour in detached parts of the colony on a more extended and general plan than then existed, which would have the effect of separating convicts so they would not, as Commissioner Bigge had pointed out, relapse into the commission of crime. He concluded by saying that "trial by jury was not contemplated by the bill". Henry Bright condemned this refusal of trial by jury and complained that the bill professed to settle a variety of objects too important to be disposed of at the termination of a session. After some further colourful and disparaging remarks concerning the legal system being proposed, he scathingly concluded:

> As for the council given to the colony, what did it amount to? The members were appointed by the Crown; they might be removed by the Crown; they had not the power of initiating any measure; and a law proposed by the governor might, in some cases, be passed without their consent. He could not help believing, that the bill, if it passed in its present state, would be a mischief to the colony rather than an advantage; and he should, therefore, move, "that the report be further considered this day six months".

As we know, though, he withdrew that. During the debate, members bemoaned the general corruption of morals in New South Wales, while others argued the merits of trial by jury. Mr Peel claimed:

> It was impossible that the details of the bill could have been fully considered by ministers, in consequence of the great press of other important business.

He recommended that the pardons granted by the Governor be limited to the colony, at least for the present time. During Committee of the Whole, several amendments were proposed, although only the attempt by Sir James Mackintosh to replace officers of the army and navy to judge cases with the words "a jury of 12 men duly qualified to serve" was defeated on division by 30 to 41. It's the only one that's recorded. The following day, Sir James Mackintosh presented the petition from the emancipated colonists, which complained of certain legal disabilities arising from the Government's failure to properly register their pardons.

So why do we have a Legislative Council? When it was introduced into the House, the bill already contained provisions for the establishment of a council to advise the Governor, although, as we know, the only reference to it was by Mr Bright during the debate on 7 July. The need for an advisory council was not addressed by Commissioner Bigge in his report, so the question arises why was it included in the bill—which, according to Wilmot Horton, was to give effect to the commissioner's report. Given the paucity of parliamentary records

available, I turned to other records from the period, most of which are now held in The National Archives in Kew. I went through over 10,000 documents—the records of them—and a couple of thousand letters, a few thousand of which I've now read. In them I found the seeds of our bill. The first relevant document I came across was entitled *New South Wales: Heads of points for consideration, preparatory to the same being submitted to Parliament*. It was written by Francis Forbes, presumably at the behest of Wilmot Horton, and is dated 1 January 1823.

Forbes had been the Chief Justice of Newfoundland from 1816 until 1822, when ill health, due to the maritime climate, forced him to return to London. While there, he was appointed the first Chief Justice of New South Wales, and prior to his departure to Australia he was asked to assist in drafting the bill. His suggestions, under six heads—which are included in those documents that you can see there—included revising the last Indemnity Act and re-enacting such parts as seemed proper; subdividing them into those that should be made perpetual and those that should be renewed for a limited time only; and empowering magistrates to pass sentence on persons convicted of offences with retrospectivity for sentences already past, including indemnity for the magistrates, with the colonial sentence to commence after the original sentence had expired.

He is of the opinion that the Governor had been exercising this power without authorisation from the Crown. The Governor's pardon was to be subject to disallowance, with a time limit of two or three years to give certainty to those affected. In the document he started with three, but he scratched it out and added two. The pardon, though, was only to operate while the party remains in New South Wales or its dependencies. A note between the paragraphs on page 3 of the document says, "It will be necessary to declare the convicts who had not had the punishment of death commuted for transportation and whose sentence has been satisfied are to be considered as free then within New South Wales and England after the termination of their sentence." I am presuming Wilmot Horton wanted that.

Point four is "The Governor, at the recommendation and with the consent of magistrates or a majority of them, expressed in writing, are to have power to pass rules and ordinances for the regulation and good order of New South Wales, not repugnant to the laws of England. These rules and ordinances are to be subject to disallowance within three years by His Majesty and counsel, after which they will be signified by the principal Secretary of State for the colonies as having received royal assent." Margin notes—again, presumably by Wilmot Horton—state that "the Governor must have a joint right of initiation", while another states that if "the Governor has the majority of magistrates upon an order initiated by himself, he shall have authority to pass the order, making special report to the Government".

"To prevent the abuse of indulgence and to preserve the public's decency, the Governor should be invested with the power of ordering or removing out of the colony any turbulent or factious convicts who may have been emancipated"—that is point five. A margin note adds "or who may remain in the colony after the term of their imprisonment". His last point was "A provision defining the power and jurisdiction of the Supreme Court and to incorporate a short system of insolvent law based on the principle of the Judicature Act of Newfoundland." There were several pages of notes attached to this document headed simply *By Mr Forbes*, in which he summarises the law regarding crimes which induce the forfeiture of estates, as well as a discourse on the efficacy of pardons. These points seem to have been the basis of the first draft of the New South Wales Jurisdiction Bill, which was in circulation by March of that year.

On 10 March, in response to a request by Wilmot Horton and apparently for inclusion in the dispatch to be written to Sir Thomas Brisbane, who was then the Governor of New South Wales, Forbes penned an eight-page document outlining points for consideration and framing instructions for carrying into effect the New South Wales Act. In the document he expresses concern that under the legislation currently proposed, the Supreme Court will be called upon to sit in judgement upon the Acts or ordinances of the Governor and to determine whether they are lawful or not—something he believes is a situation of evident difficulty to both parties, and one that, with the very best feelings on both sides, may lead to a conflict of opinions, which, however amicably enforced, cannot fail to be attended with embarrassment.

He goes on to explain that, while the principle is not new, in New South Wales it will be called into peculiar action, given its institutions are still in their infancy and it's a penal colony. He proposes that before promulgating any ordinance, the Governor be required to lay it before the Chief Justice to determine in writing whether or not it is repugnant to the laws of England. A margin note—presumably Wilmot Horton—adds, "In other words, whether he would feel it to be consistent with his duty to maintain and enforce such ordinance in the Supreme Court if a question of its validity should be argued before him." Although Forbes admits that it might be abstractly better that the person who is to interpret the law is not involved in its framing, he offers that "all speculative principles must be controlled by expediency in adaption to practice".

As for the ordinances already promulgated, he again suggests that the Chief Justice make a written determination on their validity and suggests that when the Chief Justice is called upon to decide the legality of an ordinance, he should do so in the spirit of the law with a leaning towards the ordinance. Three days later, on 13 March, Forbes writes a private letter to Wilmot Horton, intended just for his information. He says he's made alterations and explanations, which seemed to be required in the draft of the bill, but draws attention to two matters in particular relating to appeals to his Majesty and Council, both of which he thinks require a little reconsideration. He goes to some lengths to explain the difficulties that such appeals can cause to colonial courts when their judgements are overturned.

He concludes with a request to Wilmot Horton to minute at the end of every suggestion on the New South Wales bill whether it was approved or not, as it will be his guide in putting it into form for Parliament. I wish I could have got a hold of that bill. However, by May, when Forbes is asked to make observations on a proposed alteration to the part of the draft bill prepared by him relating to the legislative powers of the Governor, he is quite dismayed. In a letter dated 15 May he claims that instead of conferring power to make local regulations upon certain defined subjects, the alteration is going to give the Governor an undefined and general power with the approval of any six magistrates of the colony to make laws upon any subject matter and to any extent, provided such laws aren't repugnant to the laws of the parent State and not disapproved by His Majesty and Council.

According to Forbes, this would give the Governor, and any six gentlemen holding this office at his will, a power as ample as the Governor's Council and Assembly in Jamaica, able to create new felonies and even to raise taxes. In an effort to dissuade them from pursuing this course, he warns that such an unlimited control over the persons and settlers may operate against the Government's intention of encouraging the investment of English capital and employment of British industry in the colony. It is apparent from the bill that was brought before the Parliament, though, that he was unsuccessful in this. I'll finish here and leave Bret to address the contents and import of the legislation itself. Thank you.

Ms JENELLE MOORE: Lynn, thank you so much for that fantastic discussion. Can I invite Mr Bret Walker, AO, SC, to the stage.

Mr BRET WALKER: The experience of preparing and arguing *Egan v Willis* and *Egan v Chadwick* had rather imbued me with the notion that as fundamental propositions of European government in this country, notions of—perhaps aspirations towards—a representative democracy and responsible government were the foundation. How wrong I was then—how wrong I am now—to view so complacently our beginnings. What I really should have been more precise about in my thinking in preparing such arguments is that from 1855 those two aims might be seen as aspirations informing and understanding of our systems of government.

With representative democracy in particular, bearing in mind that in 1823 it was entirely non-representative and anti-democratic, it's worth remembering that in 1830 there were violent attempted revolutions, particularly in France—got rid of one dynasty, got another one. And in 1848, as Sir Christopher Clarke has so brilliantly described in his recent book on the 1848-1850 revolution and counter-revolution in Europe, there was a plethora of attempts to introduce representative democracy, usually by attention not only to constitution-making of the kind with which we're familiar but also a reference to the franchise, the suffrage.

There were some spectacular gains in suffrage in Europe not very long after 1823. On the other hand, they were geometrically massive, rather than in any absolute terms. There could have been a factor of, in some cases, seven, eight, even over 10, in terms of the expansion of the suffrage, but my reading of it is that it was the expansion of the miniscule to the tiny that was involved. So, though we ought, in retrospect, judge rather harshly—or at least with no particular congratulation—the constitution-making exercise of 1823 and while we should not regard it as in any sense even a spark towards representative democracy, it was, I think, not so bad compared to the kind of organised despotisms that one saw throughout Europe at the time. The King of Prussia, after all, was not particularly interested in what his Parliament would tell him about anything at that time.

As to responsible government, it can be seen from the provisions to which I'm going to come, in dwelling in some detail on them, in the 1823 Act that it was, in default of a special regard for dispatches to Whitehall, a system of complete irresponsibility: that is, no check or balance within the settlement or colony, if it was, perhaps, by then, a colony; at least in the period for dispatches to sail to England and disallowances to come back, there was complete autocracy for the Governor in manners I shall explain. But perhaps one could pick up the notion of the spark, the figure of speech with which our seminars are graced, by, if I may, politely suggesting it doesn't really tell the story. There was no conflagration started, in my opinion, by anything that constituted the spark in 1823. Perhaps is one reminded that in the days before safety matches you did have to generate a spark which would actually catch fire. Many a spark would not produce anything.

I can't see, myself—and I can only speculate as to the lost debates that Lynn has talked about—that there was any move towards representative democracy in a form that we would even passably recognise as such, or

even, strange to say and perhaps disappointingly, responsible government in the sense of some body and superior power to which ultimately the Executive would answer. In short, the Executive was the Executive of the United Kingdom, and the notions of disallowance in particular made it quite clear that everything done in this place would be provisional.

Of course, with respect to the freeholders who were at the heart of the notion of some selection for those who would ultimately, in 1842 rather than 1825, become represented by a minority on the Council originally and a majority in 1842, one is to remember—and here I make no excuse for anachronism—that they were all male, none of them was a traditional owner of a square inch of this land, and none of them could be the convicts who were of course the subject matter, the object and the purpose of the original penal settlement in 1788.

In short, exclusivists and emancipists were not so much parties as non-mingling tribes, and it is quite plain that the basal notions of representative democracy or even a representative government were entirely lacking from the considerations that produced the 1823 Act. Insofar as there may be those—I stress, not myself—who see some rigid separation of powers as critical to the kind of governmental system to which we pass ritual praise, may I stress—as has already been noted by Lynn—that the Chief Justice was conveniently on the Legislative Council, at least from 1825. It was the Legislative Council, of course, whose assent or dissent—in particular, assent—might be used for what might be called routine lawmaking by the Governor, all subject to the repugnancy provision to which Lynn has made reference and to which I now turn.

It is to be remembered that the tradition, long established and flourishing from the North American experience, was that the laws of England—including what was grandly, if in rather compendious fashion, called its Constitution—were carried with colonists insofar as they could be adapted to meet the new circumstances in which the colonists found themselves. This was, to put it mildly, for a population in a penal settlement the majority of which were figuratively if not literally in chains, a rather large adjustment to be made and one which left out of account one of the things which has become this topic of fustian rhetoric about our English heritage: namely, the right to trial by jury. Lynn has already made reference to that.

I can only commend, in order to introduce you to its lively account—in particular, chapters 5 and 6—Dr Greg Woods' *A History of Criminal Law in New South Wales – Volume 1: The Colonial Period, 1788-1900*, which contains a very lively account of what occurred with respect to the rather unsatisfactory jury system when those firebrands Wentworth and Wardell, in their then new newspaper of 1824—that is, *The Australian*—criticised the then new Governor Darling, who was not progressive or liberal by any stretch of the imagination, as being, at least by oblique reference, an ignorant and obstinate man. The writer was nicely oblique and, in effect, wondered what would happen if the home Government were to send an ignorant and obstinate man to rule the colony.

There were criminal libel proceedings. As a result of the very unsatisfactory 1823 compromise, about which you have heard, there was no jury of a kind that we would recognise as a jury. Rather, there was the jury of seven officers that had been inherited from the pre-Commissioner Bigge exercise and continued because, as you have heard, in Westminster it was not considered that conditions were propitious for the carrying with the colonists the enjoyment by the settlers, including the emancipated, any of the rights and protections that would come from the interposition of a jury between them and the power of the State. One can imagine why the word "facetious" was used to describe the appellation of a jury for the seven officers sworn. But before one gets carried away with regarding such a jury as being a mockery, it is to be recalled that the 1824 criminal libel proceedings, so well described by Dr Woods, resulted in a discharge, because the jury firmly said it could not reach a decision in the first trial, an acquittal on two of the three charges and a hung jury on the third in the second trial.

These were trials for criminal libel by the Governor against the newspaper. By the time of the second trial, there had been official orders given to the military in the colony to the effect that those officers serving on the jury who did the right thing would be well regarded, and those who had done the wrong thing would be held to account in due course. How anybody could ever have supposed that this represented, to the slightest degree, what one would expect from the proper and impartial administration of justice, albeit in a penal colony run by military officers, really ought not to be dismissed as my anachronistic musings on our inadequate foundations. They were seen at the time—and one recalls what Lynn has told us about the petition—as utterly inconsistent with the ambition of achieving, in this greatest aggregation of English colonists in this part of the globe, a proper footing for the proper development of a decent society.

The reaction of Governor Darling, as a mark of the kind of regime that the 1823 Constitution, if you can call it that, set in train, led to his imposition—one is sure, out of chagrin—of a newspaper tax of a kind that two centuries before John Milton had inveighed against in *Areopagitica*. The freedom of the press, being more spoken about than practised in England, nonetheless had been the source of extremely significant legislative and legal conflicts, in particular at the end of the eighteenth century and the beginning of the nineteenth century. Governor Darling correctly understood that a sufficient tax would rather muzzle his critics, including Wentworth and

Wardell. But Francis Forbes, Chief Justice, with the disallowance power, to which I will come briefly, stepped into the breach and declared it a tax of a kind that was to be disallowed given the particular provisions that restricted the right to raise tax to being taxes appropriate for local purposes, and no doubt called in aid as well the significance in the English common law tradition—as was no doubt misleadingly but, nonetheless, persuasively invoked—of a free press.

That had happened in 1827, and I think that it is the kind of development that suggests that the 1823 Constitution, in the technical regards to which I now turn, just might, if not being a spark that caused a conflagration, at least be regarded as having permitted further actual social experiment of a kind that would, in due course, lead to the much more significant 1842 exercise but as the true creation of a parliamentary democracy and responsible government, the 1855 constitution. It is to be remembered that the rather self-serving preamble of the Act described—as has already been quoted to you—its purpose as relevantly being for the more effectual government of New South Wales. I'm leaving references to Van Diemen's Land out for various purposes, including the fact that there was a separate treatment for it in 1842.

In 1823, this more effectual Government, it is to be recalled, was to replace a penal colony in which there was no amount of logjam and no difficulty of moving from decision to execution. There was, after all, just one person, the Governor—always military in character and disposition—which constituted the Executive Government. I say Executive Government because, in truth, it was a government entirely of an executive. The only legislature to which it was, in the modern sense, responsible was, of course, at Westminster, and 1823 left that utterly, completely undisturbed. It did not represent a step away from the letters patent with which the First Fleet set out in 1787.

It is to be remembered that even as to the judicial inauguration, which, enacted in 1823 and coming into operation in 1824, is the traditional place of this Act in our legal history, there was no Act of Settlement tenure. I won't, given the time, pause on the details but it's to be remembered that the King was permitted by that Act to remove and replace judges as seemed expedient. How fortunate we are that nobody had that notion, or at least successfully carried it out, in the case of the man who became Sir Francis Forbes.

The technical apparatus of the inauguration of the Supreme Court is one that our speakers tomorrow, in particular, will expatiate on. It suffices to say that with the single exception of the question of juries, both civil and criminal—most importantly, of course, criminal—there was a very self-conscious and very thorough replication of references, which were then regarded as adequate and in large part proved to be so, so as to set up a superior court of record of a kind that would enable the administration of justice as fully, subject to the important question of juries, as was enjoyed—if that's the right word—in the home countries. But when one comes to the so-called jury of seven commissioned officers of His Majesty's sea or land forces to be nominated for that purpose by the Governor, who, while open to challenge for interest, was certainly not open to challenge for being commissioned officers—and subject, of course, to military discipline, a familiar difficulty in latter days with courts martial—those matters were all breezed over by the requirement that the jurors deliberate but without a need for unanimity.

Provisions for appeals are not such as to be needing to be dwelt on. Suffice it to say they were ultimately, domestically, focused on the Governor with the advice of judges—but just the advice—or otherwise off to, in effect, the Privy Council, something that means, on any view of it, that the speedy dispatch of appellate business in this country has been greatly improved since 1823. There were provisions for inferior courts, upon which, given the time, I won't dwell. Suffice it to say that the enticing reference to civil juries, which were, in fact, available, simply shows what an extraordinary state of affairs and what an unimaginative understanding of the position could be a proper criticism of those in Westminster who determined that though there might be, by local experiment and local assent, civil juries for what I'll call inferior claims, there could not be criminal juries, notwithstanding that in a penal colony the significance and solemnity, and the gravity in life terms, of conviction and punishment could scarcely be understated. It must have been better understood in the households of New South Wales, I suspect, than in the households of England.

The purposes of this Act—more effectual government—being so disappointing with respect to representative democracy or responsible government, nonetheless illustrate the rather fraught conflict that existed between those who could be badged emancipists—with some difficulty perhaps enlisting Governor Macquarie in that camp—and those who were rather proudly badging themselves as exclusivists, including and not limited to the egregious John Macarthur, who was not, if I may say so, a living embodiment of constitutional rule-of-law enthusiasm.

It needs to be remembered that in the really important provisions, which are sections 24 and 25 of the Act, there was set up, as the Legislative Council, something which in its essential character is, I'm glad to say, opposite from the Legislative Council which still exists, which I would date—with apologies—to 1855. In 1823,

as opposed to 1842, it was an appointed body. It was a body which, on the face of things, in the first of the three possibilities laid down by section 24, was able to join with the Governor by means of what was called advice to the Governor in the Governor making laws. There was provision for them to dissent, and dissent could be met with two possibilities at the behest, in the first instance, of the Governor.

The first was that the Governor would accept the consent. The second is that if it appeared to the Governor—they were all men, of course—that such proposed law was "essential to the peace and safety thereof and cannot without extreme injury to the welfare and good government of the colony be rejected", then if the Governor had just one member in favour that law would be effective, subject to the pleasure of the Crown, which would be known after a double maritime excursion. But there was a third possibility, section 25:

> … in case any rebellion or insurrection shall have actually broken out … or if in the judgement of the governor … there shall be good and sufficient cause to apprehend that any such rebellion or insurrection is about forthwith to break out—

as long as nobody's heads were broken, I would have loved to have argued the availability of that power—

> … then … it shall … be lawful [to make any law] which may be necessary for suppressing or preventing any such rebellion or insurrection … although every member of the said council—

the Legislative Council—

> should dissent from any such law …

That reminds one of the Achilles heel of the Weimar Republic, the emergency power of which Carl Schmitt speaks so forebodingly—in his case with optimism, in many other people's case with grave pessimism—that is, power is in the hands of the person or the institution with the power to declare an emergency. We had, in section 25 of the 1823 Act—not uniquely, but we had in full form—one of these emergency powers, which most constitutionalists nowadays would regard as a fatal flaw in any system for representative democracy or responsible government. With respect to responsible government, one of the most important characters of a far-flung antipodean colony or penal settlement was, of course, that things had to operate in the interim while permission was sought or disapproval notified from Westminster.

In the meantime, the repugnancy question—see section 29 in fleshing out what section 24 empowered—initially required the Chief Justice—in 1842 it became all the judges—to have an opportunity to consider a bill and then to certify whether or not it was repugnant to the laws of England or whether it was "consistent with such laws so far as the circumstances of the said colony will admit". That, of course, called into play the jurisprudence and political science of the notion of the reception of the law of England into its colonies, differing, I regret to say, not simply between those colonies of conquest and those colonies of cession but also carrying the seeds of the vicious jurisprudence by which, ultimately and later, after this time, terra nullius became the means by which the law of England bound the uncivilised savages who were found in occupation but not apparently in ownership of the land, according to latter-day apologists.

I stress that none of that informed, so far as my researches can show, any of the thinking concerning the reception of the laws. It seems obvious that the reception of the laws of England always involves some consideration as to how they affect, and with whatever adjustment might be necessary, those who were already here from the beginning—that is, Aboriginal. It does seem that in those few words—a familiar phrase of such colonial constitutions—in section 29 in 1823, the seeds of a form of judicial review for constitutionality—that is, for competence of lawmaking—was introduced with no great fanfare and with nowhere near as much recourse as modern judicial review on the American style adopted by our High Court is available and is practised nowadays.

My summation of the actual operation of the 1823 Act, historical as it no doubt is, is that it's not to be treated as historic in any benevolent sense. It was an extremely modest, rather reticent, response to what by then were well known to be descried at both the exclusivist and emancipist extremes—almost joining in the middle—for a better system of government that was provided by the autocratic military Governor. On the other hand, the creation of a far more appropriate judicature; the understanding of the importance of juries, though the complete disappointment of requests for that in the case of crime; and the notion that there would be public good to be gained by advice from a council, albeit not binding, albeit not a body to which the Governor was accountable and albeit without any pretence at representative selection—all of those might be seen as what might be called pre-embryonic steps towards what we now enjoy. Thank you.

Mr DAVID BLUNT: Thank you so much, Bret Walker and Lynn Lovelock, for such insightful, fascinating presentations this morning. We have about five minutes for questions. I am very conscious, Lynn, that is about 1.00 a.m. on Sunday night—Monday morning—your time. Thank you so much for staying up late for us. I guess you could think of it as an old-fashioned parliamentary sitting day.

Ms LYNN LOVELOCK: Indeed.

QUESTION: I have a question for Bret Walker. Just getting back to juries for a minute, you mentioned perhaps a uniquely Australian relationship and insight into juries and the criminal law in that so many people in New South Wales would have had a direct, personal, visceral relationship to criminal law and perhaps would have been in a better position to comment on the solemnity of the role of the jury. Did anybody ever consider ventilating that idea a bit further? We've heard that Australia and New South Wales were open to ideas from the world, but did we ever consider that perhaps the role of the criminal jury and the value of trial by your fellow citizens was something that we could have told the world a little bit more about?

Mr BRET WALKER: My researches and reading over quite a period don't suggest that there was any generous offering by any emancipists or, for that matter, children of emancipists in New South Wales to the British world of politics concerning their admiration of and gratitude for the institution of the jury. It has to be said, in busy lives, that probably was a low priority. My comment about that is not so much that this was a ready resource, as we might now think in retrospect, of real and lived experience, which could have and should have been availed of by the great and the good in Westminster. I really cannot see any plausible possibility that there would have been any—to use the word of the time—respectable emancipist who would have been listened to in saying, "There ought to be proper juries in New South Wales because, after all, I and others like me are here because a legal system justly, properly and correctly convicted us and made us liable to sentences"—very often, of course, of death to be commuted for transportation. I can't bring myself to criticise their reticence in that regard.

Associate Professor DAVID ANDREW ROBERTS: I have a question for Bret as well. Bret, you're almost a little bit disparaging about the clauses in relation to rebellion and insurrection, suggesting that these are old-fashioned notions, but they certainly weren't in 1823. This is the middle of the great age of revolution, so surely there has to be some power in that legislation to allow a Governor of a convict colony to take extraordinary decisions against the advice of his Council.

Mr BRET WALKER: Yes. It's probably best not to put it in constitutional form, which is such an unreviewable emergency power. Don't forget there was no simultaneous power for a court to review that opinion. I did not intend to disparage a governmental concern with rebellion and insurrection. There were lived examples of that for the British concerning their colonies and, of course, it was far more widespread than Britain—rebellion and insurrection, of course, being very loaded terms to describe what, in other contexts and by different people, might be simply viewed as resistance.

Associate Professor DAVID ANDREW ROBERTS: Could I also ask a question of Lynn while she's up? Those documents are excellent. I'm not sure I've seen the letters to Horton, but there are some reflections by Forbes later on in 1828 when he is talking about his role in devising that Act. He says that the legislative component of it was decided really late. He said it was almost put in as an afterthought. Are you aware of that? At what point does that come? It sounds like, until the advanced stage of the draft, they weren't intending to set up a legislative council at all.

Ms LYNN LOVELOCK: No, it came about pretty much around May, when he expressed his concerns that the Council was going to not be under his control, basically. Don't forget he is writing his draft to have the Chief Justice review everything, and he is the Chief Justice. So what they've done is taken away his central role in working out what's going to be law or not law, which is why I liked his comment where he says, "It might be better if you kept a separation of powers, but obviously in New South Wales we are just going to ignore that."

Associate Professor DAVID ANDREW ROBERTS: Which turned sour, of course, in the debates between Forbes and Darling, and the Chief Justice is eventually removed from the Council pretty much for that.

Ms LYNN LOVELOCK: Yes.

Associate Professor DAVID ANDREW ROBERTS: Thanks. That was excellent, Lynn. That's great research, by the way. It's really good news.

Ms LYNN LOVELOCK: Thank you. It was fascinating.

Mr DAVID BLUNT: Thank you very much, everyone. I'm afraid that's time for us. Can I ask everyone to join with me in thanking Bret Walker for that extremely erudite analysis of the 1823 Act, and Lynn Lovelock for that—as Professor Roberts just commented—amazing research. Professor Roberts referred to correspondence dating from 1828.

Associate Professor DAVID ANDREW ROBERTS: Yes, when they were revising the Act.

Mr DAVID BLUNT: Perhaps, Lynn, you might be able to go back to the archives in Kew and keep reading through the rest of Forbes' correspondence.

Ms LYNN LOVELOCK: There is a lot more Forbes correspondence, but for the purposes of this presentation it just would not fit.

Mr DAVID BLUNT: Well, thank you so much. You've done a wonderful service on behalf of the Parliament of New South Wales in what you've done over the past 12 months in this regard. Thank you, Lynn.

Ms JENELLE MOORE: Thank you again, Bret and Lynn. We will now be breaking for lunch.

(Luncheon adjournment)

THE CHIEF JUSTICES OF NSW OVER 200 YEARS

The Hon. ANDREW BELL, Chief Justice of New South Wales

Ms VIRGINIA BELL, AC, Former Judge of the Supreme Court of New South Wales

Mr KEITH MASON, AC, KC, Former President of the NSW Court of Appeal

Mr DAVID BLUNT [Clerk of the Parliaments]: Good afternoon, everyone, and welcome to the Banco Court of the Supreme Court of New South Wales. It is a great privilege to be present here this afternoon in this significant institution to whom we are partnered in our bicentenary. I take the opportunity to extend particular thanks to the Chief Justice and everyone here at the Supreme Court for hosting us this afternoon and making it possible for the conference to move here to the legal precinct. This afternoon our very special panel will discuss and explore the first Chief Justices of New South Wales and the early pathways they forged for Australian case law. We have already heard this morning how critical one of those early Chief Justices was to the inclusion of the establishment of the Legislative Council in the New South Wales Act. We will now hear about how important he and others were to the development of law in New South Wales. It is my great privilege to be able to introduce to you the Chief Justice of New South Wales, together with former Justice Virginia Bell and former President of the NSW Court of Appeal Keith Mason.

Andrew Bell was admitted to the bar in 1995 and appointed Senior Counsel in 2006. His Honour was appointed President of the Court of Appeal on 28 February 2019 and then elevated to Chief Justice on 7 March 2022. After a succession of academic achievements at the University of Sydney and a Rhodes Scholarship to Oxford, he became one of the foremost experts in Australia on private international law and transnational litigation.

Following seven years as a solicitor with the Redfern Legal Centre, Virginia Bell was appointed to the New South Wales bar in 1984 and was appointed as Senior Counsel in 1997. Between 1994 and 1997 Virginia was counsel assisting the Royal Commission into the New South Wales Police Service. She was appointed a judge of the Supreme Court of New South Wales in 1999 and a judge of the Court of Appeal in 2008, and she was appointed to the High Court of Australia in February 2009, where she served until her retirement in February 2021.

Keith Mason has been a solicitor, barrister, law reformer, Solicitor General, President of the New South Wales Court of Appeal, law teacher and mediator. He has published on topics including judicial method, legal taxonomy, the law of restitution, and the interface of law, morality and religion. Currently an adjunct professor at the University of New South Wales and President of the Appellate Tribunal of the Anglican Church of Australia, he is also an esteemed colleague and friend of the Legislative Council, serving as our respected and revered Independent Legal Arbiter, as he has done for many years. Please join me in welcoming our esteemed panel.

The Hon. ANDREW BELL: Thank you, David, and welcome, everybody. This is, as David has said, the Banco Court—en banc, French for the "Full Court". This is our ceremonial court, where new judges are sworn in and where new legal practitioners are admitted. You might be interested, surprised or alarmed to know that there are almost 3,000 new lawyers admitted every year. That happens generally on a Friday once a month, with five ceremonies a day. In any event, we had one of those last Friday. This is also the courtroom in which we sit when we sit in the Court of Appeal or in the Court of Criminal Appeal. It is an active courtroom; it's not only a ceremonial courtroom.

You'll see from looking around that one of the features of this courtroom are the portraits of 14 of the 18 Chief Justices of this court. Starting immediately behind you are the first five judges: Sir Francis Forbes, Sir James Dowling, Sir Alfred Stephen, Sir James Martin and Sir Julian Salomons. Then we have a hiatus because the portrait of Sir Frederick Darley, the sixth Chief Justice, although painted long before this building was built, is too big for this courtroom. So we jump and then—some of you will know, and I'll mention it a little bit later—we have this unusual feature in the Supreme Court of New South Wales that there has been three generations of Chief Justices from the Street family: Sir Philip Street, Sir Kenneth Street and, most of you in the audience will remember, the lately departed Sir Laurence Street. None of the Streets are in this courtroom because their portraits are too big for it, but they are hanging—some in the vault above the two sets of steps leading into the court. All of the Chief Justices other than myself—because a sitting Chief Justice does not have his or her portrait painted while sitting—are in this room. You can imagine sitting in a case; they look at you from all directions when you ask an obtuse question, or something goes wrong.

Their inclusion in this building has been commented on as being "significant" because the external features of this building are very brutalist—it's not a terribly warm building—but it was fairly modern in the mid-seventies, when it was built. It has been commented that the hanging of these historic portraits of the former Chief Justices unites the historical traditions of this court in this State, formerly this colony, into the new building, so it represents a sort of continuity. I also say, because it's true, at these admission ceremonies once a month that we still wear these traditional robes, which I can tell you are not comfortable. I say at the admission ceremony that we wear them for a symbolic reason, namely the continuity of the rule of law. Next year, as you know, in conjunction with the Legislative Council, this court will celebrate its 200th anniversary. It is, in point of fact, one of the oldest continuous courts in the world. We are both proud of that and looking forward to celebrating its history. I thank David and his team at the Legislative Council for including the court in this important conference.

The way we're going to proceed is as follows. Keith Mason will lead us off. Keith, apart from his many other achievements, is the lead author and editor of the forthcoming history of the Supreme Court, the 200-year history, which I'm told is now tracking at about 450 pages. It will be a major publication. We expect it will be published in February or March next year, in time for the actual bicentenary, which is 17 May—the bicentenary of the first sitting, obviously. We know when the charter was executed, and then the first sitting was about six or seven months later—unfortunately, seven days after the first sitting of the Supreme Court of Van Diemen's Land, and so that court, now the Supreme Court of Tasmania, claims seniority over New South Wales, which we do not wholly accept. So Keith is the lead editor and principal author of the history, and Virginia has written a marvellous chapter on leading criminal cases. Keith is going to lead us off, picking up from the charter and talking about some of our first Chief Justices. We will then continue. We also reserve the right to interrupt each other, which I fully expect we will do. There will be questions at the end.

Mr KEITH MASON: Thank you. The title given to this whole conference, as you know, is The Spark: The Act that brought Parliament and the Supreme Court to NSW. This morning, Bret Walker poured a deal of cold water on the notion that the 1823 Act brought Executive accountability, let alone democracy, to New South Wales. But he hadn't really read the title, because it spoke about bringing Parliament and the Supreme Court to New South Wales. I do want to thank the framers of this conference but acknowledge that they made a more moderate claim than Bret accused them of mistaking.

Perhaps I should apologise for having a bit of a jab at Bret. I have known him since he was six. He was my pupil at the bar, but, more importantly, he and I appeared on opposite sides of the record in the case of *Egan v Willis*, which decided that the Legislative Council had authority to require the Government to produce papers—a very significant development in the constitutional history of this State and of the Legislative Council. I suppose I should acknowledge he was on the winning side; I represented the Government in New South Wales at the time.

In another, very technical sense, the subtitle "The Act that brought Parliament and the Supreme Court to New South Wales" is misleading. Both of these institutions were really created by a form of delegated legislation. The 1823 Act, by section 1, authorised the Crown in England to constitute the Supreme Court by charter or letters patent under the Great Seal of the United Kingdom and, by section 24, authorised the Crown, by warrant executed under the royal sign manual, to constitute the Legislative Council. So those acts of actual constitution took place subsequent to but under the authority of that statute.

The Legislative Council was, as Lynn Lovelock averred to, a little bit of an afterthought. The main drafting of the 1823 Act was done by Francis Forbes and James Stephen. Stephen was, at that stage, the senior lawyer in the Colonial Office. He served there for many years and ended up being head of the Colonial Office well into the middle of the nineteenth century. But Francis Forbes, who I will mention a little bit about in a few minutes, was on leave in England. He had been given the nod that he would be made the first Chief Justice of New South Wales, and he and James Stephen set about drafting the legislation that became the 1823 Act.

The vast bulk of provisions in that Act deal with the court, and some of them in quite technical ways. It said that when the court is set up it will have this power and that power. It did so by investing this court—and it still is this court, the one that was constituted under the authority of the 1823 Act—with the powers and jurisdiction of all of the main royal courts in England at the time. So the jurisdiction of the Court of King's Bench, Exchequer, common pleas and the Lord Chancellor were all tipped, as it were, into the jurisdiction of the Supreme Court, and that was the legal foundation for the authority of this court to exercise justice, to administer justice in criminal and civil matters of any import, and also to hold the Executive accountable under the then quite embryonic system of administrative law, which, of course, is much more significant nowadays.

The Hon. ANDREW BELL: Can I just cut in? It also provided for a house for the Chief Justice and said that the Chief Justice could be referred to as the Supreme Justice of the Supreme Court. Both of those binding historical legislative matters seem to have fallen away.

Mr KEITH MASON: "Put not your trust in princes." One of the triggers for what became section 24—the provision that gave the Legislative Council its power, in effect, to make law—was the well-founded belief that the Governor did not have sufficient authority to do anything that would change the law of England. Legal doctrine said that when the white settlers arrived, they carried with them, magically, in their baggage, as a birthright, the state of English law as it existed at the cut-off time. It was originally thought to be 1770; it was later updated and brought forward to 1824—but this notion that the extant English law, to the extent that it was applicable, just automatically flowed into the colony once it became a British colony. But, of course, laws need constant renewing and Parliament amends the common law all of the time.

As early governors started saying, "Well, how about we have a duty on these imports?" or "How about we make this regulation for dealing with currency or bills of exchange or convict discipline?" people started saying, "Well, hold on. That's a bit of a twist and a bit of a difference from what the English law was in 1788. What authority do you have to do this?" Therefore it was not so much a democratic consideration; it was a concern to have proper authority for the lawmaking power of governors. A legislative council whereby the Governor still did everything but with the advice of these nominated officers was the means whereby legislative authority could be exercised. But, because it was thought there would not be much call for this, it was only very late in the piece that James Stephen persuaded Forbes to set to and draft what became section 24. There are only two of the 45 sections of the Act that deal, effectively, with legislative matters. The rest are all matters concerning the court.

This is a picture of the scroll which has the Act of Parliament. As you can see, in those days, Acts of Parliament were handwritten. They were put onto a vellum scroll and rolled up. There was no internet or any other form of access to the legislation. For a while, there was a bit of a proposal being explored as to whether the people in Britain would allow that precious document to be brought out here for the bicentenary, but I gather that has not come to fruition for various reasons. Had it been, I had a proposal. I could not persuade the Chief Justice to do it, but the proposal was that the document be cut in half and the two sections dealing with the Legislative Council would be on display on the other side of Macquarie Street, but the big scroll would be here. But that hasn't come about.

As I said, the Act authorised a charter of justice to, in effect, get the Supreme Court going and make provision for it. That charter was executed by the monarch on 13 October 1823. It's known as the Third Charter of Justice because there were courts in New South Wales before 1823 but, let's say, they were doing the best they could. Some of the judicial officers had no legal training. The judge advocate, as he was called, drew up the charge, put it to the accused, conducted the evidence, listened to any arguments and then pronounced judgement. It was not an ideal type of court system and so, clearly, there was a need for something better and that was the third charter. That document is available and will be part of the display for our bicentenary. It was proclaimed here in Sydney on 17 May 1824 and so that establishes the anniversary date.

Francis Forbes has been mentioned. He was an inspired choice as the founding Chief Justice of New South Wales. He was born in Bermuda, was called to the bar at Lincoln's Inn and served in Bermuda as attorney general before taking the post of Chief Justice of Newfoundland. This is the notion that Professor Garton was telling us about on the various empire connections. As I said, while on convalescent leave in England, he began an enduring association with James Stephen in the Colonial Office. The two men collaborated in the drafting of the legislation.

Forbes was the first Chief Justice and, for a time, the only judge of the court. From the outset, he administered the full extent of civil and criminal justice in the Supreme Court from 1823 onwards. He didn't just do his judicial work extremely well but some of his rulings laid the groundwork for the rule of law in this country. I won't go into any particular details, but one aspect of the power of the royal courts in England was to supervise administrative actions of magistrates and officials. Forbes' court quickly got about doing that and regulating some aspects of Executive action. Again, in a slight fine-tuning of what Bret said this morning, while the Parliament wasn't armed with any real power to put the Governor in check, the court was and quite soon it got about doing so, and quite soon there was conflict between Forbes and Darling, which I will come to very shortly.

Forbes was a man of fairly conservative views but was considerably more liberal and more committed to the rule of law than Governor Darling and the exclusives like Macarthur, whom Darling listened to. There were some particular things done by Forbes in the area of freedom of speech, for which the court and the nation is grateful. He really laid the groundwork in some of his rulings in early cases, where newspaper people were being prosecuted for seditious libel for writing critical—often sarcastic and ugly but nevertheless critical—articles about the Governor and things the Governor and the Governor's men were doing. The Governor would then instruct the Attorney General to have them tried for seditious libel, and occasionally they were found guilty and sent to jail. Forbes consistently directed the juries, which, as you've heard, consisted often of officers under the command of the Governor, that they firstly had to act as if they were ordinary jurors back home in England—that was possibly

a stretch, but a stretch in the right direction—and that they had to recognise that freedom of speech was very important.

One of the powers given to Forbes under the 1823 Act was to certify, in advance, whether any legislation put before the Legislative Council was consistent with the laws of England. It was a rather broad formula and it was one that Forbes didn't particularly want to have, but the power had to be somewhere. The Governor had, as you've heard, authority to initiate legislation and, in effect, he had the numbers. If the Legislative Council didn't do what he wanted, he didn't have to assent unless it was overridden back home in England. Following the Governor's defeat in a couple of seditious libel trials against the editor of *The Australian*, Darling came up with the idea that he would have legislation enacted that would require the press to take out a licence. Forbes advised the Governor formally, under the power and under the Act, that this form of censorship in advance was not consistent with the law of England and he was, in that case, dealing with the spirit of the common law in England. Darling then said, "All right, then I'm going to tax the papers," and introduced a bill for a prohibitive tax. Forbes said, "No, you can't do that either," because that breached the English principles as well as the specific principle in the Act.

Forbes had multiple roles. He was a judge. He was a member of the Legislative Council. He had this specific role as Chief Justice to, in effect, certify whether any law was consonant with English law. He also was invited to sit on the Executive Council when that was constituted, but he didn't like doing that—and besides, he had a lot of things on his plate. But he did that. He had this specific power under section 29 of the 1823 Act to certify legislation, which led him to conflict with Governor Darling.

Just before I finish, I'll just say something about the Stephen clan. I mentioned Sir James Stephen, who was the senior legal man in the Colonial Office when Forbes was working with him, but he rose to become the head of the Colonial Office. His uncle, John Stephen—the second from the left in that picture—became the first puisne judge of this court, puisne meaning "next after the Chief Justice"; "lately born", I think, is the law French. He was "Uncle John" to James of the Colonial Office and he served with Forbes as the second judge in the court, arriving a year or two after Forbes. John Stephen's son, Alfred Stephen, pictured in the middle, became the longest serving Chief Justice of this court, serving between 1844 and 1873.

Sir Alfred Stephen also served in the Legislative Council. For a while, judges were appointed to the Legislative Council in the early years, up until about the 1830s. It got a bit controversial, and so they stopped doing it. After Alfred Stephen ceased to be Chief Justice, he went back to the Legislative Council and served as the President of that body for some years, I think in the earlier stage. Alfred Stephen's son Matthew Henry Stephen was another judge of this court between 1887 and 1904, and he had a grandson, Edward Milner Stephen, who served between 1929 and 1939. There have been some dynasties apart from the Streets.

Some matters provisionally or inadequately addressed in the 1823 Act and the charter are juries. You've heard that mentioned. They are dealt with in the Act, but it says that until the Crown in England decides otherwise, juries in criminal matters will be military men appointed by the Governor. That was a bone of contention, and it was well into the 1830s before the British Government relented on that. The charter provided that convicts could no longer be admitted as legal practitioners. That had been a real bone of contention and that provision was made. One matter on which both the Act and the charter were silent was the position of women. It wasn't necessary to do anything about that because the common law was very clear that women were incapable of exercising public office. I imagine Virginia may have something to say on that topic, but that was so clearly the law that there was no need to mention it.

The early Chief Justices, Andrew has mentioned. You may have picked up the fact that being a Chief Justice in the nineteenth century meant you had a very good chance of having a city street named after you. We have Forbes, Dowling, Stephen, Martin and Darley streets. There is no street named after Sir Julian Salomons, the one on the far right, but I think the Chief Justice will mention in passing why that was so; he was only Chief Justice for a matter of days. The idea of naming streets after judges fell into disuse in the twentieth century. I suspect it had something to do with the fact that in the twentieth century there were three Streets, and to have a Street Street would be a bit redundant. Thank you.

The Hon. ANDREW BELL: Sir Alfred Stephen, the man in the middle—that's a photograph as quite an old man—as Keith has said, actually went back to the Legislative Council after he retired, having served more than 30 years as Chief Justice. He lived until he was about 90 and he spent 20-odd years still active in the Legislative Council. He was succeeded as Chief Justice by Sir James Martin, after whom Martin Place is named. Martin had spent 20 years prior to becoming Chief Justice in politics, but in the lower House. He had, as a young man, agitated for representative democracy, and he was elected to the Parliament in, I think, about 1850. He was in and out of government for the next 20 years. He served as Attorney General in various governments, including

that of Sir Henry Parkes, with whom he had various fallings in and fallings out. He also was Premier on three separate occasions in the late 1850s and the 1860s.

Martin's story is a rather remarkable one. Appreciation of it has been enhanced in recent years by the establishment of what is called the Lysicrates Foundation, and certainly within the legal community there is much more interest in Martin's incredible life story. He came as an infant to Australia, aged 18 months. His father came out to be the groom to Governor Brisbane, so he grew up in the grounds of Government House in Parramatta. He was precocious as a child student. He was a prodigious reader. He initially became a journalist, writing for *The Australian*, and then he edited at an early age *The Atlas* newspaper. He was robust. He said of his predecessor whilst he was a young man—he said of the Supreme Court judges, in fact—that "some allowance, we admit, ought to be made when we consider the manner in which our judges have hitherto been selected and when we see persons elevated to the bench who, in point of talent and legal knowledge, are inferior to the majority of those who plead before them". He said the inclinations of Chief Justice Stephen were towards despotism.

In any event, Martin was an entirely self-made man. He was very conscious of his relatively lowly status. He aspired to status. He grew influential as a journalist and wealthy as a barrister, and with that increasing wealth his influence, including his political influence, increased. But there was some continuing resentment from the tail end of the exclusives that he was a parvenu and that this self-made man was precocious and obnoxious. Bede Nairn, an historian, describes him as having:

> [a] rare combination of lowly birth, pugnacity, colonial patriotism, ability and growing wealth.

He became the dominant lawyer for a period overlapping with his time as Premier and Attorney General. He continued to act as a lawyer while holding both of those offices, so he was regularly appearing in the Supreme Court in front of Sir Alfred Stephen and others. There he is; that portrait has been described as showing him as a rotund figure. He had a large personality. He had been a significant legislator; he'd been one of the original sponsors, as it were, for the University of Sydney Act and the creation of the Mint following the gold rushes. He had a very significant nation-building role, and he continued and then finished his career with a period of more than 10 years as Chief Justice. He really is one of the most significant in terms of all-round ability and contribution and interest—a really very significant figure and one who was, although conservative in his political bent, strongly meritocratic and extremely patriotic in the sense that he was a champion of this emerging country.

When he retired, William Bede Dalley, whose statue is in Hyde Park—do you know where the relatively recent statue of Macquarie is, just across from Queen's Square? There's a green, faded copper sculpture of a statesman in between Macquarie and St Mary's Cathedral. That's W. B. Dalley, who was a great statesman and, I suspect, a bon vivant of the late nineteenth century. He declined the chief justiceship, as did Sir Frederick Darley. I will come to Sir Frederick in a moment, but this is where Salomons came in.

Salomons—the small portrait up there that you can see on the screen—was a barrister. He was a well-regarded barrister. His appointment was welcomed by *The Sydney Morning Herald* and *The Bulletin*, but other newspapers were less enthusiastic. He was Jewish. I don't think that was the reason he changed his mind. I don't think it was necessarily an antisemitic reaction to his appointment, although there has been debate over the years as to whether that might have been the case. But, more so, it was Windeyer—who Virginia will speak about in a more favourable light—who appeared to psych him out. Windeyer was a judge and was probably hopeful for his own preferment as Chief Justice, and he told Salomons that he didn't think Salomons was up to the job, and Salomons had something of a crisis of confidence. So, even though his appointment was gazetted on 13 November, he resigned six days later.

Darley, having been earlier asked and said no, was prevailed upon to take on the position, and he did. He had a long tenure, all the way from 1886 until 1910. He was the second longest. I know this is a conference of historians or people with historical interest. You might be interested to know that in 1893 Sir Frederick Darley, as Chief Justice and Lieutenant-Governor, entertained in Sydney none other than the Archduke Franz Ferdinand of the Austro-Hungarian Empire at Government House some 20 years before the latter's assassination at Sarajevo. Archduke Franz Ferdinand was out visiting for a spot of marsupial shooting. He went kangaroo, koala and emu shooting in the Hunter Valley and was accompanied by his own personal taxidermist. The Australian marsupial community no doubt felt a sense of collective karma or schadenfreude when Gavrilo Princip was to hit his mark, albeit at closer range than the marsupials, on the afternoon of 28 June 1914.

Sir Frederick Darley was the Chief Justice in the period leading through the convention debates for the Australian Constitution and the Commonwealth. He was there to welcome the Governor-General, Lord Hopetoun, on the creation of the Commonwealth. Centennial Park, I think, was where the official ceremony took place. But he did not support the existence of the High Court, which was established in 1903, and there was a great deal of resentment at this new court from the incumbent supreme courts around the various colonies. It wasn't initially warmly welcomed; it was seen as an incursion on the status and the historical significance of the supreme courts.

It was poorly funded. It wasn't actually established until 1903, so it wasn't established immediately, and there was some tension. That tension has ebbed and flowed over the years—although, of course, the High Court's role at the apex now is very well and firmly established. Only briefly, Sir William Cullen succeeded Darley. Cullen is the first on the left. Cullen had an instrumental role, before taking up the chief justiceship, with the role of women in the law.

Ms VIRGINIA BELL: Thank you, Chief Justice. Do I take it you are throwing to me now?

The Hon. ANDREW BELL: I'm throwing to you.

Ms VIRGINIA BELL: May I say, I was allocated the subject of women in the context of the judicial work of the Supreme Court over the last two centuries. The Chief Justice and Keith have assumed, as is their wont, the lion's share of any discussion of that topic, since, of course, until the very late twentieth century women had no part in that work at all. I thought I would look at two areas: firstly, the impact of the personal qualities of the judge on the hapless women who happened to appear before the court. I am speaking of the work of the court in the nineteenth century, when, it has to be said, the social and political views of the judge were very likely to influence the outcome of litigation in which women might be engaged. Happily, I can say from my experience as a judge of the court in the very late twentieth and early twenty-first centuries, that tendency seems to have run its course.

I also thought I would look at the struggles of women at the end of the nineteenth century for reform of laws which so oppressed them, and the recognition by some redoubtable feminists that before there could be effective change it would be necessary for women to be able to practise law and advocate on their own behalf and, indeed, represent constituents in Parliament. Dealing with my first topic, it is necessary to say something about the common law as it stood for much of the nineteenth century. Women were precluded from participation in vast areas of public and professional life. The legal personality of a woman became submerged, on her marriage, with that of her husband. In some respects, the law did treat married women as the property of their husbands. Under the doctrine of coverture that applied in the colony of New South Wales, a woman's legal capacity was reduced almost to nil upon her marriage.

A feme sole—a woman who was not married—could own property. She could conduct a business, she could sign contracts and she could bring legal proceedings in her own name. By contrast, a feme covert—literally "a covered woman"—couldn't do any of those things independently of her husband because she was considered one person in law with her husband. Her personal property became that of the husband, though, on his death, she did have the right to retain her "paraphernalia". Her paraphernalia were her clothes and her ornaments. If she had an interest in land, the husband had complete control of it during his and her life and, if he survived her, he could retain an interest in the land for his life, known as a "curtesy". Her wages were his and, if he died first, they didn't revert to her; they passed to his estate and were dealt with by his executor.

I should just say that one of the happy circumstances of living in a penal colony was the intersection—if I can use that word, which is so loved by social scientists—of the common law of coverture with felony attaint. Upon conviction, a felon became civilly dead. He had no civil rights or capacities at law. Hence, if you were married to a convict in New South Wales, you remained a feme sole and you could keep your own property. The restrictions on coverture became more and more untenable as the century progressed. Turning now to William Windeyer—barrister, politician and, subsequently, a justice of this court—to my mind, I have to say, despite any rough and tumble he may have had with Sir Julian Salomons, William Windeyer ranks second only to Simone de Beauvoir in terms of his instinctive understanding of the oppression that women were subject to.

He led the movement for reform of the law of coverture and he introduced the Married Women's Relief Bill into Parliament in 1878. That led to a fierce debate in the pages of *The Sydney Morning Herald*, as you might imagine. One correspondent observed of the law, were it to be enacted, "She may occupy her time in earning money and may spend it on her own luxury dress or extravagance—or even drink, for that matter." Despite these well-founded fears, the following year the legislation passed as the Married Women's Property Act of 1879, and a married woman obtained the right to earn money and hold property in her own name.

The Act did not, in terms, deal with her contractual capacity. That omission came to light in the case of Olivia Mayne. Mrs Mayne sued two theatrical entrepreneurs, the MacMahon brothers, for their failure to pay her the agreed £25 per week for the hire of her boxing kangaroo, called Fighting Jack. The MacMahons' barrister argued that, while the Act allowed women to recover, protect or secure their personal property, they nonetheless remained nonentities under the common law and therefore couldn't make or enforce a contract. The defence also, as a second line of attack, argued that Mrs Mayne was a woman who "ran away to chase money and excitement, neglecting her husband" in an attempt to characterise her entering into a contract as illegitimate, if not actually illegal.

She actually recovered from the jury, but the Full Court set aside the judgement, holding it was altogether too much to read the conferral of the right to contract under the Married Women's Property Act. William Windeyer was undeterred. He relied on the boxing kangaroo case when advocating for further reform of the law. I pause to say that it makes you sort of proud to be Australian that when the Married Women's Property Act of 1893 redressed this oversight, it was largely on the strength of vindicating the right to be properly remunerated for your boxing kangaroo. While Sir William is still up on the screens before you, I have to point out that he had the discernment to have married and to remain happily married to one of the most notable feminists of the nineteenth century. Lady Mary Windeyer, who is pictured beside him, was the foundation president of the Womanhood Suffrage League of New South Wales.

I like to think it was her influence, at least in part, that we can divine in Justice Windeyer's most famous judgement, *Ex parte Collins*. That decision was one of a number of cases in the latter part of the nineteenth century that dealt with the vexed question of making information available to the public about methods of birth control. There were two cases, *Ex parte Collins* and, three years before it, *Bremner v Walker*. They illustrate the chasm between Chief Justice Martin in *Bremner v Walker* and William Windeyer in Collins. Going firstly to *Bremner v Walker*, Thomas Walker was prosecuted for an offence under the Obscene Publications Prevention Act, arising out of his possession of diagrams of the male and female reproductive organs. He used those diagrams to illustrate public lectures on techniques of birth control.

He was convicted of obscenity before the magistrate. He appealed to the Supreme Court and the matter came before Chief Justice Martin. Chief Justice Martin was a sufficiently good lawyer to see the appeal had to succeed on a technicality. Nonetheless, he devoted some paragraphs in his reasons to explaining why the exhibiting of drawings of this kind was a very serious offence. He drew this distinction. "It was one thing," he said, "for a professional man to exhibit drawings of this kind to a group of students studying physiology but quite another thing to do so to the public at large." This, of course, was in line with Sir James' general attitudes exhibited some years earlier in the Legislative Assembly, when he opposed the enactment of a matrimonial causes bill, expressing the concern that, were it to become an Act, it would import the excesses of the French Revolution. Revolutionaries, he considered, were apt to see the marriage tie as of no moment, and he feared for the colony if it should go down that path.

By contrast, only three years later, one has *Ex parte Collins*. William Collins, a young secularist, was charged with distributing one of Annie Besant's pamphlets on family planning. He was convicted by the magistrate and he brought proceedings in the Supreme Court to prohibit the magistrate from proceeding with the conviction. In his reasons, Sir William Windeyer rejected that any natural function of the human body is obscene in itself. He said, "There's nothing unholy or unclean about the natural instincts of man. It was the diseased mind of the unnaturally living ascetic, with his distorted views of religion, that led to God's handiwork becoming the object of shame and disgust." Sir William asked, rhetorically, "Where was the immorality in allowing a woman married to a drunken husband information in order to avert the consequences of her husband's brutal insistence on his marital rights?" Then he drew this riposte to Sir James Martin's contrast between the professional man and the members of the public at large. In a very famous passage he said this:

> Information cannot be pure, chaste, and legal in morocco at a guinea, but impure, obscene, and indictable in a paper pamphlet at sixpence. … The time is past when knowledge can be kept as the exclusive privilege of any caste or class.

Indeed. To move from the sublime, to move from that high peak of nineteenth-century jurisprudence—

The Hon. ANDREW BELL: I will just interpose for a second. Sir James Martin, or his wife, had 15 children, and she left him and moved to Vaucluse late in life.

Ms VIRGINIA BELL: I am always loath to correct the Chief Justice, but indeed she bore him 16 children—one stillborn.

The Hon. ANDREW BELL: Right. Thank you.

Ms VIRGINIA BELL: You can't look at the jurisprudence of the Supreme Court in its first century as it affected the interests of women without reference to Justice Hargrave, who has been notably absent from discussion so far. John Hargrave was born in England a few months after the Battle of Waterloo. He was educated at Cambridge and he went on to study law at Lincoln's Inn. Unremitting study was said to have unhinged his mind and, after receiving a legacy, he retired from the bar. Ultimately, his wife had him committed to an asylum. Gradually he recovered, and you won't be surprised to learn that he came to the colonies, where he was appointed a judge of the Supreme Court.

His work habits, perhaps reflecting a concern lest he should lose his mind a second time, in my view have always served as an example to all judges. He acknowledged that he rarely commenced sitting before 11.00 a.m. and he is reported to have ignored all the complaints that he rarely sat after 2.00 p.m. He never forgave

his wife, and he harboured an unmitigated dislike of women. This made his selection as the first judge in divorce, following the enactment of the Matrimonial Causes Act of 1873, somewhat unfortunate. And it was not as though Justice Hargrave's views on women weren't known. They had been made clear in a series of cases brought by widows challenging their late husbands' testamentary capacity. At the time the law left it to testators to fulfil their moral duty to look after their widows and children. If the husband failed to provide for them, the court could offer no assistance unless it found the husband to have been of unsound mind at the time of making the will.

In 1872 Justice Hargrave heard a case brought by Frances Townsend. She challenged her husband's will on the basis that he was of unsound mind and that he suffered delusions as to her fidelity. Despite evidence from several witnesses that he was maniacal and under delusions, Justice Hargrave found the will to be most rational. He went on to chastise Frances Townsend, saying she had ransacked her husband's most secret papers in an attempt to prove at the cost of his only child that his father ought to be considered a confirmed lunatic. On appeal, fortunately, with Chief Justice Stephen presiding, the decision was reversed. It was found the testator suffered from an insane delusion. I must just pause. I sensed the Chief Justice, when I was speaking a few moments ago, getting restive, and I fear that he's worried that I'm spending too long on my first section.

The Hon. ANDREW BELL: Are you still on the first section? I think we could move seamlessly through to the Women's Legal Status Act—picking up on the segue from Sir William Cullen, with which I introduced you some time ago.

Ms VIRGINIA BELL: I have to omit an enormous amount of very valuable material for historians, but I'll do so. I sense your frustration, but what can you do when you're in the Banco Court and the Chief Justice is giving you a kick? I'm going to come to the topic of Ada Evans, the first woman to graduate from Sydney University's law school in 1902. Nonetheless, she was to wait 19 years before she was permitted to be admitted to practise. I should say—and this brings me in a somewhat circular fashion to the Chief Justice's prompt—getting access to the law school was no mean feat. The dean of the law school was Professor Pitt Cobbett, whose name, to quote FDR, should live in infamy. He was not at all happy at the idea of having any female law students, and there's no doubt that Ada Evans would not have been admitted had it not been for the happy circumstance that he had taken a sabbatical in 1902 and was temporarily replaced by the assistant dean, then William Cullen.

I pause so I may interpolate one thing, Chief Justice. Sir William also had the discernment to be married to another of the foremost feminists of his day. Anyway, going back to Ada, she commenced her law studies to the evident annoyance of Pitt Cobbett on his return, and she completed them with distinction. There's a report of her graduation ceremony published in *The Australasian* on 26 April 1902:

> The excitement for the girl graduates was to see Miss Ada Evans presented for the LL.B. Professor Pitt Cobbett, who is a bachelor, and not partial to women, could not conceal his disapproval as he introduced the interesting-looking girl to the chancellor, who smiled pleasantly.

The paper went on to note that there was no prospect of Miss Evans being admitted to the bar, although after a short rest it was announced that she was going to begin agitation for a new Act. The paper neutrally recorded, "At present every judge in Sydney is opposed to her." The Legal Practitioners Act at the time established a board to approve properly qualified persons for admission as barristers. Evans was advised that an application to the Supreme Court to compel the board to admit her had no prospect of succeeding. Between 1904 and 1917 she wrote to successive attorneys general seeking a change in the law.

It was not until October 1918 that the Women's Legal Status Bill was introduced into Parliament. In speaking for the bill, Attorney General Hall suggested that New South Wales was lagging behind other states in permitting women to enter the legal profession. He recalled that one woman had passed her examination for admission to the bar at the same time as he had. He graciously acknowledged that her pass was better than his, and he noted that she had occasionally communicated with his department, inquiring when she would be permitted to practise for the profession for which she had qualified herself 18 years earlier. As enacted the Act provided that a person shall not by reason of sex be deemed to be under any disability or subject to any disqualification from being elected as a member of the Legislative Assembly or as a member of a local council or to be appointed a judge or magistrate or to be admitted to practise as a barrister or solicitor.

Ada Evans commenced her apprenticeship as a student of law in May 1919, and on 12 May 1921, 19 years after graduating, she was admitted as the first female barrister in New South Wales. Now, don't you push me, Chief Justice—I just have to add this postscript. In June 1921, in a sad postscript, she refused a brief to appear in an equal pay case. She was concerned, she said, not to undermine the standing of women by any show of incompetence the product of her involuntary 19 years of absence from the law.

The Hon. ANDREW BELL: It may well be, and it still happens today, that the Chief Justice or the Supreme Court is often consulted about legislation. It may well be that Sir William Cullen, who was serendipitously the acting dean when Ada Evans applied for admission and before he became a judge, may have

been—and in my suspicion probably was—consulted about the Women's Legal Status Act of 1918, because he was at the height of his own chief justiceship then, and it permitted women not only to practise law and become barristers et cetera but also to stand for council, to become mayors and to become members of Parliament.

It's interesting; Virginia has mentioned the wife of Sir William Windeyer and the wife of Cullen. The trilogy, as it were, lies in the fact that Sir Kenneth Street, the second of the Streets to be Chief Justice as I mentioned before, was married to the redoubtable Jessie Street, who many of you will know as a leading feminist and social activist. There is probably something to be made of that fact about both their influence on their husbands and their husbands' own attitudes to basic equality and representation. Conscious of the time, I'm just going to give you a quick Cook's tour through the other judges and Chief Justices. I'm pleased to say that about one-third of our judges in the Supreme Court are women. It's about 40 per cent in the District Court. It's 60 per cent in the Land and Environment Court, and it's 50 per cent in the Local Court. We've come a long way.

Now for the quick Cook's tour. Cullen was succeeded by Sir Philip Street. He, in turn, was succeeded by Sir Frederick Jordan, who many people regarded as the greatest Chief Justice—a brilliant man. If you want to read more about him, Keith has written the definitive biography of Jordan, available at all good bookstores. Jordan was, as Keith likes to say, sandwiched by the Streets, so Sir Kenneth Street followed. Interestingly, for most people, becoming Chief Justice would be the epoque of their career, but the second Street was followed by HV Evatt—so the third from the end. HV Evatt had, 30 years before, been appointed at the High Court. He was about 32 years old at the time. He served on the High Court with great distinction for 10 years, I think from 1930 to 1940. He overlapped entirely with Sir Owen Dixon, for example, during that period. Then, of course, he left to go into politics.

He played a great role in the third general session of the United Nations, during which the charter of human rights was passed, and then he went on to his political career. He also argued the Communist Party case—one of the great cases in the High Court's history—with great distinction, and then had a period of time as Leader of the Opposition. He became Chief Justice having achieved all of that, but the reality was that the position was really arranged for him. He was in decline—it was a means of moving him on from Federal politics—and his time was a rather tragic and brief one as Chief Justice of New South Wales.

He was followed by Sir Leslie Herron, who is the very engaging-looking man holding a book open in what is, I think, my favourite portrait of the court. He led the court during a very tumultuous time, because the Court of Appeal was established during his time. It was controversial in the history of the court because the judges who constituted it were not appointed in order of seniority. This caused huge contretemps amongst the judges of the court. It split the court, and there was huge resentment, open antagonism and warfare. The court is now more than 50 years old and is, I think, regarded as one of the great appellate courts in the common-law world. It's had some great judges and has a very high reputation. Herron was the Chief Justice during that period and also when the Supreme Court had its most significant legislative reform, with the Supreme Court Act 1970.

Then—more controversy—he was succeeded by none other than Sir John Kerr. I always think it's not easy to tell whether Kerr is wearing a wig or not, but you can see his full bottom wig is dangling. That's his great head of hair. One's view of Kerr is skewed, however one looks at it, by the events of 1975, but he was a significant Chief Justice. He was very significant in the foundation of LAWASIA, which is a Pan-Asian legal body, and that dated back to his work in the Second World War and the Pacific Commission. He was heavily involved in the intelligence agency during the Second World War and the immediate post-war period. He had a great interest in the Pacific, and that led to the foundation of LAWASIA. The Supreme Court of New South Wales still plays a lead role in the judicial branch of LAWASIA.

Kerr was Chief Justice for, I think, 2½ or so years before he became Governor-General. He was also a very good judicial administrator and played an instrumental role not only in this building being developed but also in preserving the heritage courts, which I think some of you might go for a tour of after this session—that's the heritage courts on King Street and St James Road that, essentially, wrap themselves around St James' Church. The foundation stone of St James' Church was originally the foundation stone of the Supreme Court, but plans changed and what was to become the court became St James' Church. Then other buildings were built around St James' Church, which became the court, the first one of which I think was completed by about 1834. Is that right, Keith? Anyway, you'll have to buy the book to find the answer to that.

To finish the Cook's tour, Kerr was succeeded by Sir Laurence Street—who, again, is too big for this building. Sir Laurence was succeeded by Murray Gleeson, who is the only Chief Justice of New South Wales to both go to the High Court and become Chief Justice of the High Court. Many people think his successor, Jim Spigelman, could also easily have been appointed Chief Justice of the High Court. He was an outstanding Chief Justice. He was Chief Justice, I think, when Virginia was appointed—and Keith too, I suspect. He, of course, had a most fascinating career.

He came to Australia at the age of two, like Sir James Martin. He came from Poland post-war. At 25 he was principal private secretary to Gough Whitlam. At 28 he was the head of the Commonwealth Department of Communications. During his time at the bar, he was chairman of the Art Gallery, chairman of the Powerhouse Museum and chair of the Film Finance Corporation. He was an outstanding barrister. When a law student, he was with Charles Perkins on the freedom rides in the sixties. After his retirement as Chief Justice, he served a term as chair of the ABC.

My immediate predecessor, Tom Bathurst, is there. He still is a great commercial and corporations lawyer. I describe his chief justiceship as Old Testament, because during it we had a great flood in the building—some floors were out of action for six months because of burst pipes—we had the bushfires enveloping Sydney for months and months, and then we had the pandemic. So we had flood, fire and plague. Virginia will give a quick burst about Jane and some of the early female judges, and then we'll have some questions.

Ms VIRGINIA BELL: If I could briefly note, going back to the Women's Legal Status Act, it contemplated that women might become judges and magistrates; it didn't provide for women to serve on juries. That was because Parliament couldn't cope with the idea of women sitting in judgement on men. The idea of any woman becoming a judge or a magistrate was so utterly fanciful, they didn't worry about enacting it. That was very wise in 1918. It wasn't until 1987 that Jane Mathews was appointed as the first woman justice of the Supreme Court. Jane had before that served on the District Court. In her role as a District Court judge, she headed up the then newly established Equal Opportunity Tribunal and she delivered pioneering judgements on issues to do with what was then the very new concept of sexual harassment.

Things speeded up somewhat after Jane's appointment to this court. In 1994 Carolyn Simpson was appointed the second woman justice to the court. Carolyn is still serving as an acting justice of appeal. She is the longest serving judge in this court. Again, relatively early on, Margaret Beazley was appointed to the Court of Appeal—the first woman to be appointed as an appellate judge. She then served as president of the Court of Appeal, following Keith's retirement. Of course, now she serves as our present Governor. I should add a nice little personal touch, if I am allowed it. In April 1999 Margaret Beazley, Carolyn Simpson and I sat as the first all-female appellate bench in any common-law country. It was quite a moment.

The Hon. ANDREW BELL: Thank you, Virginia. We have exquisite timing with the most gentle of prompting. We have a little time for questions. I think there are some roving mics. We don't usually have roving mics in court because we like to confine the questioning to one person in the middle, but we will make an exception for this audience. If there are any questions, please feel free to ask Virginia.

QUESTION: This is a question for Virginia Bell. We sometimes get referenda results wrong. Is 70 too early for High Court judges to have to retire?

Ms VIRGINIA BELL: I don't think you intended to, but you are defaming me. The retirement age is 70; I am still only a youthful 72. The retirement age was fixed in the 1977 referendum. Before that, of course, judges of the High Court had tenure for life. I think we've seen in the United States, with its Supreme Court, why it is not wise to have life appointments. You would know from recent experience that it is very rare for the Australian public to support a referendum proposal, but one of the eight out of 44 that they have supported was forcing a retirement age on Federal judges. You can argue about whether 70 is perhaps too young given the life expectancy today as opposed to what it might have been, say, at Federation. But you need a bright line and you need renewal in a court, so I don't think there is any real reason to chafe about it.

The Hon. ANDREW BELL: There are two points I would add. In New South Wales the retirement age is now 75 and one can come back as an acting judge, if invited, until 78. I don't refer to that as the "drop dead" date because that's not very nice, but that's the end point for judicial service. As you know, Virginia, for example, did a large Commonwealth inquiry into whether one could hold multiple ministries, unbeknownst to anyone else. Other retired judges have conducted inquiries. It's much better to have distinguished retired judges conducting inquiries of that kind than sitting judges, in my view. It happens from time to time. Justice Paul Brereton, who is now the initial Chief Commissioner of the National Anti-Corruption Commission, did the war crimes inquiry while he was still serving as a judge. It has happened. Different States have different attitudes to the appropriateness of that. On the whole, it's not appropriate for institutional reasons, although exceptions can be made et cetera. Had Sir Anthony Mason not been made Chief Justice, he could still be a sitting member of the High Court at age 98½. He turns 99 next May and is still in very good form.

QUESTION: Justice Bell, you have bookended the Matrimonial Causes Act with an inappropriate appointment. Have you any anecdotes to share with us about the other end of the Matrimonial Causes Act and the officer then exercising that power in New South Wales? I'm referring to Justice Larkins.

The Hon. ANDREW BELL: Keith is probably better placed.

Mr KEITH MASON: Even with the absolute privilege that sitting in this place affords me, I won't recount all of the stories I've heard about Tony Larkins. He was a real character. He had a monocle. He was, as they say, a confirmed bachelor. I don't think he had the prejudices that Hargrave had, but I do remember losing a case very badly before him when I was taking on the Catholic Adoption Agency.

QUESTION: This is a question about Windeyer. Another interesting case is Mount Rennie. Obviously, one would feel ambivalent about the death sentence, but it's an interesting judgement in the context of its time.

Ms VIRGINIA BELL: You raise the fact that his reputation came to be that of a hanging judge, and that was a well-deserved reputation. For those who are not familiar with it, the Mount Rennie case involved the pack rape of a 16-year-old servant girl by a group of youths. My recollection is that I don't think any of them were over 20—one might have been—but Justice Windeyer sentenced nine of them to death. A number of those sentences were commuted. Some have suggested that Justice Windeyer's particular sensitivity towards the circumstances of women led him to be especially harsh in dealing with offences of violence committed against women, and there may be something in that. He certainly was harsh. The other thing about it is that the summing up to the jury in the Mount Rennie case would certainly not pass muster today. This was a summing up that amounted to an instruction to the jury that they were going to convict all these young men—and they were young men. It's interesting. It did invoke quite a large wave of public sympathy and public concern about hanging young men not yet 20, notwithstanding their violent behaviour.

The Hon. ANDREW BELL: Any other questions? Excellent. Good timing.

Ms VIRGINIA BELL: Flawless timing, Chief Justice.

The Hon. ANDREW BELL: I take full credit. On behalf of the court, I thank you all for your interest in its history. I think it's imperative that we celebrate it properly, document it properly and draw it to public attention next year, which we will be doing. For those of you that are continuing history, as part of our 200th initiative we're installing what some people call a "history wall" immediately behind you. In the outside corridor, about 15 metres will have a backlit, chronological history of the court.

I'm sure this audience would be pleased to know that the court will itself be conducting tours for secondary schoolchildren on a regular basis, which will begin in this court in the mornings, take in the history wall, involve a visit to some hearings and probably go across the road, where you're about to go. We are looking at teaming up, to the extent we can practically, with our friends at the Legislative Council because I certainly have a strong belief in civics. We need to do as much as we possibly can to improve public awareness, particularly on the part of young people, about the role of institutions, parliamentary and judicial. We claim, and I think it's right, that having a stable, strong, independent court is integral to this place remaining a thriving democracy. Thank you very much.

Mr DAVID BLUNT: Thank you so much, Chief Justice, Keith Mason and Virginia Bell. Thank you for having us here today as your guests. Thank you for bringing to life the people behind each of these portraits. Thank you for the stories. Thank you for the depth of the history that you have unfolded for us. I ask all participants in our conference today to join me in thanking the Chief Justice and colleagues.

The conference adjourned.

Second Day

Tuesday 14 November 2023

THE COLONIAL TREASURY

The Hon. DANIEL MOOKHEY, Treasurer

CAROL LISTON, AO, Associate Professor

Mr DAVID BLUNT [Clerk of the Parliaments]: Welcome back, everyone, to day two of our bicentenary conference. We had a wonderful day yesterday, learning about New South Wales' place in the world of empire in the 1820s and the 1823 Act, as well as then delving into the history of Chief Justices of New South Wales over at the Supreme Court. Before we commence today, I will take the opportunity to promote a couple of resources that are available to you all. The Parliamentary Library this year has been publishing something called Bills Assist—a new web-based resource that provides a centralised location where you can learn more about bills that are before the Parliament, media coverage and much more.

Can I also encourage you to sign up to the House in Review blog. I know that a number of you are already subscribers but, for those of you who aren't, please take the opportunity to sign up. It's a blog published in the days following each sitting of the Legislative Council and it summarises a quick-to-read overview of legislation debated, committee inquiries, papers tabled, significant procedural moments and other business before the House. We'll be sending links to both of those resources to each of you after the conference, along with your feedback forms. Please look out for that email. We've got another exciting day scheduled for today. I'm sure you've each got your programs in front of you, so I won't go through the detail of the program we've got ahead. I will just mention, though, that at the conclusion of Anne Twomey's talk the conference will finish with a tour of Boomalli's powerful and impactful exhibition in the Fountain Court. The tour will also take in the Legislative Assembly and Legislative Council Chambers and the President's suite.

To introduce our first speakers this morning, I would like to welcome the Hon. Damien Tudehope, MLC. Mr Tudehope is a member of the Liberal Party and Leader of the Opposition in the Legislative Council. He is shadow Treasurer, and shadow Minister for Industrial Relations. Under the previous Government he served as Leader of the Government in the Legislative Council, Vice-President of the Executive Council, and Minister for Finance and Small Business. I read here that Mr Tudehope is passionate about tennis and cricket. He is an avid supporter of the Sydney Swans and is co-chair of the Parliamentary Friends of the Sydney Swans and the Parliamentary Friends of Religious Freedom. As shadow Treasurer, Damien Tudehope is a particularly good sport to have agreed this morning to introduce his nemesis, the Treasurer. Or is he actually introducing his apprentice? Will he be introducing him or roasting him? Well, let's find out.

The Hon. DAMIEN TUDEHOPE [Member of the Legislative Council]: Thank you, David—Mr Clerk. I am indebted to the Clerk always for his advice. Thank you, everyone, for being here this morning. This series is such an important part of preserving the history of this place and the things that we do in this place. It's a great pleasure of mine to be able to participate, even in this very small role. It's my task today to begin this session by introducing Daniel Mookhey, my nemesis—he is my nemesis but also my friend—and also to introduce Adjunct Associate Professor Carol Liston, who will take us back in time to hear about the very beginnings of the Colonial Treasury.

The first Colonial Treasurer was a fellow called William Balcombe, who was appointed on 2 October 1823. I was doing some small research on Mr Balcombe. When he first arrived in Australia, it appeared that Bathurst or Brisbane wasn't quite clear as to what the scope of his new office would be. The financial arrangements of New South Wales at the time were somewhat diffuse. This is an example of "the more things change, the more they stay the same", let me tell you. The colony's finances had been administered by the commissary, the treasurer of the police fund, and the naval officer and the treasurer of the Orphan Fund.

Colonial revenue, at this time, was raised by—this is how we earn our money—royalties on timber and coal, fees on shipping, import duties, wharf taxes, auction duties or stamp duty, market and fare duties, fees paid on cattle slaughtering and, most importantly, tolls on public bridges and roads. The more things change, the more they stay the same. But it gets more interesting because, in the 1830s, the government in London and the Governor in Sydney acted slowly to improve the administration of the Treasury. It was necessarily slow, as every recommendation from the Governor had to travel 16,000 sea miles and took about three months. Conversely,

every dispatch from the Secretary of State took as long. If there were disagreements, they could take months, if not years, to resolve.

Consequently, in 1836 the office of the Collector of Internal Revenue was subsumed within the office of the Colonial Treasurer. What happened then? This action caused the then Treasurer, Campbell Drummond Riddell, to immediately claim an increase in his salary. This action occasioned a protest from within the Legislative Council, when John Blaxland gave it as his opinion that the duties of that office—that is, the office of Treasurer—were demanding of little talent or acquirement of any kind. Bear that in mind, Daniel.

Who are our two speakers today? I begin by introducing Carol Liston, an Australian historian who specialises in the history of New South Wales from 1788 to 1860. Her research covers early colonial history, with interests in people, local history, heritage and the built environment. She holds a particular interest in the colonial development of the county of Cumberland—Greater Western Sydney—using land records, family history and surviving buildings to document the past. She is also the co-editor of the *Journal of the Royal Australian Historical Society*.

Our second guest is the Treasurer of New South Wales, Daniel Mookhey. The Treasurer, as the Clerk correctly pointed out, is a regular sparring partner of mine, going back many years to when he was a humble shadow finance Minister and I had just entered Cabinet. We both entered Parliament in 2015, although in different Houses, where I learnt skills in the other place. I took a term to see the light and then I joined him in the Legislative Council, where we continue our contest of ideas. I hope that when Parliament sits, or he is facing a grilling in budget estimates, I make him long for those halcyon days where the Colonial Treasurer didn't have to face an opposition counterpart. The Treasurer is a worthy adversary, and someone well respected on all sides. I am sure today will be an enlightening discussion. Please join me in welcoming the Treasurer and Associate Professor Liston.

The Hon. DANIEL MOOKHEY [Treasurer]: Good morning, and thank you to the civic leaders and citizens who have gathered here in the parliamentary theatrette to celebrate our democracy and to mark 200 years of responsible government in New South Wales, which coincides with the 200th anniversary of the NSW Treasury as well. I begin by acknowledging that we are on the land of the Gadigal, and I pay my respects to Elders past, present and emerging. I affirm the New South Wales Government's ongoing solidarity with all First Nations people as we strive to deliver justice and equality for all our citizens.

I also acknowledge many of the guests who are here, including the President of the upper House, Ben Franklin, who otherwise keeps us in check; and my good, good friend the shadow Treasurer, Damien Tudehope. When I was told he was introducing me, I told my staff, "Take comfort in this: He does not have parliamentary privilege in the theatrette." I wish to acknowledge the Auditor-General of New South Wales, Margaret Crawford, PSM, who, I often say, is the higher power we in Treasury all answer to; the Clerk; the Usher of the Black Rod, who has the power to arrest us all—you might not know that; as well as Associate Professor David Roberts, Ms Sue Williams and Professor Frank Bongiorno.

I'm really pleased to join you and Associate Professor Carol Liston from Western Sydney University this morning to talk about the early years of the NSW Treasury. Professor Liston is currently writing one of the 15 chapters of a 200-year history of the Treasury, which will be published next year when Treasury marks its 200th anniversary. Professor Liston's chapter is an examination of the colonial economy prior to and after the establishment of the Colonial Treasury, which was triggered by the Bigge report. John Bigge's seminal inquiry actually comprised three volumes: *The State of the Colony of New South Wales* in 1822, *The Judicial Establishments of New South Wales and of Van Diemen's Land*, and *The State of Agriculture and Trade in the Colony of New South Wales*.

Two hundred years ago, in the mid-1820s, New South Wales was changing its currency from British sterling to Spanish dollars. I encourage lots of people to visit the Powerhouse Museum. If you were to go there, what you would see is a coin collection of all the different forms of legal tender that were accepted in the colony into the lead-up to 1823. This included the Spanish holey dollar, but also—from my own side of things—the Indian rupee, and many of these other currencies across the world that were all accepted as legal tender here until the colony was of the view that perhaps it had reached sufficient scale to issue its own currency. It is an amazing collection that was recently displayed at NSW Treasury.

Introducing a new currency created accounting and political issues for the time. The first Colonial Treasurer, William Balcombe, had to deal with this, plus the emergence of private banks in the late 1820s that then collapsed in the depression of the 1840s. Again, if people have been reading David Marr's new work, which is an amazing story about what life in the colony was like for Indigenous Australians at this point in time, they would understand the correlation between the collapse of the private banks in the 1830s and the formation of

Queensland, as well as how it led to the Legislative Council embarking on a period of expansion of the colony at the expense of First Nations.

Indeed, many of the events which are now being recorded by our historians about violence on the frontier can be traced back to the collapse of wool prices in the 1830s, which brought on the collapse of the private banking sector in New South Wales. That then caused the Council to, in effect, resolve some of the fiscal tensions by embarking upon a policy of land extensions. This led to political infighting involving the Colonial Treasurer and was one of the reasons why Governor Bourke resigned at the beginning of 1837. I am glad the Premier is not here, because otherwise I am sure he would take offence at me making the point that the one responsibility of Treasurers going back 200 years has been to fight governors and premiers who are embarking on too much fiscal expansion at a time when the economy cannot afford it. It is good to know, as the shadow Treasurer says, that as some things change, some things don't. Economic issues, which the British Government, as the real treasury, made the point of, and pressures lasted until the gold rushes and self-government.

A lot of this story will be told in the publication that Treasury will be making next year, which is the bicentennial history of 15 chapters. But what I want to talk about a bit more today was the connection that I have—not a particularly good one, actually—with the very first Colonial Treasurer, William Balcombe. Whilst it is right for us to record him as the first Colonial Treasurer, we should actually take this opportunity to reflect on his background. Again, William Balcombe, our first Colonial Treasurer, served between 1824 and 1829, but he was far more famous for his time of service in St Helena with the East India Company at the same time Napoleon was exiled there. Indeed, what is forgotten is that when Napoleon was, effectively, recaptured at Waterloo and sent to St Helena to spend his dying days, he was sent to St Helena at the time because it was a waypoint in the Atlantic trade. When we say the Atlantic trade, we should reflect on the fact that the Atlantic trade was a key part of the triangle which was the slave trade at the time.

William Balcombe was the master of that outpost, which was a trading station that was selling goods and services to ships that were passing through. He was working for the East India Company as a purveyor of sales. Whilst it is not clear whether or not he was involved in the direct trade of slaves, it is quite clear that the customs and the duties he was imposing in St Helena were certainly correlated very strongly with the slave trade. He was in St Helena until 1880, before being sacked and sent to New South Wales as the first Colonial Treasurer because he was considered too friendly with Napoleon. He was considered as a person who was, perhaps, furnishing Napoleon with a living standard that the British at the time were objecting to.

At the time that he was in St Helena, there were 821 white inhabitants, 820 soldiers, 618 indentured Chinese labourers, 500 free Blacks and 1,540 enslaved persons. That is just one connection between the colony and, in effect, the Atlantic slave trade that existed at the time. There was Colonel John George Nathaniel Gibbes, the Collector of Customs from 1834 to 1859. He was a planter in Barbados—again, a family that played quite a prominent role in that economy at the time. I make special mention of him because, when he came here, he built a house overlooking Sydney Harbour. I heard the real estate was going cheap back then. You might not know it as the Gibbes House; you might know it as another house, called Admiralty House, which is where the Governor-General resides. It is fascinating; again, if you start to think about how connected the colony was to so many of these global circuits, it starts to become quite an amazing story.

I make mention of these two particular incidents because I have two connections to these people. The first is that the very first Treasurer was a person tied up with the East India Company, and the sixty-seventh Treasurer, which is who I am, is the first Australian of Indian descent to serve in the Treasury. It is just a marker of how much, as a society, we ourselves have changed. The second point I make is that I am a Treasurer who resides in Enmore, and Enmore was named after a plantation in Barbados. That was reflected, again, in so much of our geographical naming. This might not be a history that is well told in New South Wales. It may be a history that we need to tell better in New South Wales, which is why it is so important that we are having conferences like this one here today.

Indeed, we are getting better at telling our stories. We are getting better at telling our complete history and giving people a much bigger picture of what it was like to be here when our existing political order was formed. That story should be told. That story should be told more, it should be told more in these conferences and it should be told more by our experts. I am really pleased that I can introduce to you one of those experts. I would like to now welcome Associate Professor Carol Liston to take the story a little bit further. Thank you very much.

Associate Professor CAROL LISTON: Thank you very much for those warm welcomes. What I want to look at today is perhaps more about the people and the money than the institutions because, let's face it, when we talk about Treasurers we're talking about cash, and that really is the heart of the game, particularly in a convict colony. I'm not sure if you realise just how many convicts were here because they were involved in passing forged Bank of England notes—either in making them, engraving them, or, in the case of many women convicts, passing

them in a quite sophisticated trade in Britain—nor, indeed, that some of those convicts, male and female, were charged with high treason by the British Mint, because a popular activity for old ladies in front of a fire was making counterfeit sixpences. We have a convict population who has a personal engagement, shall we say, with the currency of the colony.

Let's just be clear: We're talking about a prison. The importance of the 1823 Act is to move it on somewhat from being a prison; but the British, when they came here to Sydney, were looking at a prison, and that means that our economy and the money and the expenditure was entirely what the British Government wanted to spend on a prison. It wasn't about a free economy. It wasn't about creating opportunities for those people who landed on these shores and couldn't go back home. For a start, we have to have in mind that the paymasters were in London and that the bills were paid for by the British Government, with varying degrees of generosity, I guess, as their finances changed. Even after the convict system ended in New South Wales in 1840, the Treasury, to the end of the nineteenth century, would be sending returns to the British Government asking them to pay for the imperial convicts—those people who had life sentences who were in the prison system, the lunatic asylums or the benevolent asylums, people with a life sentence who were still serving convicts until they died. We can see those returns all the way through the nineteenth century.

We are so accustomed to online and modern payment systems. We've almost even forgotten what a cheque looks like. We need to turn our minds back to a quite different world. To pay the bills in New South Wales, the colonial officials drew on the British establishment through the commissariat. The commissariat was a military paymaster. The expenses of the colony were such as this Treasury bill signed by John Palmer of Waterloo, who was the commissary at this time, and drawing on the British Government a bill to pay local salaries for superintendents and stockkeepers in the colony. Treasury bills were used to pay for the food, so that the commissariat would call for fresh meat, for vegetables, bread for the institutions, and that would be paid for by these Treasury bills.

But they hadn't sent any cash. As the Treasurer said, this is a place where any bit of loose coinage in the world circulated. There was no money. These Treasury bills became quite important for the local residents and merchants to be able to gather together to send to England to get credit in England. Because the problem was you couldn't buy a piano here. You needed to have a line of credit back to Britain, and that is what the Treasury bills provided. But, by the very nature of those bills, it also increased the cost for the British Government. There is going to come a point when they say, "You're too expensive. Cut back on Treasury bills." The problem for the commissariat—and I have to say that some were honest and some weren't—was that meant that the Treasury bills also became a circulating medium in the colony as the merchants gathered them up. The commissariat often didn't have any idea how many were in circulation.

While the British Government was busy with Napoleon and a war, they didn't care much. Once Macquarie came and the Napoleonic Wars ended, the constant appeal—no, order—from the British Government was "Cut back the expenses." Macquarie was a soldier, but he also had a sense of civic place and he did want to build things. The problem was that the British Government only wanted to spend money on the convicts, not really on the colony per se. Macquarie is important because of his engagement with the alternative finance on a large scale. Part of that backing came from the emancipists—that is, former convicts who had served their sentence and were living here making a future for themselves and who, indeed, by the end of his administration were perhaps the dominant economic force. For Macquarie, he improved, shall we say, a system that Governor King had put in place, which was a system where fines and fees were collected in the police and orphan funds. As we have heard from the introductions, by putting tolls and fees on a number of activities, the colonial administration could gather its own revenue.

The importance of the police fund was that it was an incipient colonial revenue. This was money that the British Government was not in charge of. We can see from this public notice in 1810, which is the first year of Macquarie's administration, that they publish; it's an open fund. Its accounts are published in the newspaper, the *Sydney Gazette*. The Treasurer is D'Arcy Wentworth, also Superintendent of Police and treasurer for the public police fund. Here, it's paying money for wages; it's also paying rewards for capturing bushrangers. So this is a fund that the Governor and the administration could use in ways that suited them. But it didn't quite solve the problem of going shopping. That was when the police fund started to issue its own notes. You need some form of circulating medium, and D'Arcy Wentworth, as treasurer of the police fund, could effectively circulate something that's not unlike an old cheque. It's worth £1 10s. They go down to 2s 6d, and the really cheap ones are all endorsed on the back in Latin. One of the economic historians thought that might stop the colonial forgers. I wouldn't have thought so, myself. This is a colony that, as we know, has to make do with whatever it can trade if there's no circulating medium.

And so we remember here the contribution that Macquarie made, which was to import bullion, to import a large quantity of, in this case, Spanish dollars, again in silver, and to punch out the middle of them so that they

were no longer a circulating medium outside New South Wales—Macquarie's famous holey dollars. By defacing it, he was hoping that it would provide some type of cash to circulate in the colonial economy. They're now worth lots and lots of money and are in museums, as the Treasurer said. But it was a sign of trying to make a colonial economy work that was slightly independent from drawing on the British Government with the Treasury bills.

Macquarie's other great economic thing was to establish the Bank of New South Wales. This was not looked upon favourably by the British authorities. This is a period when the banks are private, as we heard yesterday. Lots of private banks were being formed—a lot of them, in England, from ex-East India Company officials, the nabobs who went home with lots of cash. But as far as Macquarie saw it, the local economy had people of considerable worth, and by forming a bank here in New South Wales, by creating the Bank of New South Wales, he created a local financial institution. But he went further than that by saying that the notes issued by the bank could be counted as proper currency within the colony, and that the funds of the colonial government could be put in this bank. That was to cause a lot of ruckus over the next 20 years or so, depending on the stability of the local banks.

Yesterday we heard a little bit about women in colonial society, but it's worth knowing that there were a number of women who were shareholders of the Bank of New South Wales and there were a number of women who had accounts with the Bank of New South Wales. The population of New South Wales understood the importance of a financial institution like the Bank of New South Wales. Of course, that wasn't the only source of money. There was barter. We are here in one of the remaining buildings of what was popularly known as the Rum Hospital. Here is D'Arcy Wentworth's account of how much rum they had the duty on because they built this building and the Mint, because there wasn't money for a colonial hospital. And, yes, they did sell land grants for racehorses and bottles of rum. Indeed, Elizabeth Macarthur had to have little pieces of paper to say she would pay her bills because there was no money for her to go shopping either. You can imagine how difficult it was.

The difficulties of the economy were, in fact, ameliorated by people with links to banks in India, in the case of Robert Campbell, and by Eber Bunker, an American whaler, because he wasn't a British citizen. He was a very useful man for Macquarie because he could get around the East India Company's rules because he wasn't a British citizen. Here we come to John Thomas Bigge and his report. We heard a little bit about it yesterday. Lynn's paper was particularly important in terms of the economy because she mentioned the petitions that were given to the British Parliament by Edward Eagar. Edward Eagar was a solicitor and an ex-convict. He had practised here in Sydney until the judges decided that convicts couldn't appear in court. He was particularly concerned about improving the conditions for ex-convicts. The petitions that he presented included all the things we heard yesterday were not in that Act: a petition for trial by jury; a petition for a legislative council, because there should not be taxation without representation.

This formed the content of those petitions that were presented at the time the 1823 Act was passed. There is a wonderful link to the Treasurer because of this man, and that was Geoffrey Eagar, his son, who eventually became Colonial Treasurer in the 1860s as a member of Parliament and, in the 1870s, the first permanent head of Treasury. This is the man who is credited with creating the modern Treasury. He is the son of the ex-convict. We then move on to Napoleon, who we've heard something about, and a portrait of a very young William Balcombe. He was a friend of Napoleon, particularly with his family, because when Napoleon moved to St Helena there was nowhere to put him so he lived on Balcombe's estate. The family got very friendly, particularly his daughter Betsy, who spent the rest of her life publishing memoirs about it. They were so close that he was sacked for fear he would encourage the escape of Napoleon. The family continued. His great-granddaughter is Dame Mabel Brookes, a Melbourne socialite who in 1957 bought back the St Helena estate in order to give it to the French Government in memory of Napoleon.

However, here in New South Wales we were slightly less organised than that. The man who had to deal with the 1823 Act was Sir Thomas Brisbane, soldier, astronomer and scientist. I really feel for Brisbane because he didn't ever know what was happening—that's what it is! The commissariat brought in more Spanish dollars and that became the currency. When Balcombe arrived he had to deal with both sterling and dollars. Here is a man charged almost with treason. It was as well that his mentor was the Gentleman Usher of the Black Rod of the British Parliament. He lived in O'Connell Street, but in fact the Treasury was the bottom floor of his house. He needed armed guards and was constantly worried about being burgled.

His accounts are a wonderful insight into colonial New South Wales. He paid for coffins as well as for salaries. He paid for anything that had to be paid for, and it was in cash. Most of you would remember being paid in cash, I think. Even his colleague the naval captain Piper had a more exotic lifestyle and got into trouble, just like him. Cooper and Levey were emancipist traders. They too had their own notes. To get money home, they bought a ship and sold it in England because you couldn't exchange overseas. Cooper's nephew came back as the first Speaker of the Legislative Assembly.

What all of this suggests is that there is a problem of moving money around. Darling didn't like the banks so he told the Treasurer to take all the government money out of the Bank of New South Wales in specie and keep it in his house. This is one of Balcombe's letters, which says, "Respectfully, there are no money vaults. There's no cash room. I don't have anywhere to keep the entire cash of New South Wales." This is perhaps not a problem you have, Treasurer.

The Hon. DANIEL MOOKHEY: If I did, I wouldn't tell!

Associate Professor CAROL LISTON: And that was part of the problem, because they didn't know if Balcombe was making a bit of money on the side. However, that's another story for another day. Drummond was a man not well liked, but he had to deal with failing banks. I want to close by suggesting that the money wasn't just about money; it was about a social identity, because the names for the colonial population depended on whether you were pure or debased. "Sterling" was what they called children who were pure—of British free background. "Currency" was what they called the children of convicts. Even in 1830, after Balcombe had died, when a convict woman pinched the money from the till in the pub in Windsor, this was the silver that she took—from Portugal to Germany to France to England, all of which you could use to buy a drink in a pub.

You couldn't get money home. The saddest story is that of Francis Allman, once in charge of the convict settlement at Port Macquarie, who lent money to some Irish convict mates. When he tried to send it back to Ireland in the depression of the 1840s, he had to buy notes from an intermediary to send back. They went broke—didn't have the money. The relatives came from Ireland and asked for the debt to be paid. Governor Gipps said, "You cannot be in debt", and he had to resign his position. So moving money around was a dangerous game. Thank you.

Mr DAVID BLUNT: Thank you so much, Carol, for that fascinating insight. Thank you, Mr Treasurer. I understand the Treasurer has to get away in about two minutes' or one minute's time.

The Hon. DANIEL MOOKHEY: Three.

Mr DAVID BLUNT: Three minutes' time. I invite a question firstly to the Treasurer, and then we'll let him go, and then there'll be time for a few more questions to Carol. Are there any questions for the Treasurer?

The Hon. DANIEL MOOKHEY: The money is safe in a bank.

Associate Professor CAROL LISTON: More than one, I hope.

Mr DAVID BLUNT: Mr Treasurer, I think this is a sign that everyone wants you to go and do your job.

The Hon. DANIEL MOOKHEY: Thank you very much.

Mr DAVID BLUNT: Any questions for Carol, after that fascinating talk?

QUESTION: Thank you, Carol. That was great. Yesterday we learned that perhaps not much really changed in 1823. You've said, though, that there wasn't to be any taxation without representation. When would you say that happened?

Associate Professor CAROL LISTON: When we get a partially elected Legislative Council in 1842. Edward Eagar, Dr William Redfern and the others who were lobbying at the end of the Macquarie period were aware that Macquarie had instituted duties and fees. But they were also resisting the role of the East India Company in the Asia-Pacific region, because it limited the trading that they could do and yet Macquarie was still taxing them. They were very much taken by the American colonists' arguments at the time of their independence, and so "No taxation without representation" was one of their slogans—as was, as we heard yesterday, "Trial by jury", which didn't work in the criminal court. What we didn't hear yesterday was that it was introduced in the civil courts here in Sydney, in the lower courts. That created a sort of intergenerational rivalry because anyone who'd been a convict couldn't be on a jury list but their 21-year-old sons could be. There was a bit of tension between the old and the new, because the people with the money still couldn't be on a jury and their useless sons could be.

QUESTION: Just a quick question about bartering: Was there a kind of futures market that developed? If you were growing grain out on the Hawkesbury, you could try to leverage that based on what the harvest might be worth. Were there disputes about that?

Associate Professor CAROL LISTON: Yes, often ending up in the civil court as people tried to work out, effectively, whether their crops would produce what they wanted. One of the big battles in the 1820s was over a ship called the *Almorah* that came into Sydney Harbour. The commissariat had chartered it to go to Batavia to get grain of some sort, for fear that there had not been enough of a harvest. For anyone who had thought they didn't have it, suddenly there's a shipload full of grain coming into the colony. It also came with about

100,000 Spanish dollars in it, in bullion. It was hijacked for breaking the East India Company rules and sailed to India, so they didn't have to worry about it landing. All of these customs of how much money it is—we get dollars coming in when they're worth 5s each on an exchange. They go out when they're 4s 4d. All of those differing values made life hectic for people like Balcombe—really difficult.

Mr DAVID BLUNT: I'm afraid we're going to have to wrap it up there, but can you please join with me in thanking Professor Liston for that wonderful talk.

NOT JUST NUMBERS: 200 YEARS OF AUDIT IMPACT

Ms MARGARET CRAWFORD, PSM, Auditor-General, Audit Office of New South Wales

Ms CARMEL PHELPS, Author and historian

Mr DAVID BLUNT [Clerk of the Parliaments]: The story continues. To introduce our next session, I have the great privilege of introducing the Hon. Greg Piper, Speaker of the Legislative Assembly and member for Lake Macquarie. Mr Speaker has made his mark in Parliament as a truly independent Speaker in every sense of the word. In the last Parliament he worked closely with his Independent colleagues to achieve a number of very significant policy reforms. Importantly, in relation to this coming session, he was also chair of the Public Accounts Committee. In that context, he probably knows more about the work of the Auditor-General than just about anybody else in New South Wales. To introduce our next guest, please join me in welcoming the Hon. Greg Piper to the stage.

The SPEAKER [The Hon. Greg Piper]: Thank you, David, and ladies and gentlemen. It's fantastic to be here and to have listened to that last session. I congratulate Professor Liston. I just said to her that I'm really waiting for the stage play. I think it could be done here. We've got a lot of performers pent up in this place. I acknowledge the President, the Hon. Ben Franklin, and I reckon we could get a few players out of the Legislative Council to strut the floor here and dress up in costume. Having delved into the origins of the Colonial Treasury, we are now going to hear from Margaret Crawford, the first female Auditor-General in New South Wales. Margaret Crawford, PSM, is going to share some of her insights into how legislative changes have enabled the Audit Office to hold government accountable for its public resources. We're also going to hear about some of the key areas in which the Audit Office has evolved since 1824 and some of the most impactful audits conducted during Margaret's time in office.

There's a little bit of a biography in the booklet there and I'm sure you've all read it, so I don't want to state it verbatim. But I will just point out that Margaret came into the role with a lot of experience, including from her time in Victoria with the Department of Human Services; all of our favourite organisations, like the Australian Taxation Office and the former New South Wales Roads and Traffic Authority—we all love the RTA; and a little bit of time in a small local government you might have heard of, Brisbane City Council. Before becoming the Auditor-General of New South Wales, she held the position of Deputy Secretary of the former New South Wales Department of Family and Community Services. Let me say those are all very difficult areas, and a huge amount of experience came with that.

David mentioned that I had been the chairman of the New South Wales Public Accounts Committee through the last period of government, and I had the great privilege of therefore working very closely with Margaret Crawford as the Auditor-General. I have to say, in no particular order, I found Margaret to be a practical, professional and highly personable person. She's brought great leadership skills to the Audit Office. I think you've left a real mark there, Margaret. I'm somewhat sad that I'm not with you, but I'm also very pleased that I'm the Speaker. With that, can I ask everybody to please give a warm welcome to New South Wales' first female Auditor-General, Margaret Crawford.

Ms MARGARET CRAWFORD: Thank you very much, Greg. Hello to everyone who is in the audience today but also to those people who are watching online. Could I particularly say hello to many staff from the Audit Office who are watching today. I also acknowledge my great colleagues from the New South Wales Treasury and also New South Wales Parliament. I am really honoured to have been invited to speak to you today as part of the celebration of 200 years of the New South Wales Parliament, the first of Australia's parliaments.

I would like to begin by acknowledging the traditional owners of this land, the Gadigal people of the Eora nation, and I pay my respects to Elders past and present. I extend that respect to other Aboriginal and Torres Strait Islander people who are joining us today. I think it's important to acknowledge that First Nations peoples have not always been treated well in the history of this Parliament and that the application of accounting standards and independent audit approaches do not always sit comfortably next to traditional cultures, values and beliefs. There is much we still need to do to better understand and bridge that divide.

As we celebrate 200 years of the Legislative Council next year, we will also celebrate 200 years of having an Auditor-General in New South Wales. As just one of a long line of New South Wales auditors-general since 1824, and as I approach the end of my term, this bicentenary is an opportunity to reflect on the history and importance of the role and ensure I protect its legacy for the next and future auditors-general. So much has changed in the physical, social, economic and political make-up of the State over the last 200 years, and the arrangements governing the Auditor-General and the activities of the Audit Office have adapted to reflect these changes. But

their core role—to help the New South Wales Parliament hold Executive Government to account and to provide insights that inform and improve how government serves the community—has really never wavered and for two centuries has remained fundamental to our Westminster system of government.

Our celebrations over the coming year centre around the theme "Not Just Numbers". We will be recognising the many ways the audit function has supported the Parliament and contributed to better outcomes for the people of New South Wales. We will also be celebrating some of the people and personalities who have played a role in our history, not just auditors-general but the diverse staff that have made our office a great place to work over so many years and are still our best asset today. To this end, we have commissioned respected author Carmel Phelps to write a history of the Audit Office. It might be a little bit dry, but Carmel's work has very much helped my team and me to prepare this presentation and will also feature in an exhibition that will be staged in this great place in March next. I'm delighted that Carmel is with me here today, and she has graciously agreed to help me with any questions of history that you may have later.

Today I'm going to share a few stories about how the State of New South Wales came to have an independent audit function and some of the early personalities that populated its history. I will also share my own perspective on how 200 years of audit have impacted the people of this State and what my hope is for the future. But before we dive into the pages of history, I want to quickly paint a picture of the Auditor-General and the Audit Office today, because I realise that not everyone here is familiar with our work. As Greg said, I am the first woman appointed to the role, and I am the twenty-third Auditor-General for New South Wales. My appointment is for a term of eight years, and that will come to an end on 3 April 2024. The Auditor-General is one of a small number of integrity bodies that oversight Executive Government. My role provides independent, objective and authoritative assurance to the Parliament that the State's financial statements are presented fairly and that selected activities are delivered efficiently and effectively.

Although it has not always been the case, independence is now seen as essential to be able to properly fulfil the obligations of the role. My independence is protected by things like the fixed eight-year term, which is non-renewable, and at its completion I am precluded from working back in any Executive role in government. I report to the Parliament and cannot be directed by the Government. I determine my own performance audit program, and I can't be stopped from presenting those audits to the Parliament. Importantly, I can't be sacked, unless, of course, I become bankrupt or insane. But I think most commentators would say that all auditors-general are a bit mad.

I am supported by an office with around 300 staff. We do a huge amount of work, which you are probably a bit familiar with. Last year we did some 500 financial audits, 15 reports to Parliament that summarised the outcomes of those audits and 20 performance audits around select activities of government. We also developed our work program, which sets out the focus of audits for next year and future years. And, of course, we are constantly working on building and investing in capability within our office in areas like systems assurance, cyber and data quality, technical advice and the like.

Here is what the Audit Office looks like today—possibly a little different than they looked 200 years ago. Our people are diverse, professional, hardworking, independent and open-minded. They display pride in our purpose and live the organisation's values every day. Let's step back in time and take a walk through some of New South Wales' history to understand how the Auditor-General and the Audit Office came to be and why it's important in the context of Parliament's own bicentenary. I'm conscious that you've heard a lot about history over this session and previous sessions, so there might be a little bit of repetition. Forgive me for that.

As context, shortly before the First Fleet set sail for Botany Bay, the British Home Secretary drew the colony's first Governor's attention to the role of the Commission for Auditing and Public Accounts, and the need to ensure that only authorised financial procedures should be observed. Founded as a penal colony rather than as a trading post, it needed to be run at the expense of the British taxpayer. Accordingly, the British Government aimed to keep tight control on all expenses. Imagine, if you will, it's 1788, and over the next 26 years our first four governors of New South Wales—Phillip, Hunter, King and Bligh, all naval officers who held civil commissions—were answerable only to the British Parliament in London, some 20,000-plus kilometres away and eight months' journey.

At the centre of the colony's embryonic economy was, of course, the commissary store. Set up to operate like a naval purser's office, it was responsible for purchasing, storage and distribution of goods and for contracting convict labour. In the beginning it was the only provider of all forms of sustenance—food, clothing and accommodation. As you can imagine, those responsible for running the commissariat were well placed to dominate local business and wielded enormous influence. With only convict labour available to do much of the work in the storehouses and some members of the military overly ambitious to advance their own interests, checks on the colony's finances were not always reliable or trustworthy.

Financial administration was one of the most problematic aspects for the early governors to manage. Facing challenges just to survive—and, as we've heard, no official currency for the first 25 years—even basic standards of financial accountability were almost impossible to maintain. The British Government tried to impose complex and unwieldy traditional accounting systems—I think that's very familiar to what we do today—with little understanding of the challenging environment of the colony, further complicated again by the huge distance between the colony and its political masters in London.

Despite all this, the Commissary of Stores still complied with all prescribed bureaucratic processes. Accounts of costs for the first years of both the civil and military establishment were compiled and sent to London in October 1792. But the commissaries—those men who maintained the logs—were not trained in accounting. Their job was to record all transactions by hand and to ensure that all payments were endorsed by a magistrate or other official authority. They had to submit the accounts for the Governor's examination, but the level of scrutiny applied to these accounts is thought to be fairly questionable. The nature of the transactions recorded at the time perplexed those responsible for their oversight. When accounts sent to Britain could not be understood, authorities had little ability to check them and no real auditing could be done.

As the economy expanded in the years post-1788, so too did the complexity of the matters that needed to be managed and accounted for by those in authority. Various levies and charges were imposed on settlers, and the colonial administration took on more responsibility for providing infrastructure and security. As we've heard, barter was common for everyday transactions. Promissory notes and things such as soap and property—rent—could be used to pay for goods. Influential members of the New South Wales Corps developed a powerful monopoly in trading spirits, particularly rum, and took increasing control of the local economy. Educated settlers and members of the military could advance their own interests at the expense of government, getting away with fraud, corruption, embezzlement and theft with only a low risk of detection.

In such circumstances, it was difficult to maintain honest and accurate accounts. The short supply of professional skills meant that the colonial accounts were increasingly onerous to control, and with no colonial accountant or auditor, the fledgling financial system was highly susceptible to abuse and corruption. Something needed to be done. Governors Hunter and King were unsuccessful in curbing the barter of spirits for food and wages. In 1806, Governor Bligh was sent to impose order. Most of us are familiar with how that ended. In 1808, Bligh was arrested and the colony taken over by the military, with the support of prominent local civilians. This remained the situation until the British Government disbanded the New South Wales Corps and appointed Lachlan Macquarie Governor in 1810.

Some 20 years into settlement, the growing economy needed infrastructure, buildings and public services. Without funding from the stringent Home Department budget in Britain, Macquarie was exceptionally proactive in raising funds through royalties, tolls, licences, dues and levies to construct a solid infrastructure and stimulate a more productive, self-sufficient economy in the colony. In 1812 he was told by the British Government that this revenue should be returned to their Treasury. Further, by 1814, in debt and under financial pressure from wars in France, the British Government demanded that the colony administrators increase taxes and impose more restrictions on spending. As we've heard, instead Macquarie used the revenue he collected to fund public works, such as roads, bridges, wharves and quays; the South Head lighthouse; new barracks for soldiers and convicts; and a hospital, known colloquially as the Rum Hospital. In 1817, as we've also heard, the Bank of New South Wales was established.

While some essential institutions are being established, there is still no government auditor or accountant, and formal audit processes were not yet considered to be an integral part of the colony's financial administration. However, in response to financial crises in the commissariat, criticisms of Macquarie and calls for more democratic governance, the British Government decided to instigate a comprehensive inquiry into the affairs of the colony, appointing John Thomas Bigge to this task. I probably won't go over the story of Bigge, because I know that it has been covered in previous presentations. Maybe I'll just say that most of the recommendations he made were implemented, to varying degrees, with long and unfortunate implications for both colonists and the Aboriginal population, and calls for more democratic governance grew louder. I will conclude on Bigge by acknowledging that in August 1824, while only slightly curtailing the Governor's powers, New South Wales was granted Crown colony status, meaning it was no longer just a penal settlement.

The first Colonial Treasurer was appointed to collect the internal revenue to pay salaries for civil establishments, to issue licences, and to charge tolls on bridges and ferries. Importantly, an accounts branch of the commissariat was established, and William Lithgow was appointed as its inaugural Assistant Commissary General. He took up duties in Sydney on 27 May 1824. A less fragmented and properly regulated system of financial administration was coming into being. Lithgow was put in charge of the commissariat staff in Sydney, Liverpool, Parramatta and other outlying settlements, as well as staff from the commissary in Van Diemen's Land. His job was to receive duplicate monthly accounts from both New South Wales and Van Diemen's Land

commissaries and examine these thoroughly before sending them to London. He was also required to countersign every bill drawn to cover each warrant of expenditure.

Immediately tasked with key projects, including comprehensively reorganising regulations for the commissariat and an inquiry into convict rations, Lithgow soon impressed then Governor Brisbane with his ability and usefulness. Governor Brisbane needed assistance and reassurance in light of commissariat scandals, so he additionally appointed Lithgow to a civil role as the first Auditor of Colonial Revenue from 8 November that same year. For this new job, Lithgow was paid £100 per annum, over and above his military salary. Finally, we had our first civil public servant auditor for New South Wales. In early 1827, it was decided that Lithgow's workload in his dual appointments as both commissariat accountant and colonial auditor was unmanageable and the roles needed to be separated. Then Governor Darling's requested to the imperial authorities about establishing two distinct offices—one for military accounts and one for colonial audit—was approved, but the Governor's further request to increase Lithgow's salary to £800 a year was rejected. He was paid his perennial salary of £650 per annum from 1 June 1827. In fact—and this does sound very familiar—this was never raised in the 25 years of his term as colonial auditor.

In reading the history of this time, I was particularly struck by the tussles between the colonial auditor and the Colonial Treasurer. In Lithgow's time, the Treasurer was essentially a paymaster, subservient to the auditor, who prepared the estimates of revenue and expenditure, presented them to the Legislative Council and controlled subsequent expenditure. Sadly, the roles were reversed in 1856, when new arrangements made the Treasurer responsible for the estimates, and the auditor was left with no clearly defined powers. The following decades witnessed an adversarial exchange between Treasury's exercise of its power and influence and the Auditor-General's claim to an unfettered auditing process and reporting of the public revenue. This played out with much duplication of effort, claims of incompetence on both sides, arguments over office accommodation and poaching of staff. Again, we can see that some things never really change.

Regardless, Lithgow's contributions to New South Wales are very important and deserving of some attention at this 200-year mark. As an auditor, he set high standards. He was respected for his extensive knowledge and for his composed approach. He was an excellent accountant and analyst and was able to recall details accurately, meaningfully and fairly. He thought laterally about things we actually still ponder today. For example, how do we measure the impact of our work? His wideranging efforts gave the fledging colony stability and a sense of continuity. He was very busy and was appointed to around 27 boards, committees and other public bodies during his term. Already holding one of the heaviest workloads in the colony, he also, at times, fulfilled duties of a sitting magistrate and justice of the peace. He acted for lengthy periods as private secretary to the first two governors. He was clerk of the Executive Council, and one of his contributions as an ex officio member of the Legislative Council was to help others interpret appropriation bills. He did a lot more. His is a fascinating story of a life of public service, helping the colony to understand, regulate and administer its finances.

He retired as Auditor-General at the age of 66, having served five governors. I explained in my introduction how important independence is in performing the role of the Auditor-General. In using Lithgow's abundant talents in so many different capacities and appointing him as an official nominee to the Legislative Council in 1829, it was not possible for him to maintain a totally independent audit function or to avoid situations which might involve a potential conflict of interest. Nevertheless, he left a legacy of good governance. He helped find practical solutions to economic problems, saved large amounts of public money and formulated countless administrative guidelines. He was honest and highly principled. He avoided scandal by showing courage and integrity when needed, exposing corruption and reporting on the misdemeanours of influential officials. These are the very qualities and values the Audit Office of New South Wales holds dear some 200 years later.

Since Lithgow, we've had 22 auditors-general and public sector audit of New South Wales has evolved significantly. The time available to me precludes a blow-by-blow description of all that has changed, with each Auditor-General making their own contribution to improve financial management and reporting, and to more effective government services. But I can assure you all that in the history that Carmel is working on for us that will all be included. The powers and duties were first set into legislation of the Audit Act of 1870. The 1902 Act prohibited the Auditor-General from being a member of the Executive Council—much better for insuring independence and integrity. Although it had been amended a few times, the 1902 Act lasted for eight decades. The pace of change picked up in the 1980s with audit transforming rapidly, both in terms of legislation but also in terms of the methodologies we used. For example, new technologies were embraced to improve accuracy and efficiency.

The Public Finance and Audit Act 1983 established the Auditor-General's office and, subsequently, that office was declared a statutory body. Performance audits only started in 1991 and at that time the Act was changed to make sure that I can never work again when I finish my term. Further important changes to the mandate have occurred during my term. Very significantly, in 2016, I became the auditor for all local councils in New South

Wales. This meant our workload increased by 30 per cent overnight. It has been a huge challenge for my office and I think it's a huge challenge, still, for many local councils. Most recently—in fact, in the very last sitting of the Parliament—the Government Sector Audit Act was changed again to provide for "follow the dollar" powers, which means that we now examine whether non-government agencies that receive government money to provide services and infrastructure on behalf of the Government have effectively fulfilled their obligations. Additionally, those changes also enabled the Auditor-General to get unfettered access to confidential information, such as Cabinet-in-confidence documents and legal professional privileged material. These were really long-overdue reforms. Greg Piper, I thank you very much for shepherding those through the Parliament.

That brings us to today. In the lead-up to a bicentenary, I have enjoyed learning about and reflecting on those who have come before me. Their collective legacy is, undoubtedly, the support to Parliament to safeguard public funds through high-standard financial scrutiny and reporting. The annual statutory financial audit is now a very well accepted part of our financial management system. In some respects it can be taken for granted until something goes wrong. Arguably, without mandatory annual financial audits, I think the standards would certainly slip and, more recently, moving into performance audits allows a much greater coverage of the actual effectiveness of what government does. The Audit Office today is really well respected by both Parliament and the many agencies we audit. It is well positioned for the future, with highly professional and committed staff and technologies designed to enhance both the efficiency of our audit process and the insights we derive from our investigations.

But history tells us that government priorities and arrangements for independence and assurance will change over time, and our leadership and audit functions will need to adapt to respond to these changes. Already we are challenged regarding how to respond to pressing matters like reporting the impacts of climate change. We've also been asked to play a role in auditing agency responses to laws preventing modern slavery, which we also touched on earlier. Beyond auditing whether government commitments are delivered, and at what cost, I am very proud of the role my office has played in shining a light on processes that lack integrity and put at risk the community's trust in government, raising the bar and changing the conversation to focus equally on how things are done, not just what is done.

Like our earliest colonial auditors, we will need to be fierce in defence of our system of government. We need to talk out loud and often about the importance of the Parliament and the public institutions that support integrity, transparency and accountability. In conclusion, I have to say that audits are a gift to support the Parliament in this effort. They are a gift for risk management and improvement purposes, a gift to support the legacy of 200 years of the New South Wales Parliament and an Auditor-General for New South Wales. Thank you very much.

The SPEAKER: Thank you, Margaret. I will agree that audit reports are a gift and certainly the media take them that way. It's always great to have such a beautifully packaged critique of what is happening in government circles. Can I just comment on the list of auditors? What happened to Grant Hehir? He only did two years or so. Everyone else sort of maxed out.

Ms MARGARET CRAWFORD: He did 14 months; he got a better offer.

The SPEAKER: I was going to say, who's even heard of him now? Grant Hehir is, of course, the Australian Commonwealth Auditor-General. He couldn't hack it here. Carmel Phelps, are you coming to support Margaret? It's wonderful to meet you; I've never met you. I've got this short little bio here. Carmel has been writing organisational histories and biographies since 2001. Comprehensive research, a collaborative interpersonal style and passionate enthusiasm for her subjects underpin her representation for weaving illuminating and interesting stories from potentially dry history. Carmel, did you write that? It's fascinating. You've turned a dry little bio into something magic.

Ms CARMEL PHELPS: Yes, I probably did.

The SPEAKER: Thank you for being here. We are now going to take some questions from the audience, and I understand we can take them from the live stream as well.

QUESTION: Thanks very much. It was a fascinating session. It seems to me the Audit Office and the history of it would be a really good way of looking at the changing understandings of the meaning of corruption, which, of course, has shifted quite dramatically over a couple of centuries. I'm wondering if either of you could say a little bit about that? The relationship between private interest and public resources is very different today to what it was when a Macquarie or a William Cox were, effectively, investing the money under their control as paymasters, for instance.

Ms MARGARET CRAWFORD: I might lead off and then, hopefully, Carmel can correct me on my history. I think it's fair to say that back some 200 years ago the nature of auditing was very much transactional—

almost that line-by-line scrutiny of every single transaction. Clearly we don't do that today. I think back then that focus on fraud and corruption was probably more than for us now, in the sense that, when we conduct audits today, we are really looking at the broad system of government and the controls that are in place that work to prevent fraud and corruption. We're not doing the sort of forensic work that would have been done in past times.

In relation to private citizens, we've also, of course, been constrained to only ever look at government-controlled agencies and to never go beyond that. The changing of the legislation just last year is really very significant. It doesn't mean that all of a sudden the Auditor-General is going to go out and do financial audits on all sorts of non-government agencies. It just means that we can look at how agencies which are in receipt of government funding actually fulfil their obligations in that regard. So it's a really powerful extension of the mandate. Carmel, did you want to add anything?

Ms CARMEL PHELPS: I think you've handled it very well. It was a much more personal thing in the old days. One of the antagonisms between the Auditor-General and the Treasurer was when the Auditor General, very early on, caught public officials not quite doing what they should. A lot of the impact of the Auditor-General, in the first 50 years and especially the first 25, came from the person themselves—from William Lithgow.

Ms MARGARET CRAWFORD: It is hard work for no pay.

Ms CARMEL PHELPS: That's right. You've got it right, Margaret.

QUESTION: I'm just wondering, with the publicity over the Federal Government outsourcing auditing to the big four and getting into a bit of trouble over that, whether the New South Wales Government outsources auditing.

Ms MARGARET CRAWFORD: Thank you. We don't outsource per se, but we do work with partners. Every audit that we do is, technically, my audit and is signed off by staff within my office. I referenced the fact that in 2016 our mandate was extended to local councils and that increased our workload by 30 per cent. At that point there was just no way we could have humanly done every single audit ourselves, so we entered into partnerships with some of the smaller private sector audit organisations that were already working in that sector, plus we went out to tender. We do have arrangements with some of the big four. They're not so popular at the moment, but all of those audits are done under our methodology and are all signed off and oversighted by someone within the Audit Office. Clearly, given lots of different things are changing in our world, we're probably pulling back a little bit from those arrangements and trying to lift our own staff capacity so that we can do more of the audits, particularly of local councils, ourselves.

The SPEAKER: Can I just comment on that?

Ms MARGARET CRAWFORD: No!

The SPEAKER: The Audit Office hoovered up nearly all of the available auditors in New South Wales at that time to carry out those audits. The Public Accounts Committee has a requirement under the Act to do a quadrennial review of the Audit Office itself, where we would go to the market and get auditors. It took us something like four months to find a company capable of doing it, because there were not enough auditors left that might not have had, at least, a perceived conflict of interest.

Ms MARGARET CRAWFORD: A deliberate strategy, perhaps, Greg.

The SPEAKER: Yes. You did it very well.

QUESTION: This is a question from online. As the first female Auditor-General, and acknowledging that, obviously, it took quite some time for our first female Auditor-General to be appointed, do you have any insights into that?

Ms MARGARET CRAWFORD: It's a huge honour, and I hope that I'll be the first of many. I think the reaction when I was first appointed probably had less to do with the fact that I was female but more to do with the fact that I wasn't an accountant and that I hadn't really worked in the area of finance before. I think that was of more shock value, almost, to people in Treasury and the like, than being the first woman. There are many fantastic female auditors. In fact, in my office now there are more women than men and we have equal representation at every single level within the office. So it's not a new thing anymore.

QUESTION: I have a more contemporary question. You used the term "performance audit". What do you mean by that?

Ms MARGARET CRAWFORD: In 1991 the legislation changed to, I think, what are often called value-for-money audits. So rather than just looking at the accounting for the finances—like how we report the expenditure of government—it's looking at the effectiveness, efficiency, economy and compliance with the law.

So the government of the day actually provides funding to the Audit Office to conduct those performance audits. As I said, 20 would be the maximum in any year. They are very much a deep dive into either one activity or a program of activities that really look at how effective was that spend and not just what was spent, so they are really powerful. They tend to be the things that, as Greg mentioned, the media latch onto. They are always scathing.

QUESTION: I'm just wondering if you'd like to comment. So many sections of government have been rolled up into one, and that is the creation that's called Service NSW. I belonged to four organisations that were progressively made into a bigger and bigger one. Even that's gone now. I don't even know where to ring to ask a question. I wonder how that affects an auditor, because in the organisation I was with we had an internal auditor—sometimes impolitely known as the "infernal auditor"—who used to check on us. But, as I said, that was just one part of something that is much bigger. I'm wondering whether that affects your ability to deal with the detail, which is where a lot of expenditure occurs.

Ms MARGARET CRAWFORD: As the external auditor, we are auditing the accountable authority, so it's got to be an entity controlled by government. Service NSW sits within the Department of Customer Service, so we have in fact audited Service NSW and, because it has been publicly reported, I can speak to that audit. The outcomes were that, really, at the front everything looks pretty good and there has been a huge improvement in the way services are delivered by the New South Wales Government. But behind the scenes it gets a little bit less clear about who is ultimately accountable for what is delivered—the real accountability. There's a lot of fast swimming underneath to make that front office look pretty smooth. It is machinery of government. We just make sure we're always auditing the accountable entity or authority. Who would think that audit is so interesting!

QUESTION: I have a quick one about the 1870 Act. Was it influenced at all by Gladstone's reform in the UK in the decade prior?

Ms CARMEL PHELPS: Most of audit was influenced by what was happening in the UK at the time. I don't know clause by clause. But it was also influenced, as they were talking about yesterday, by locals who wanted change, in particular the auditors-general who were grappling with this changed situation where the power had really shifted from the Auditor-General back to the Treasury and the Auditor's role was very undefined. There were powers in UK Acts that weren't translated to Australia at the time, and one of the things that was missing from the 1870 legislation was the Auditor's ability to get in and inspect the accounts of various departments, which both Christopher Rolleston and Edward Rennie in particular complained about. It didn't come in until the 1902 Act.

The problem seemed to be that the Legislative Assembly was wary of giving the Auditor-General too much power. This was a bit of a theme for the next 30 years, until they got to 1902. There are also lots of instances of where people were saying that the colonies were lagging behind what was happening in England. In particular New South Wales was lagging behind what was happening in Victoria, which had given the Auditor-General more powers. Unlike Carol, I haven't been able to do a totally in-depth search of a lot of it—I'm looking at the story from the top—but, yes, there were always influences from England, and those reforms.

The SPEAKER: Would everybody please join me in thanking Margaret and Carmel. Margaret, obviously for your presentation, but personally from me, thank you for your service as the first female Auditor-General and certainly the best that I've worked with. Thank you.

Ms CARMEL PHELPS: I should say she's our second Scot as well.

The SPEAKER: Second Scot? There you go.

Ms CARMEL PHELPS: The two greatest ones were the Scots.

Mr DAVID BLUNT: I ask you to join me in thanking Mr Speaker, Greg Piper, for facilitating such a fascinating session. On behalf of my colleague Helen Minnican, Clerk of the Legislative Assembly, who is here this morning as well, can we, on behalf of the parliamentary administration, also join with Mr Speaker in those words of commendation and congratulations to Margaret on her wonderful service as the Auditor-General for New South Wales.

(Short adjournment)

LAW AND JUSTICE IN NSW AFTER 1823: THE ARCHITECTURE AND AFTERMATH OF THE NEW SOUTH WALES ACT

Associate Professor DAVID ANDREW ROBERTS, University of New England

Ms JENELLE MOORE [Usher of the Black Rod]: Welcome back, everybody. I hope you really enjoyed morning tea. To introduce our next session, I have the great pleasure of introducing and welcoming to the stage the Hon. Rod Roberts, MLC, Deputy President and Chair of Committees in the Legislative Council. Mr Roberts is an Independent member who enjoys the river lifestyle, cycling, running, travelling and assisting as a soigneur—did I pronounce that correctly?—to the New South Wales GPM Stulz cycling team that competes in the National Road Series. Mr Roberts represented Australia in the 2015 World Duathlon Championships and is currently co-chair of the Parliamentary Friends of the Australian Constitution. As a former detective sergeant with the NSW Police Force and senior lecturer at the police academy on the detective training course, Mr Roberts has a keen interest in law and justice in New South Wales. He will now introduce our next session on how the 1823 Act impacted law and justice in colonial New South Wales. Please welcome Mr Roberts.

The Hon. ROD ROBERTS [Member of the Legislative Council]: Good morning, everybody. Can I add my own personal welcome to you to Parliament House, and also extend that welcome to those of you who are joining us via the livestream today. I am enthused and delighted to see so many of you interested in our history, both as a colony and as a Parliament. As you're aware, the theme for both yesterday and today is "The Spark", that spark being the New South Wales Act. Of course, the Act led to the establishment of Australia's first legislature and was the foundation for the New South Wales Legislative Council as we know it today. The New South Wales Legislative Council is the first, oldest and—may I say, in a completely biased manner—finest legislative body in Australia.

We heard yesterday from Bret Walker and Lynn Lovelock on the debate and parliamentary processes in England that led to the passing of the Act and what the intent of the Act was. The next session will delve into the world of law and justice in New South Wales after 1823 and the passing of the Act. The creation of the first Legislative Council under the New South Wales Act was a foundational moment in the reform of the colony's constitution and legal architecture. It is suggested that it was designed both to temper the potential for tyrannical Executive power and to guard against the dangers of representative democracy. Our next speaker contends that it was not so much a stepping stone towards liberal self-government as a careful, constitutional reform for a socially suspect and politically boisterous colony. I hope we're still not described as that today. I'm especially interested in hearing from our next speaker about not only what was in the New South Wales Act but also—just as fascinating—what was not in the Act.

It appears not much has changed in politics in 200 years. They say that it is not what a politician says but, more importantly, what they don't say that you can draw inferences from. Well, it appears that the New South Wales Act may well be the same: Not what was in the Act, but what was not may go some way to explaining the intent of the lawmakers back in England at the time. Now, to take us on the journey to explore how representation and power evolved within the new Council, it is my pleasure to welcome back Associate Professor David Roberts, whom many of you may remember from our 2022 conference.

David is an associate professor in history at the University of New England, where he researches Australia's colonial history and edits the *Journal of Australian Colonial History*. He is best known for his work on the history and legacy of Australia's convict past. His research is currently funded by a collaborative Australian Research Council grant for the project entitled Inquiring into Empire: Remaking the British world after 1815. We are all very fortunate to have someone like David here with us today, a true expert in the field and someone with such an incredible in-depth knowledge of colonial history. Please join me in giving a very warm welcome to Associate Professor David Roberts.

Associate Professor DAVID ANDREW ROBERTS: Thanks, Rod, for that very kind introduction. I bring greetings from the New England region, which is the home of the Anaiwan people, on whose land I live and work. I also bring greetings and apologies from Professor Lisa Ford, who was scheduled to join me today and had to withdraw at the last moment. That's a great shame because she leaves a great hole in the proceedings. Her legal knowledge of the imperial background to the 1823 Act is exemplary. I'll do my best to fudge some comments in that regard. We are, of course, commemorating the moment, 200 years ago, in 1823 when the Parliament passed the so-called New South Wales Act, otherwise known as the New South Wales Jurisdiction Bill, which gives a slightly better idea of its purpose.

Section 24 of that Act authorised the establishment of the Legislative Council of New South Wales; however, it was another five months before the King, George IV, issued a warrant on 1 December 1823 authorising the establishment of a temporary version of that Council. It took another six weeks before that was posted out to the colony, another four months before it arrived, a bit longer before the New South Wales Governor proclaimed the existence of the Council, and then it was another few weeks before it held its first meetings in August 1824. So the wheels of government turned slowly in the 1820s, but that means that we can, over the next several months, look forward to celebrating various bicentennial moments arising from the passing of the New South Wales Act.

The Council was, of course, part of a much broader package of reforms—reforms that were carefully tailored to suit what was at the time an extremely fractious and querulous penal colony. The 1823 Act simultaneously paved the way for a Supreme Court in New South Wales and a separate one in Van Diemen's Land. Less well known is the fact that the Act also platformed the jurisdiction of magistrates in the colony by authorising the creation of Courts of General and Quarter Sessions—that's a tier of justice below the Supreme Court. That's a lesser known but very instructive part of the Act, and it's something that hasn't been so well appreciated by historians. I'll come back to that in a moment. The New South Wales Act did many things in many different spheres, but today we are primarily interested in its reforms to governance and justice. We are asking about how these things should be interpreted and understood 200 years later.

I'm going to focus on the Council. I think a lot of really good material was said yesterday about the Supreme Court, so I'll focus on the Council. I am going to look at its first phases up until the expiry of the New South Wales Act in 1828, at which time Parliament devised a new Act, which led to further corrections to the Council and the judiciary. I'm conscious that there are going to be others talking about this topic, so I'll try not to overlap. We will hear more later about some of the personalities of the first councillors and a bit more about the political and social landscape in which the Council operated. I'm going to talk in part about what the Council actually did during its first five years. It did a lot, so it will be a bit of a summary.

I wanted to begin by asserting a view—or reasserting a view, because Bret Walker covered this yesterday, which, in a way, undercut a lot of what I was going to say, although he was far more nuanced—that the New South Wales Act was intrinsically minimalist. That is to say, it was not so much a great leap forward as a protective reassertion or formalisation of the status quo. It was meant to consolidate a range of circumstances and customs that had evolved in the colony over the last couple of generations. Just to explain briefly, the creation of the Supreme Court and the appointment of a Chief Justice was significant, but in terms of the operation of the criminal law, nothing really changed with the New South Wales Act. The new court was almost precisely the same as the old criminal court—despite the fact that most of the colonists hated the old court.

The British Government stuck with a quasi-military model in 1823, essentially because it was avoiding the issue of trial by jury. What the British Government did in 1823 with the court is essentially kick the can down the road, deciding that for now nothing much would change. Now, having written that, Bret yesterday, of course, was far more nuanced in his appreciation for some of the judicial reforms and the elements of judicial review; however, I'm an historian, not a lawyer, so I'll stick to my polemical version. But, essentially, very little changed with the court. At the same time, the reforms to magisterial jurisdiction and the creation of sessions courts was really intended to formalise conventional practices in which magistrates played a primary role in the management and disciplining of convict workers. This had been going on for 40 years.

But at some point around 1823 it was realised that there was no statutory basis for the authority of New South Wales magistrates. Commissioner Bigge didn't note it. He spoke a lot about magistrates, but he didn't really pick up on this idea that the magistrates actually didn't really have any constituted authority—in part because I think Bigge's judicial reform was actually a shocker. We can talk a bit more about that later, but it was an abysmal report for someone who came from a judicial background. So what the New South Wales Act does in establishing sessions courts is set up a system similar to what exists in England, as if that's going to cure everything after that, and it didn't work, as I'll explain. Finally, you've got the Legislative Council, which really epitomises this thrust for formalising and normalising the status quo, because what it does is assert a business-as-usual approach that involves little more than the appearance of change.

It is tempting to imagine the creation of the Council under the terms of the Act as a significant step forward for responsible government and that it constitutes a significant curbing of the immense power of the Governor. If so, then it was a very small step indeed. Bret yesterday called it a pre-embryonic step, and he is right. There was nothing at all representative about this body, and it would be some time before the powers of any New South Wales Governor were substantially curtailed. Certainly, the new Council was a body that disappointed the demands and aspirations of colonial patriots and democrats, and I think Frank Bongiorno may speak to that later. We know from the limited evidence available that the Crown-in-Parliament did not intend to allow the colonists any such right or power at this stage. This was a reassertion of Crown power in the age of revolution.

The key clue here lies in the construction of this body as a council. To quote from the New South Wales Act, "It was not at present considered expedient to call a Legislative Assembly in this colony." So, in other words, this is an advisory body, not a representative one. What the creation of the Council reflects is an awareness that the local authority needed some capacity to make its own laws and ordinances, but that was not a noble or progressive concession because the local authority had always made local laws as were considered necessary for the welfare and good of the people. The problem was that the power of the Governor in that regard was not properly sanctioned by Parliament. By 1823 it was realised that all the proclamations and orders and regulations issued by the Government over 40 years were, conceivably, illegal.

This problem comes to the fore in the 1810s under Governor Macquarie. There is a raft of noisy and high-level allegations about his tyranny and arbitrary powers—accusations that he is behaving despotically. What is interesting about those accusations is that they don't come from the convict population and they don't come from the subaltern levels of society; rather, they come from the colonial elites, who believe that their interests and status are being undermined by the Governor's authoritarianism. In fact, the commission of inquiry conducted by John Thomas Bigge actually reveals no systemic evidence of tyranny. There are a couple of headline examples where he has had some free people flogged and a few other moments, but what that inquiry reveals is a mountain of evidence of waste, bickering, cronyism and policy failure. Macquarie very much lost control of things towards the end, but there is no compelling evidence of tyranny in the sense as was experienced in other colonies.

But the most potent concerns here are not to do with civil or political rights; at least, that is not where the Government is exposed. Rather, it's a problem to do with taxes and trade. It's about Macquarie's decisions regarding the allocation of internal resources, especially land and convicts. It's about monopolisation, tainted contracts and restrictions on trade. It's about fines and tolls imposed through the Government's proclamations and regulations. In sum, it's the concerns of capitalists, not convicts, that is of interest to the Crown and Parliament at this time. So Parliament passes a series of Acts beginning in 1819 to indemnify the Governor from the consequences of having imposed illegal taxes, and the 1823 Act makes that indemnity perpetual. Lynn Lovelock, in some of the documents she uncovered yesterday, sort of proved that this was part of the decision-making process.

The creation of the New South Wales Legislative Council derives wholly and solely from an understanding that the Governor needed urgently some legal protection for his decisions and policies. He needed the right to make his own laws with the express sanction of Parliament. But in the post-Napoleonic era, it was wise for the sake of peace and good order and for the avoidance of scandal for the Governor to have some wise advisers around him and, most particularly, that he should be required to seek legal advice. That's what the 1823 New South Wales Act does. That is the logic. It is also a logic that, as we've learned, revealed itself very late in the piece. It's not until the last weeks of deliberations that they actually decide to put a legislative function into the Act. But the point is that this is not a representative authority. Only the Governor can initiate legislation, and in fact he could override his advisers if they opposed his legislation.

The Council's business was conducted in secret. Members were required to sign an oath of secrecy to say nothing about what went on in their Council. All local legislation had to be passed on to the British Government immediately and the Crown retained the power to veto any local law for whatever reason within a period of two years. Of course, what really evidences the limited capacity of this body is its restricted membership. It's basically a Council of between five and seven members, all of whom are nominated by the Crown, but five of them are high-ranking public servants. We'll hear more about these people later so I won't bite into that.

But there are two members nominated from the colonial community, supposedly a nod to local interests, but these are in fact elite capitalists from the mercantile and agricultural sectors, so they're hardly men of the people. This Council is hardly an independent liberal democratic entity. It rather serves to give legal authority to the astonishing gubernatorial powers that had ruled the colony for 40 years. It offers some modicum of self-government, but its primary intent is to preserve Crown power. There's a waning appetite for autocratic government in this period, but this is not a colony that can be trusted to govern itself. That's my opening rant.

Nonetheless, I guess the point I want to make is that despite this restricted architecture, or perhaps because of it, the Council in its early days operates very smoothly and calmly and with little controversy. I think in the early period—Carol might agree—this has a lot to do with Governor Brisbane's personality. I'm not quite as hard on Brisbane as many others, but I think he was very keen to have a council take control of some of his decisions and responsibilities in this regard. By and large, although they all fought internally behind the scenes, on matters of legislation the Council and the Governor got on reasonably well. They all sort of knew what had to be done. Up until the end of 1826 it passes 27 pieces of legislation. You can see that's a peak time in activity for the Council, and I think that's essentially because there is a lot of outstanding business that they know needs to be taken care of.

There's not a great deal of controversial matters taken care of here. And then, for three years under Governor Darling, another 26 bills are passed. We know that the Council did from the outset engage in meaningful discussions with the Governor over its draft legislation. Time was taken to deliberate on the drafts that were presented by Brisbane's Attorney General. Defects were noticed and amendments were made. In the case of the January 1825 harbouring Act, which is an extraordinary Act—it's actually the third item that the Council passes; it's designed to prevent rampant convict absconding—the Council does appear to have given much thought to the probable impositions on the liberties of free citizens in terms of the power they were bestowing to arrest suspected runaways. They passed it nonetheless, but they did obviously have a good think and talk about it.

The Council dealt with many other overdue and urgent matters. There was legislation pertaining to liquor laws, which was a really important and vexed issue in a colony where people drank way too much and supported way too many sly grog shops. But the liquor laws were also very difficult; they revisit these over and over again, trying to get them right, for many years. They passed a Parish Registers Act in 1825, which requires ministers to keep official records of all births, deaths and marriages, and in doing so they performed a most valuable service to modern-day historians and genealogists. In this great early flurry of legislation there are Acts concerning the recovery of fines. There is an Act to establish a post office, an Act for the better regulation of shipping in local ports, and laws pertaining to tolls and fees, which are mostly about legalising some of the taxes that had been raised illegally for some time. As I said, these are all catch-up laws.

But there are other laws that seem to be more proactive. I'm particularly interested in an Act for the relief of persons imprisoned for debt, which answers a growing concern about the horrendous state of the Sydney Gaol at this time. Apparently it was just horrible, harsh conditions being imposed on people, particularly, who were put in jail for owing very small amounts of money. The Council essentially passes a law which makes the creditor pay for the person's accommodation in the jail, to stop vexatious imprisonments. If someone owes you a few dollars, you send them to jail and make them suffer. It was actually seen at the time as being an act of humanity and common sense or, dare I say it, an act of good government.

Most importantly, what we see at this time is ongoing work around the issue of indemnity. In fact, the very first thing the Council seeks to do—it turns out to be its second bill, but it's the first one the Council debated in its very second meeting—is a bill to protect the Government from all and any proceedings against it on account of previous decisions made by governors. The need to indemnify and confirm the validity of questionable practices becomes a repeated theme in the Council throughout many years. In fact, I argue this is essentially what the Council was designed to do: It's to sort of pass indemnity laws in conjunction with Parliament, which is doing the same thing. In mid-1825 the Council passed a law expressly confirming that all its earlier laws were valid, essentially because it had been passing laws without the presence of the Lieutenant-Governor, who was one of the nominated members of the Council. He was out of the country and then someone thought, "Does that mean everything we've done is illegal? Let's pass an Act."

There's an Act to stay proceedings against the Colonial Treasurers for collecting and receiving duties. So they're indemnifying the tax collectors for having possibly collected illegal taxes. But the most controversial Act in this regard is an Act passed in 1825 to give a stay of proceedings to colonial magistrates, and this one's particularly interesting. That was needed when it became apparent that magistrates had been acting not necessarily in accordance with the principles of British justice, meaning they were issuing illegal sentences to convicts. In short, they were engaging in all sorts of informal and spurious practices, the most sensational of which was ordering convicts to be flogged on suspicion of committing crimes and in order to extract confessions with regard to suspected crimes. It's "Give this bloke fifty lashes and he tells us where he hid the stolen watch." They were very suspect practices, and it all blows up into a big public scandal in the mid-1820s.

In this case, you see the Legislative Council beginning to perform one of its other key functions, which is to investigate problems and issues arising through formal committees of inquiry. In this case, the Council sets up a subcommittee and it actually calls all the magistrates in before the committee and interviews them, and it gets all their bench records and it analyses them. They then send that to a grand jury, which is magistrates investigating themselves, I think. Ultimately, it prompts a bill to indemnify the magistrates against any lawsuits and criminal proceedings, such as might be conducted by ambitious and oppositionist lawyers hoping to make a name for themselves. I think Frank and others will talk about Mr Wentworth and some of the other characters.

This is a time when we are starting to see increasing law talk and, essentially, people trying to make their careers out of filing lawsuits against the government. This is a critical development. It's an era of increasing litigation, much of it tied to political agendas. New South Wales very much exaggerates this situation because, although it throws up a lot of questions about the reception of English laws and what laws are actually enforced in the colony and tries to sort some of these matters out, it really throws up more questions than it answers. The magistrates' indemnity bill is the first bill which actually introduces a substantial difference of opinion on the Council. I think the private members—the non-public-servant members—were opposed to the indemnity bill

because they thought the magistrates deserved to have their time in court in order to clear their names. They thought an indemnity bill was a blight on the honour and reputation of the magistrates, and they opposed it. But it nonetheless goes through. It also opens a serious rift between the Governor and his Attorney General, Saxe Bannister, who drafts the legislation that goes to Council.

Bannister thought it repugnant to the spirit of English law and refused to write the legislation. Brisbane told Bannister that that opinion was beyond his pay grade and he had to do it, which he did. But it becomes law. The members of the Council vote down a further inquiry into the magistrates. So you can see here that a very clear role of the early Council is to indemnify and cover up—I suppose, correct and cover up—possible previous illegalities. It's a very interesting episode. It's about tucking away and tidying up the state of the law. I want to briefly talk about Darling's Council as well, because things become rather different in the second half of the 1820s.

I think things under Darling are somewhat more complex. They are certainly more tumultuous. The composition of the Council has changed—that is, it is slightly expanded. There are a few adjustments to procedures, which I won't go into here. There is, however, a prevailing sense that the Council did not work so well during the late 1820s. It passed fewer items, as we saw before, and it sometimes broke down amid acrimony and conflict. In particular, the Governor and the Chief Justice fell into dispute over Darling's attempt to prevent newspapers from publishing abusive and libellous content. We heard a lot about this yesterday when we were in the Supreme Court, and it was spoken about in some of the sessions here too. I take a slightly different view. It's not all about Darling trying to muzzle the opposition leader. He actually needed to control and prevent some most abusive and libellous behaviour from newspaper editors at the time. Some of the stuff they were doing was just frankly vile. Again, we'll spare the details. But this particular issue plunges the government into one of its most acute constitutional crises in the early period.

These are headline political dilemmas. For those of you who know this period, Darling was involved in all sorts of scandals and problems. It gives an impression of disarray and dysfunction in the government but that, I think, is belied by the fact that it also passes a number of very important pieces of legislation. The Council, behind the scenes, continues to be quite productive. Behind all the noise and fury, there is a very solid and uncontroversial body of work being legislated. We see a new Bank of New South Wales created, which we spoke of before. A colonial census is activated in 1828. There are Acts pertaining to auctioneers and to the impounding of stock and an Act to regulate the theatre industry, which is particularly interesting. It's about crowd control rather than the morality of thespians. I read that one, and that was interesting. There is also master-and-servant legislation and attempts to address the illegal trade and government rations et cetera.

I want to raise one example before a conclusion. There are also simmering issues that the public doesn't know much about. One of these is worth mentioning because, behind the scenes—unnoticed to the public and unnoticed to historians—it constitutes one of the great crises of the period. It, again, involves magisterial jurisdiction and it reflects on some of the problems arising from the New South Wales Act. As I said, the New South Wales Act formalised magisterial jurisdiction through the establishment of sessions courts. In the process, it did two other things, inadvertently. It did not accommodate a possibility that magistrates were needing to operate outside of sessions. Magistrates who needed to sit alone in the remote districts or who needed to sit outside the normal schedule of sessions courts weren't covered by the law. This was a really serious mistake in a colony like New South Wales that has remote settlements and expanding frontiers.

Even more seriously, the Act potentially concedes that, prior to 1823, magistrates had no formal jurisdiction over convicts at all and that they did not have previous authority to issue certain sentences, such as re-transporting convicts to penal stations. This is a very serious predicament, and it's noticed in the Council. As I said, it's one of the key respects in which the 1823 Act doesn't really understand the repercussions of its provisions. This crisis, however, is dealt with quite effectively and very discreetly by the Council. It passes the so-called Port Macquarie Act; Port Macquarie was the main penal settlement of the time. It's an Act that is very skilfully constructed and, essentially, legalised colonial penal settlements as transportation zones, authorising them to receive convicts sentenced to transportation under British law. In doing so, it brings New South Wales law into line with recent English Acts pertaining to transportation and exile. Section 6 also provides further indemnity for magistrates, which clearly was a main part of the Act.

As I said, it's barely noticed by the public and by the historians. They actually quietly repatriate about 400 convicts from Port Macquarie and release them back into the normal spheres of work. It doesn't end the really serious situation that arises from magisterial jurisdiction. That doesn't get solved for many years. But this law comes up over and over again in subsequent legislation and court cases as basically giving some of the definitive answers to these perplexing questions. I just wanted to mention that as a means of showing how the New South Wales Act threw up all these really serious questions and that the Council, for all its faults, is actually quite effective in meeting these crises.

In conclusion, as we know, time wears on and there is a growing public pressure for the reform of the Council. A lot of it gets couched in the assertive language of the freedom of Englishmen. If anything, this truncated, limited legislative model created by the Act does much to inspire the indignation and audacity of the colonial opposition. It gives them something to rail against and something to fuel their talk of autocracy versus democracy, and that's the real spark of the 1823 Act. It ignites a more vocal and radical movement for democracy.

Of course, what it does—all that noise and bluster—is help persuade Parliament not to give the democrats what they want because, when the Act expires and the new one comes out in 1828, they dampen the spark and they retain the same nominated Council. There is an increase in the membership, there are more local landholders and merchants, the veto power of the Chief Justice gets removed and the oath of secrecy gets removed and it becomes slightly harder for the Governor to enact a law without the approval of the Council. These, again, can be seen as a significant step down the road towards a modern legislative system; but they were very small steps, indeed.

Mr ROD ROBERTS: Thank you, David, for such an insightful overview of the period after 1823 and the enactment of the New South Wales Act. We are going to take questions and answers now.

QUESTION: Hello. I'd like to ask a question about the royal prerogative of mercy. Apart from the Tolpuddle Martyrs, was that ever used in the early colonial time?

Associate Professor DAVID ANDREW ROBERTS: In New South Wales, extensively. That power was vested in the Governor, who is the royal authority. Then, from 1823, 1824 and 1825, it gets vested in the Executive. I didn't go into this in this talk but, in 1825, they split the Legislative Council into an executive body of four members, who were then joined by public members to be a Legislative Council. So it's the beginning of this bicameral approach, but it's kind of not.

QUESTION: So it was used substantially?

Associate Professor DAVID ANDREW ROBERTS: Yes. The Chief Justice will come to the Council and say, "Look, I convicted these blokes, but they are young," or "There was no violence involved." But they used the royal prerogative and commuted death sentences extensively because, if they didn't, there would be a bloodbath. The law reforms to reduce the number of capital crimes don't really happen until the mid-1820s and on. As in England, they use it extensively.

QUESTION: I am interested in your more tolerant view of Darling. Do you think he suffered from all his attempts to reform the administration and the finances and whatever? He was actually the patron of William Lithgow. He brought him from Mauritius with him.

Associate Professor DAVID ANDREW ROBERTS: Yes, that's right.

QUESTION: He used him extensively for a lot of his reforms, but he really did try to get them through. I wondered whether he suffered from the people unwilling to change.

Associate Professor DAVID ANDREW ROBERTS: Yes, I think he did. I think he most definitely did. I think he was probably the wrong man for the times. Carol, what do you think? The late 1820s is when the reforms from the royal commission really start to hit home and there is a big pressure to institute reforms to the bureaucracy and the way the colony is run. Darling was probably not the right man for it, because he is a very severe, military-style person. Yet, on the other hand, he is facing a largely incompetent public service. I will keep using the example of his Attorney General was deaf; I don't know how he operated in courts. I don't wish to be rude. You look at the incompetence of all of his public officers and the sort of petty things they threw in his way. When I read the Darling papers, I just get the sense of "Oh, my God, it must have been so frustrating for you, mate."

As I think Frank and Alice will talk about later, this is the time when the opposition in the colony really, really starts to ramp up, and they bait Darling very, very successfully. They have direct communications to the Opposition in Parliament, so Darling is getting nailed in Parliament. He becomes a tool by which the opposition in New South Wales and London basically hammer the Government, and he got very much caught up in it. The best account of this is A.G.L. Shaw's book *Heroes and Villains*, where he talks about Governor Bourke, who is the great hero of liberal Australia, and Governor Darling, who is the autocrat. He actually reverses that and shows the exact opposite take. I don't mind Darling. All politicians should read about him, as a way of how not to do things—unfortunately.

QUESTION: Both you and Bret talked about how this Act is essentially conservative in maintaining the power of the Governor. Bret, especially, went into detail about some of those powers. Were there ever occasions, during disagreement between the Legislative Council and the Governor, where the Governor did

activate that power? For example, I think the less extreme one is where if he had one member of the Council on board, he could pass something if he thought it was necessary.

Associate Professor DAVID ANDREW ROBERTS: We don't really know a great deal of what the Legislative Council did at all. Its minutes are very perfunctory and brief. As I said, they were not really allowed to talk about it. The main thing that happens is that the Chief Justice and the Governor disagree over legislation. In the case of New South Wales, with Forbes and Darling, I think that's largely a political play. I know that in Van Diemen's Land, where Governor Arthur had much less patience for his Chief Justice and his council, he did just tell them, "I'm passing this anyway." I think that was particularly over Acts to do with increasing magisterial powers over convicts, and police powers and things like that. He just said, "I've got to do it. The place is a mess. This is my power to do it."

I do not know when we start to get really transparent proceedings from the Legislative Council, but it is not until much later. So we don't really know. The press didn't know much about it either. Is that fair to say, Frank? Yes, there is surprisingly little public debate about what is going on in the Council, which is also evidence that it just acted quietly and effectively, I think, and did what it had to do in these years. It made a few mistakes, but generally—probably because it was a largely unrepresentative and undemocratic body at the time—it just got down to its business.

QUESTION: On the forward estimates—moving forward to 1839—it stands to reason, from reading the newspaper accounts of what was happening in the Legislative Council, that the Governor had to go cap in hand to the Legislative Council to get approval for forward estimates. How did that come about, if there wasn't a change in the Act that instructed him to do that?

Associate Professor DAVID ANDREW ROBERTS: That is a very good question, and I can't answer it easily. There were renewals of the Act more or less every five years, I think. I keep looking at Carol, who is the colonial history expert that I always defer to. I think by the late 1830s it is a very different situation, and you are starting to, by then, see the early anticipation of responsible government. Certainly in the 1820s I don't think there is any discussion of forward estimates. They had the privilege of just spending what they needed to spend. The point is that the Council had a very firm control over all of this. Ten years makes a big difference in terms of the build-up towards a proper Legislative Council.

QUESTION: Just on that point, have you got any comment on the question of demographic change that a lot of these small steps were made possible by? Because, as you say, by the 1830s things had changed, but certainly by the 1840s it is a different kind of colony and there are different pressures from society by then.

Associate Professor DAVID ANDREW ROBERTS: Absolutely. With the end of the convict system and of the transportation of convicts to Australia, it becomes no longer tolerable to have the sort of Legislative Council that we saw set up in 1823. But even by the 1820s, the number of free immigrants, ex-convicts and colonial-born people is becoming so substantial that even then it is highly questionable as to whether you can continue without a representative council. The question of the Council follows more slowly than the question of the courts. I think the really big issue here is the courts and trial by jury—the right of free Englishmen to be subjected to normal processes of law. This is where the rubber really hits the road for the conservatism of the British Government and the 1823 Act. I think, Frank, this is what we will probably talk about later—that this is what really ramps up the opposition, this idea that Englishmen in Australia do not get access to proper court systems at this time. They care much less about the Legislative Council, I think. But demographic change is certainly really critical throughout the whole period. Everything changes after 1815.

QUESTION: Hi, David.

Associate Professor DAVID ANDREW ROBERTS: Is that Gary?

QUESTION: Yes. This is a hypothetical, but I wonder what proportion of people in the colony would have actually qualified to vote if they had remained in England. The franchise in England was strongly restricted—

Associate Professor DAVID ANDREW ROBERTS: Very restricted, yes.

QUESTION: —up until 1832, and then there was a small expansion for property holders. But it was really only 1865 and beyond that more of the populace got the vote. I wonder whether, in a sense, the rights of freeborn Englishmen to a jury is something that everybody experienced, but very few people in England or coming from England would have actually had the right to vote?

Associate Professor DAVID ANDREW ROBERTS: Anything that we would recognise as representative democracy was a pretty foreign concept in the 1820s, both in England and here. All those developments are down the track. But what is interesting in New South Wales is not so much discussions about who votes, but as to whether you can sit on a jury or not. That's the more poignant question. There are a lot of

debates and there is a lot of evidence collected that we could come up with this many jurors or we can come up with that many jurors there. Opponents are saying, "Well, they're not going to turn up to jury, anyway, because they are too busy looking after their farms." The debates—again, coming back to the question here—tend to be around the courts and the rights in civil and criminal cases rather than a question of whether someone is represented properly in Parliament in the way that we understand it today. Thanks, Gary. It's a good question.

QUESTION: I think it was in 1829 or perhaps 1830 that the Council re-enacted verbatim the terms of the Roman Catholic Relief Act that had been passed by the Parliament in Westminster. It includes a whole lot of provisions that had nothing to do with the colony, such as that Jesuits should not sit in the House of Lords, and things like that. Any idea why that was such a rough job?

Associate Professor DAVID ANDREW ROBERTS: I'm not really sure precisely on that, and I would rather leave that to people who study and are experts in that, because it's very complicated. But one of the things that the introduction of the Legislative Council Act does is it complicates the question of what English laws are received in the colony. There's an understanding that all Crown colonies receive English law until the point that they get their own legislature. That happens, of course, in 1823. After that—and it was something else I didn't really get time to go into here, and Lisa would be better at it—there's a whole heap of really pressing legal questions that arise as to what English laws are in force in the colony. I don't know about religious laws and education laws, but in the criminal law it's very poignant, because at this time they're reforming English law. They are actually repealing a lot of Acts, so in New South Wales they are convicting people of criminal offences that are no longer criminal offences in England, sometimes resulting in groups of 30 people being convicted to death and then being released, because there are debates about what laws are in force.

You will see that some of the Acts that are brought in are reception laws in New South Wales, where they say all these laws—and they name them—are now in force in New South Wales. They have to do that to actually consolidate and clarify the state of law in Australia. I can't answer that question precisely, but it would be caught up in much the same thing. It is possibly an attempt to extract what is applicable to the colony. They don't necessarily just take wholesale English law and introduce it in New South Wales. They'll take bits and pieces as suits them. I think that increasingly happens in the 1830s, is my guess.

The Hon. ROD ROBERTS: I thank you all not only for your attendance this morning but also your engagement in asking questions of David. I thank you, David, once again for a very in-depth and concise overview.

Associate Professor DAVID ANDREW ROBERTS: Thank you.

The Hon. ROD ROBERTS: In closing, thank goodness we've come a long way in democracy. Thank you very much.

Ms JENELLE MOORE: Please join me in thanking Mr Roberts as well. Thank you also, David, for reviving the idea that the Act did indeed form the spark, after some robust debate on that point yesterday.

(Luncheon adjournment)

THE NEW SOUTH WALES LEGISLATIVE COUNCIL'S PLACE IN THE POLITICAL LANDSCAPE IN THE 1820S

Professor FRANK BONGIORNO, AM, Australian National University School of History

Ms JENELLE MOORE [Usher of the Black Rod]: Welcome back, everybody. I hope you had a fantastic lunch. To introduce our next session I have the great privilege of welcoming the Hon. Ben Franklin, MLC, President of the Legislative Council, having been elected in May this year. Under the previous Government Mr Franklin served as Minister for the Arts, Minister for Aboriginal Affairs, Minister for Tourism, and Minister for Regional Youth. He is a passionate advocate for the arts, for the regions and for representative democracy and we are privileged to be working under his guidance and under that of the Clerk as they formulate the program for our bicentenary celebrations. Please join me in welcoming President Ben Franklin.

The PRESIDENT [The Hon. Ben Franklin]: Thank you very much, Jenelle, and welcome back from what I hope was a sustaining and delightful lunch. For our next session we will be considering the early Legislative Council in the context of the shifting and emerging political tapestry of the 1820s in which it was established. We'll explore the unique political and public culture in which distinctive factions were already emerging, with the colony on the cusp of developing a popular press and on the brink of a period of sustained political contention. To guide us on an exploration of this political landscape I have the pleasure to introduce Professor Frank Bongiorno, AM. Frank is Professor of History at the Australian National University and president of the Australian Historical Association. His latest book is *Dreamers and Schemers: A Political History of Australia*. Frank is a fellow of the Royal Historical Society, the Academy of the Social Sciences in Australia and the Australian Academy of the Humanities. Ladies and gentlemen, please welcome Frank Bongiorno.

Professor FRANK BONGIORNO: Thank you so much, Mr President. I would like to acknowledge the Gadigal people of the Eora nation and pay my respects to their Elders, past, present and emerging, as I would the Ngunnawal and Ngambri peoples of the Australian Capital Territory, where I normally live and work. In September 1826, in a personal letter to British official Sir Robert Wilmot Horton, Chief Justice Forbes evoked the sense of a genuine polity—indeed, a kind of public sphere that had come into being, he thought, in recent years. He wrote:

> The affairs of the colony have changed; they are so much changed that we are hardly the same body politic. The appointment first of a Supreme Court and then of a Legislative Council and afterwards of an Executive Council, the spreading of the Government over a larger area, the frequent points of contact with the best informed of the inhabitants, and above all, the fairness and openness with which the affairs of the colony are now conducted have made something like a peaceful revolution in the place. I must add too, the liberty of discussing the Acts of Government and public men in the journals of the colony has given the people an interest, a knowledge, an impetus, which it would have been hard to foretell in the colony for the next generation.

It seems like a very nice, pleasant place to live. It's notable, I think, though, that in his evocation of the emergence of a public sphere, Forbes credited three institutions to which his own career was closely tied: the Legislative Council, the Executive Council and the Supreme Court. Given that he was, as we have already heard in a number of the papers, an architect of the 1823 legislation and became, in a way, the Legislative Council's de facto President in the very early period, Forbes was hardly disinterested in his early assessment that the Council was, as he said, "a wise measure, works marvellously well and was rather liked by the public". We can better discern, I think, in Forbes' letters a vision of representative government, a vision of a representative Parliament, rather than its achievement and substance at this point in the 1820s. He understood, I think, that, however well the members of the Council performed and however conscientious they were in their duties, it did lack a representative aspect.

I think we've looked at this topic from a number of different perspectives: from a legal perspective and from the perspective, perhaps, of constitutional evolution. What I want to do here is to test the idea that the Council was significant in shaping New South Wales into a new kind of polity or political system of the kind that Forbes is evoking in that quotation. The perspective is that of political history. My argument is that it was not, and was not intended to play that kind of part. The Legislative Council, rather, slipped pretty quietly into a political culture that was already taking a distinctive shape by 1824—I think this was one of David's themes—but was also changing fast. I want to try to capture a sense of that dynamism in the next few minutes. It was acquiring a sophistication and complexity that could not be adequately served by the 1823 legislation—nor could it be by the 1828 legislation, I might add.

The new body caused few ripples. The main game, as far as political history goes, largely occurred elsewhere, at grand banquets and public meetings, in the courtroom and in legal documents, in petitions and newspapers and at the Governor's desk and dining table. The Council's constitutional position did not translate into a status as a major focus of either satisfaction or dissatisfaction. Rather, colonists with grievances tended to

bypass it. John Eddy has evoked the flow of documents from the colonies to London as what he calls "real politics" emerged in the 1820s:

> Emancipated convicts, the colonial-born, lawyers, merchants, pastoralists and farmers all had claims to make. Legal documents, the accounts of personal feuds, vengeful or frustrated tirades against administrators, long treatises on colonial conditions, and the constant cry for land, free rations, stock, appointments, convict labour, and other favours assailed the Colonial Office.

You can visualise that flow of paper on board those ships. The Legislative Council itself, I would argue, was peripheral to the great public movements of the era, which locally—moving beyond what John Eddy was talking about there—focused a sense of grievance on the person of the Governor, his relatives and officials. The British theorist Bernard Crick defined politics as:

> … the activity by which differing interests within a given unit of rule are conciliated by giving them a share of power in proportion to their importance to the welfare and survival of the whole community …

It involves conciliation and compromise, "a way of ruling in divided societies without undue violence". One description of this idea is that it allows a minority who are defeated, if you like, whether it's in a parliamentary vote or at an election, to live with the majority who have defeated them. It involves the exercise of power. Divided societies tend to be unequal societies. In New South Wales of the 1820s—a settler colonial society—whites exercised more power than Indigenous people, men had more power than women, the propertied had more power than the poor and the free had more power than the freed, generally speaking. These are all generalisations. This was a dynamic society, of course, in which the cross-cutting of identities was reshaping political life. We're familiar with the power that could be exerted by rich emancipists, for instance.

We also need to keep in mind that across large parts of what was then New South Wales—essentially all of eastern Australia—many First Peoples continued their lives much as they had before the British invasion. Their traditional economies, cultures and societies, and their accustomed means of decision-making—their political and legal order—remained intact. There is a deep time history of politics in this State and in this country in which First Nations peoples had institutions and law by which they ruled their own societies, including assemblies that look rather deliberative, from the settler accounts we have of them. They look like parliaments, in a way. These political systems were disrupted and sometimes destroyed by colonisation, along with other aspects of Indigenous society, but First Peoples also drew on them in responding to the presence of invaders in their lands, deliberating on whether to fight or negotiate, to avenge or forbear, to stay clear or come into cities, towns and settlements.

As Lisa Ford has shown, there was a de facto acceptance by the British newcomers of the continuity of Indigenous law and therefore of First Nations sovereignty. In the earliest interactions of Arthur Phillip and the Sydney colonists with the Eora, the Gadigal, the Bidjigal and their leaders such as Bennelong, Colebee and Pemulwuy, political encounter was part of a wider cultural encounter, with old and new sovereignties perhaps best thought of as entangled rather than one blanket overlaying another. But as the invaders occupied greater tracts of territory on which to grow their crops and run their sheep, British imperial government claimed a more absolute sovereignty over both peoples and lands. The status of Aboriginal resistance as warfare, and therefore as fundamentally political rather than criminal, "savage" or "barbaric"—to return to the offensive language of the era—became more ambiguous in the eyes of colonial political authority as time passed.

The establishment of the Legislative Council was an aspect of this project of creating a rational and uniform imperial order founded on a more secure and settled territorial sovereignty. It was not created to make space for political expression or struggle. Rather, as David explained in a previous paper, it was the result of rising anxiety about the legal status of the existing order, concerns that magnified during the Macquarie era and would be papered over with temporary remedies of one sort or another, such as Acts of indemnity that basically indemnified the Governor being passed by Westminster. A particular concern was that the Governor would be sued for levying taxes without parliamentary authority.

There had been many critics of the colony's legal basis, going all the way back to John Macarthur in the early years of the nineteenth century, but Jeremy Bentham was the most famous and influential. As Ann Brunon-Ernst has suggested, Bentham's view was that the Governor had power only over some categories of person, such as convicts, officers, soldiers, marines, and sailors, but not over civil servants, former convicts and free settlers. I will read a brief version of a quote from Jeremy Bentham that captures this basic idea. The full quotation will give you a good indication, I suppose, of why John Stuart Mill devotes a part of his autobiography to explaining that Jeremy Bentham wasn't a very good prose writer. Bentham wrote:

> The successive governors of New South Wales have for these fourteen years past been exercising legislative power without any authority from Parliament: and either without any authority at all from anybody, or at most without any authority but from the King.

Bentham is an influential critic of the legal basis of New South Wales. He believed that in promulgating regulations, the Governor had created offences that did not exist in English law and that the colonial courts were not therefore competent to deliberate on. Here was an alarming account of both the legislative and judicial

foundations of New South Wales. The early authoritarianism of a political order which gave the Governor, at least in theory, something like untrammelled power was a product of a swing away from more representative forms of rule in the wake of the American Revolution.

Yesterday in an early session Stephen Garton talked about some of those examples of North American councils and assemblies going right back to the seventeenth century. Authoritarian rule had seemed especially apposite in a penal colony, which called for strong executive government, and was reinforced by the outbreak of revolution in Europe, which, especially from 1793, provoked counter-revolutionary reaction in Britain. Still, the power bestowed on governors provoked nagging questions about constitutionality. The American War of Independence was fought in part over the question of taxation without representation.

In New South Wales this "imperial despotism in miniature", as it has been called by one imperial historian, fit the times—an era of revolution, counter-revolution and warfare—but arguably not the identity of a British people who proclaimed proudly that they "never will be slaves". The political history of early New South Wales disclosed many of these kinds of tensions. The Second Fleet brought with it news of revolution in France. The execution of the king and queen in 1793 inaugurated a more intense fear among authorities of revolt, rebellion and revolution.

"Friends of Liberty", as they were called, would be transported to the colonies. Five of the six Scottish Martyrs, Jacobins in sympathy with the French Revolution, arrived in Sydney as colonists—sorry, convicts. Well, they were colonists too, but they were convicts. The best known of them, Maurice Margarot, claimed to have been in Paris at the time of the storming of the Bastille in 1789 and was, soon after that, a member of the famous London Corresponding Society, sometimes considered the first English working-class political organisation. The authorities regarded Margarot's home in Sydney as a hothouse of sedition. Revolutionary ideas extended beyond such gentlemanly prisoners, however. Thomas Paine's *Rights of Man*—the book that, more than any other, inspired the revolutionary ardour of the era—was being read by officers in New South Wales, and his notoriety hung over the early history of the colony.

It was the arrival of convicts following the uprising of the United Irishmen in 1798 that brought a more intense fear again. There were several conspiracies uncovered by the authorities between 1800 and 1803, and one shipboard mutiny that had resulted in the killing of 14 convicts. That was followed in March 1804 by the better known rebellion of about 200 convicts working at Castle Hill. Scholarship on the uprising used to play down its ideological dimensions, but the work of recent decades indicates that it's better considered an uprising of the United Irishmen abroad, inspired by the potent combination of Britain's renewal of war with Napoleonic France in March 1803 and a failed uprising in Dublin staged by Robert Emmet in July 1803.

The rebels embraced a modified version of the Irish revolutionary slogan "Death or liberty", to which they added "and a ship to take us home". The badly organised affair, predictably, ended in a bloodbath, but it's a reminder of the place of New South Wales—and this is in keeping with Stephen's theme yesterday—in a European imperial order that was being rocked by revolution. These events, remember, were contemporaneous with the Haitian Revolution, beginning with the uprising of slaves in 1791 and leading to the massacre of thousands of European inhabitants of that island and those loyal to them in 1804—the very same year as Castle Hill—followed by Haiti's independence.

It's surely no wonder that authorities in New South Wales inclined towards harshness in their dealings with rebellious or potentially rebellious convicts, especially when they were Irish. The Spithead and Nore naval mutinies of 1797 had also exposed the British Empire's vulnerabilities in an age of revolution. War and fear are often bedfellows, and the whole history of early New South Wales and Van Diemen's Land occurred against the background of Britain's war with France, which was only rarely interrupted before Waterloo in 1815.

Resistance to the Governor's authority in New South Wales came primarily from military officers or, in the case of John Macarthur, an ex-officer engaged in commerce, pastoralism and meddling. In the absence of an assembly, a free press or popular politics in the early years, resistance to the Governor's authority depended on other means and opportunities. In a small, intimate community, the social snub could be readily deployed. In this way, of course, women were drawn into the colony's factional politics. They were drawn in in all sorts of other ways as well—through the courts, for instance. In 1801 Macarthur, in dispute with Governor King, promoted a boycott of Government House among the officers. When King, to test the waters, sent out an invitation to civil and military officers for a function, excluding only Macarthur, he received acceptances from all but four, who King said:

> … were so uncivil as not to send me any answer until I sent for it … when they all refused. I could no longer be in doubt who were and who were not the adherents of Capt'n McArthur.

So you can see how this symbolic politics—this face-to-face, intimate politics—works in early New South Wales. You didn't need a Parliament or an Assembly for these things to play out. A Governor's opponents could also

anonymously circulate printed libels in the form of ribald verse, called "pipes". King was the target of several of these in 1803 during his feud with the officers. He accused one Lieutenant Hobby of responsibility for *Anticipation, or Birthday Ode*. These are just four lines from a rather long poem, for want of a better word—verse, I suspect, would be more accurate. They read:

> Of surgeons, civilians, and men of the law,
> And other descriptions, with many a flaw.
> The great King presided, as chief of the clan—
> A wicked, oppressive, notorious man.

The courtroom, as we've heard, was also favoured as a site for prosecuting factional struggles, as Herbert Vere Evatt, one of our Chief Justices, showed so vividly in his book *Rum Rebellion*. A court martial, criminal trial or civil hearing could in this manner become the occasion for the pursuit of a feud or the staging of a contest. Military officers dominated all of them and could easily stage a trial of strength with the Governor. A powerful, skilled and determined litigant or accused might use the court as a most convenient political arena.

Macarthur, a turbulent former officer and the colony's richest man, used a series of cases between 1806 and 1808 in just this way to pursue his quarrels with Governor William Bligh. There's a massive literature, of course, on the Bligh rebellion itself and his eventual overthrow in January 1808. But the most convincing interpretation in recent years has moved beyond the idea that this was a class struggle between small settlers and wealthy merchants, with Bligh as a kind of defender of the common people, which was the basic argument that Evatt put back in the 1930s. The episode, instead, needs to be seen in the context of the broader history of political authority and challenges to it within Great Britain and its empire, as well as against a background of intense debate around political ideas, including those of Bentham that I've just been discussing.

Macarthur and the officers were influenced by Whiggish ideas of freedom, which had been used to justify the overthrow of James II in the Glorious Revolution of 1688 and which had also seen governors deposed in the North American colonies. Bligh had proposed to demolish buildings that had been built on government land, a plan from which officers stood to lose materially. They saw in such an arbitrary threat to property rights an offence that went to the heart of their understanding of the distinction between freedom and tyranny.

It's also striking that this affair was haunted by the spectre of popular revolution—or, at the very least, it gave a key figure in it an excuse that he could use for his behaviour when he was later called to account for it. Major George Johnston later testified that if rebellious officers had been arrested, "the military would have joined in insurrection with the people". Johnston may have been desperately fictionalising and fantasising here, but he would surely not have raised such an argument—and he did so on more than one occasion—if he thought that the authorities at home would not have been receptive to it at this time in the early years of that century, with the war with France still raging.

The point of the discussion so far has been to give something of a prehistory of the 1823 legislation and the subsequent formation of the Legislative Council. I won't be talking about the Supreme Court here. The colony was not lacking in a political culture. Party or factional struggle was executed by the means offered, sometimes adapting aspects of inherited British constitutionalism, sometimes drawing on the newer revolutionary ideas or reacting against them. Violence was a central aspect of this culture—something it's easy to lose sight of. Even as the colony moved in the 1820s and 1830s towards an order in which we can observe the origins of some of our modern political arrangements, official treatment of convicts arguably became more severe. The Legislative Council was not designed as an institution that would allow the incarcerated to expose injustices against them, and nor was it expected to play any role in representing the emancipist class.

Even the young William Wentworth, sometimes misleadingly treated as a leader or spokesperson of the emerging group of former convicts, trod very carefully around how such people might be incorporated in a system of representative government. Writing from London in 1819 in *A Statistical, Historical, and Political Description of the Colony of New South Wales, and Its Dependent Settlements in Van Diemen's Land*—they always had such long titles, didn't they?—Wentworth called for trial by civilian jury, an elective legislative assembly and a nominated Council. But he tiptoed cautiously around the issue of emancipists' participation in those arrangements. Any former convict who had not reoffended after transportation and who now possessed 500 acres or more should qualify to serve in an assembly, and then much lower levels of property should be sufficient to vote. But, again, he insisted that former convicts must not have reoffended. So here was a property franchise that recognised the respectable, propertied emancipists as entitled to political rights alongside free men, but it's not really democratic, is it? It's not a vision of a radical democracy by any stretch.

The design of the early Legislative Council indicates that it was more a fig leaf for the Governor than a place where such demands for wider civil freedoms might be advanced. Bigge, as we've heard, had not even recommended the formation of such a body in his report on the colony, and it had only been added at the last minute to the New South Wales bill. The historian A.C.V. Melbourne commented that it was created "merely for

purposes of administrative convenience", and "it was thought to be neither wise nor necessary to admit the influence of public opinion to a share in legislation in New South Wales". It initially had only five members or officials. *The Sydney Gazette*, the mouthpiece for the Government, applauded this limitation, asserting that it "would have been extremely difficult to have selected any two gentlemen from the agricultural and commercial interests as members of the Legislative Council without perhaps creating an invidious distinction". That is perhaps an early tall poppy syndrome.

The British Government, however, regarded this original, narrow composition of the Legislative Council as only a temporary measure. It was reconstituted in 1825 to comprise four official and three non-official members. The officials also joined a new Executive Council. In 1829 its size increased again to between 10 and 15 members. So here was the beginning, I suppose, of a Parliament that would at least represent the opinions of the propertied and the respectable—the merchant and the landowner. But the Governor, of course, still held enormous sway. The Council met in camera, and its members took an oath of secrecy until the 1828 changes. Only the Governor could initiate legislation, and he could override a Council vote in some circumstances, as Bret Walker explained yesterday.

Forbes, as we've seen, believed the Council did good work, but even he could see its inadequacies in an increasingly complex colony. Writing to Wilmot Horton in September 1827, he reported that it had met for a few days the previous May but not for many months either before or afterwards, probably reflected in some of the figures that David produced, I think, in terms of legislation. The Executive Council established in 1825 did not meet more often. Indeed, Forbes joked that it ought to be called the Execution Council since it only met to deliberate on condemned felons. Government in the Darling era was by what we would now call a kitchen cabinet, which Forbes believed comprised self-interested yes-men. The colony, he felt, had outgrown its institutions. A house of assembly was needed or else the voice of the public would seek other channels, such as the press and parliaments in Britain. Forbes' earlier optimism about the Council's performance and reputation seem to have evaporated.

So what had changed? Firstly, Forbes himself spent time away from the Legislative Council's affairs at Bathurst during a period of illness. In his absence, by his account, the Legislative Council ground to a halt. The Bank of New South Wales became embarrassed, and political intrigue and division overtook the Council's affairs. There was also the fall of the not very businesslike Governor Brisbane, accompanied by intense factional politics between the Macarthur family and exclusives on one hand and Wentworth and his allies on the other. Each had offered the departing Governor Brisbane a banquet in his honour. It was eventually Wentworth's that was left standing, and the young lawyer did not miss the opportunity to advocate trial by jury and a representative assembly, which Brisbane compliantly and helpfully agreed the colony was now ready for. He could say that, because he was leaving. Public events of this kind, with their carefully designed choreography, band music, loyal toasts and visual spectacle—Augustus Earle was hired to decorate the room—were the stage on which the colony's political life was now being acted out. Press coverage now containing titles such as *The Australian* and *The Monitor*, as well as the older Gazette, provided record and commentary, building a wider sense of political community and partisan allegiance.

It was the Sudds and Thompson affair that did most to expose the inadequacy of the Council's arrangements. The Legislative Council passed a law allowing the Governor to withdraw convicts from penal settlements, with the idea of their either working in irons if they behaved badly or being assigned to a settler for service if their conduct had been good. It was this law that came into play in the case of what had begun as a seemingly insignificant crime. Two soldiers in September 1826, Sudds and Thompson, were arrested for stealing some cloth from a Sydney shop. They admitted having done so to get out of the army and received seven years' transportation. But then Darling, concerned about army discipline at a time when there had been several similar cases, decided to make an example of them and intervened to override this original sentence. He interpreted the new law to mean that he could change a sentence of transportation to labour in irons on the roads. The men were to be subjected to a humiliating ceremonial punishment and then to hard labour before being returned to their regiment. All might have been well for the administration except that Sudds died a few days after being paraded before the regiment in chains, probably from a virus doing the rounds of Sydney. Forbes believed Darling had erred in law but that the men had deserved their punishment.

This incident translated into a scandal when *The Australian*, having previously displayed little concern about the treatment of the men, made it the basis of a campaign against Darling. The heavy chains evoked images of torture and slavery, and Darling was unlucky in the timing of the affair with the anti-slavery movement ascendant at home, the 1823 Act due to expire and reformers on the lookout for means by which they could advance an elective assembly and trial by jury. The campaign against the Governor, with Wentworth preparing a case for impeachment, damaged Darling's reputation and, in fact, led to his eventual return to London. Wentworth and his allies, of course, led the wild public rejoicing that followed. There's a famous piece of propaganda in the Sudds and Thompson case.

To conclude, Wentworth called the Legislative Council a wretched, mongrel substitute. That's probably a harsh judgement, but it reflects the reality that it met the colony's legal requirements more or less but not its political requirements, nor did it reflect the colony's growing complexity and sophistication. The Council that began meeting here in Macquarie Street from 1829 would eventually prove to be different, with its larger size and fine balance of officials and non-officials. The respectful attitude that Governor Bourke adopted towards even the manoeuvrings of his political opponents on the Council in the 1830s enhanced its importance as a place of deliberation and a site of politics. In such ways, while the Legislative Council did not initially play a transformative part in the colony's political life, it would come to have a more influential role, even before it became partly elected in 1843. Thank you.

The PRESIDENT: Thank you very much, Professor. I think you'll all agree that was quite a fascinating set of insights. I was mildly concerned, when we started on the historically peripheral relevance of the Legislative Council, that that's where we were going to end. But I took great heart in your final comments, which showed the clearly central place of the Legislative Council in society in New South Wales today. Now we're delighted to take questions from the audience for our esteemed Professor Bongiorno.

Associate Professor DAVID ANDREW ROBERTS: I did appreciate and was pleased to hear about the longer trajectory of dissent and opposition within the colony and its tracing back to a bigger picture. My idea was always that the failure of this Act to satisfy those demands really accentuated that. So dissent really ramps up in the 1820s, do you think, in the wake of this Act? To what extent is it a different sort of dissent than what you see tracing back to the early 1800s and the 1810s? Is it fundamentally different?

Professor FRANK BONGIORNO: Yes, I think it is. I'd call it the rise of a popular politics in the 1820s. It's not a mass politics in the way that we might understand that today, which I think has some years to wait. And it's not really a democratic politics either. The term "democracy", I think, is pretty anachronistic for much of what we're talking about in the 1820s. It's a form of Whiggish politics, I would say, in terms of what Wentworth is up to. But it is a popular politics in the sense that you've got political leaders who are using a range of fora to, if you like, deploy bodies, to deploy noise and to deploy spectacle against political authority in ways that I don't think we see much of before the 1820s. There's a kind of program sitting behind it, I guess, is the other point, which Wentworth has kind of outlined in that 1819 publication. At that point, there's no movement behind those sorts of ideas. There are various sorts of petitioning going on, where some of these issues, like trial by jury and so on, are being raised, but there's no movement behind them. But certainly by the time we get to about the mid-1820s the landscape has changed and you do have something that I think we can call a kind of popular politics.

Associate Professor DAVID ANDREW ROBERTS: And it's driven by personalities, largely?

Professor FRANK BONGIORNO: Yes. It's still a very small face-to-face society, and the charismatic leadership of a figure like Wentworth is a part of that story.

Associate Professor CAROL LISTON: If I take that up about Wentworth, it seems to me that with Wentworth in London when the 1823 Act goes through, his decision with Wardell to bring a printing press—to what extent do you feel that this is quite a staged process? The press and the way in which they use the so-called freedom of the press, but really just challenging—and Brisbane goes along with it. Wentworth writes to say, "Can we have income? Can we have the government advertising?" It's no real secret, despite the myth that this is done without permission. It seems to me that the role of the press in generating your political environment is something important, and Wentworth gets a lot of it, but what about Wardell?

Professor FRANK BONGIORNO: In fact, not just Brisbane. I think Darling is initially pretty complacent about it too, isn't he? Obviously we associate Darling with the jailing of E.S. Hall and all that sort of stuff, but he doesn't seem unduly concerned initially either. Obviously, this is a period where the power of the printed word is becoming very much a part of emerging political cultures in Britain and Europe, so it's hardly surprising that Wentworth, having spent so much time in both Britain and Europe during that juncture, would come back to New South Wales with political ambitions and on the make, more generally.

As a lawyer, he sees that it's essential that you have some sort of mouthpiece, where you can create a sense of horizontal comradeship and a sense of political community, which is really what the press does. It allows you to forge those kinds of identities and alliances in a more face-to-face society, a more informal society and a society—to go back to some of the work that Alan Atkinson has done—where the vocal, the oral and the verbal are more important. To move away from that is, I think, to create a different form of politics, and that's also a part of the novelty of what's happening in the 1820s.

The Hon. JEREMY BUCKINGHAM [Member of the Legislative Council]: Professor, in the month preceding the first meeting of the New South Wales Legislative Council, there had been a declaration of martial law in Bathurst. If you look at the minutes of the first Legislative Council, the first thing they did was appoint

William Stewart. Then they dealt with the Rossi reports into the creation of a police force, and Stewart actually created the New South Wales police. Could you reflect on that? How did the colony feel about the declaration of martial law? Did they feel under threat from the Wiradjuri? Why, in such a militarised society, was there a need to create another form of order in the form of the New South Wales Mounted Police?

Professor FRANK BONGIORNO: There is, during the Governor Brisbane period—the Brisbane era—an upsurge of violence. It's been an issue since the 1790s, of course. But, yes, the declaration of martial law is very much a part of the scenario we're talking about here. Governors are effectively, in this era, military leaders. We've seen the transition from naval figures to army figures, which I think is bound up in that transformation—a sense that this is a colony that's effectively now engaged in a kind of territorial occupation that really wasn't an aspect of the very early period. In the early period, there's a sense that some sort of coexistence is possible, but once you start sending sheep over the mountains to occupy plains in the west and elsewhere—north, south—it's a different sort of scenario. Yet when we talk about the early history of the Legislative Council, we're talking about that very period—the assertion of a much more ambitious kind of sovereignty that accompanies the coming of colonial capitalism in that form, which was authorised and encouraged in the Bigge reports.

QUESTION: Do you have any feel as to how much Darling was hampered by having two particularly incompetent attorneys general, Saxe Bannister and Baxter? They were hopeless, contrasted with Wentworth and Wardell. He could not have been getting any sound legal advice, let alone courageous prosecution of the government interest.

Professor FRANK BONGIORNO: David has been talking about this and would know a great deal more than me. Certainly, Forbes' letters to Wilmot Horton are increasingly scathing about Saxe Bannister. I think it's almost as if he doubted he could be as incompetent as he seemed. That he was deliberately doing what he was doing to undermine the Governor was the sort of sense you get from that correspondence. Yes, governors relied on officials, and they're in a very isolated position within colonial society.

It would be interesting to think about this. Does the Council mitigate that sense of isolation? Does it increasingly give them other forms of advice—alternative forms of advice, I guess, to describe it—to lean on? In a sense, it perhaps does begin to break down that powerful sense of isolation that's such an important theme in the early history of the colony, but they're still heavily dependent on their officials who, of course, are ex officio members of all these bodies as well. I wonder, by the time we get to, I suppose, the third iteration of the Council in the late 1820s, whether life is becoming a bit easier, in some ways, for governors, because they're not quite as isolated, perhaps, or dependent on their officials. Bourke obviously had plenty of problems with his officials—some of them—but, on the other hand, he was also able to cultivate allies perhaps more easily than maybe Brisbane and Darling. Would that be true?

The PRESIDENT: Unfortunately, we're out of time for this session. I thank all of those who have shared their questions with us. Most importantly, can I ask you to all show your appreciation to Professor Frank Bongiorno for a very scintillating session.

POLITICAL HACK AND THE MAD MACS

Ms SUE WILLIAMS, Author

Mr DAVID BLUNT [Clerk of the Parliaments]: We've already heard a couple of very erudite questions from the Hon. Jeremy Buckingham. Now Jeremy Buckingham is going to come to the stage to introduce our next speaker in our next session. Let me tell you a little bit about this gentleman. Originally from Tasmania, prior to his career in politics Mr Buckingham worked as a stonemason on many significant public works, including the Australian War Memorial in London, the Federation Square project and the Sydney Olympic Games site. His first stint in the Legislative Council began in 2011, when he and the Hon. Sarah Mitchell withstood a legal challenge to their election from Pauline Hanson and took seats 20 and 21 at that election. Jeremy Buckingham served then through until 2019, and he has come back. He's back in the Legislative Council at the start of his second stint, representing the Legalise Cannabis Party. Welcome, Jeremy Buckingham.

The Hon. JEREMY BUCKINGHAM [Member of the Legislative Council]: Good afternoon, everyone, and thank you very much for that lovely introduction, David. We will next be delving—and we all love to delve—behind the scenes of the very first Legislative Council and its inaugural members. We're about to hear that the first five Legislative Council members were schemers and dreamers—and nothing much has changed! This afternoon we will explore the personal trials and tribulations of Francis Forbes as Chief Justice, Frederick Goulburn as Colonial Secretary, William Stewart as Lieutenant-Governor, John Oxley as Surveyor General and James Bowman as Principal Surgeon.

To shed light on the lives of these historical figures, I have the pleasure to introduce author Sue Williams. She is, as you all well know, an award-winning journalist, a travel writer and a bestselling author of both non-fiction and historical fiction. Her novels have concentrated on the early colonial days of New South Wales and include *Elizabeth & Elizabeth*, about Elizabeth Macquarie and Elizabeth Macarthur, and *That Bligh Girl*, about Mary Bligh and her father, Governor William Bligh. She is currently working on a book about the previous Governor, Philip Gidley King, entitled *The Governor, His Wife and The Mistress*. Please join me in welcoming Sue Williams.

Ms SUE WILLIAMS: Thank you. I think Frank is a bit of an awful act to follow, really. I've just told him he's going to be answering all the questions—any hard questions, anyway. Thank you very much for having me here today. It is a great pleasure. As you've heard, I'm a comparative lightweight writing historical fiction, which is very different to the kind of work that Frank does. I've written a couple of books about two governors: *Elizabeth & Elizabeth,* which is about Elizabeth Macquarie, the fifth Governor, Lachlan Macquarie, his archenemy, John Macarthur, and his wife, Elizabeth; and also *That Bligh Girl* about Mary Bligh, the feisty daughter of Governor William Bligh—the two victims of the Rum Rebellion. I guess these two governors and their battles against Macarthur were very much the background to the appointment of the first five members of the Legislative Council.

The early colony of New South Wales was deeply divided between the enlightened emancipists, best represented by Macquarie, who believed very much that the convicts, once their term had expired or they'd received a pardon, were entitled to the same kind of rights as free settlers. They could hold responsible positions. They could become police officers. They could actually become the chief of police; he appointed one former convict the chief of police. He believed that they were entitled to the same rights and responsibilities. We know Lachlan Macquarie extremely well, and we've heard so much about him today.

And then we have the deep divide with the exclusivists, often said to be led by John Macarthur, who believed very much that once a convict, always a convict, and once the stain of being a convict was on you it could never be washed off, really. He is often characterised as a very rapacious man, who wanted an enormous amount of land for his growing wool empire. He became an enemy of many of the governors very early on. He undermined Gidley King. He undermined Hunter before Gidley King. He masterminded the overthrow of Bligh with the Rum Rebellion. I think very much he felt that he should be in charge of New South Wales. He'd come along with the Second Fleet. He knew everybody and knew where the bodies were buried. He was always very keen to have a very big say in government, which often nobody was very keen to give him, really. But he was always working behind the scenes to destabilise governors, and he did so very successfully.

He had gone over to England after the Rum Rebellion but agitated there against Macquarie. Largely as a result of all his accusations, a lawyer called John Bigge—we've heard about him before—was appointed to lead an inquiry into the new colony. His report was quite damning. A lot of people have criticised him since because you would expect a lawyer would take evidence under oath, but he would never take any evidence under oath. He

just disregarded that immediately. His first question to everybody was "Do you have a complaint against Governor Macquarie?" which is a leading question, really. People came up—even if they didn't have very serious complaints about Governor Macquarie—with very trivial complaints. We'll talk about a couple of those later on. He recommended that the military-style law under which the Governor had complete authority, answering only to the Colonial Office in London, be reformed. Largely as a result of that, an advisory council of responsible citizens were appointed. As a result, the British Government ended up appointing five men to form the first Legislative Council, made up of government officials to advise the Governor—that Governor at the time was Thomas Brisbane—on the making of laws.

The first member of the Legislative Council was Frederick Goulburn. He was the first official Colonial Secretary of New South Wales. He was under Macquarie for a year, then he served under Thomas Brisbane in the Legislative Council. He had a really tough time because so many of Brisbane's reforms proved extremely unpopular with the populace. The terms on which he'd grant land was only if previous land had been improved, so that kind of stirred up an awful lot of enmity right from the very beginning. He was just much stricter with his land rules. I think, under Bligh and under Macquarie, they'd both been quite liberal in granting land to people that they favoured. He actually sold a lot of Crown land—that's kind of very familiar in our politics today, I guess—and he had a much tougher stance on convicts.

He took Bigge's report on trust that Macquarie was far too lenient and had been too trusting of convicts, having appointed one as the chief of police and others as magistrates. So he cancelled all tickets of leave, and he would only take tickets of leave when the time had come. He would never endorse any premature tickets of leave. He hired convicts out to clear land for settlers rather than previously, when they were often building infrastructure like roads under Macquarie. He also set up new centres for secondary punishment in Moreton Bay and the notorious Norfolk Island.

In lots of ways, Brisbane was pretty unpopular, and Goulburn was often blamed for many of those reforms. The difficulty for him was that Brisbane spent most of his time in Parramatta, so none of the local population could get to him very easily, whereas they could get to Goulburn. They held Goulburn responsible for some of the most unpopular changes that Brisbane introduced. John Macarthur, again, was quite determined to undermine Brisbane as he had done his predecessors. He also, by default, decided to try to undermine Goulburn as well. He called him a despot, just as he'd called Bligh a despot, and the enmity kind of festered with fights over land. Brisbane had promised Macarthur a huge land grant but then backtracked when he discovered part of that land had been reserved for a school, so poor old Goulburn had to come in and offer an alternative. He did that, but Macarthur said it had taken him too long, and then Goulburn started falling out with Brisbane as well as with Macarthur. It was a really difficult situation for him. By the end of his term in office, he was kind of praised by people, often because he was such a good mediator. But he had a really tough time trying to mediate with people like Macarthur and Brisbane, neither of whom were very keen to give an inch, really.

The second member of the Legislative Council was Dr James Bowman. Unfortunately, no image of him exists, but I put in here a picture of Dr William Redfern. The reason is James Bowman, in some ways, precipitated the downfall of Lachlan Macquarie. He arrived on the same ship as Bigge, the commissioner for the inquiry. Bigge arrived with him, wanting him to be the Surgeon General to succeed the retiring Surgeon General, D'Arcy Wentworth. The problem was that Macquarie had already appointed Dr William Redfern to the post, and it had caused immediate trouble and enmity with Bigge. Macquarie hadn't realised, I think, that Bigge was going to be such a potent enemy. Although his wife, Elizabeth Macquarie, warned him about Bigge and Bigge's intent, he wasn't a very political person, in lots of ways, and he didn't really believe that Bigge was out to get him. But we think, in retrospect, he was.

Dr William Redfern was a former convict who, as a doctor, even when he was transported, tended all the other convicts on the ship. So he covered himself in glory very early on. He worked on Norfolk Island with Gidley King, and he was given a pardon after his work there. One of his recommendations was that a surgeon should always accompany all convict ships. Because the conditions on the ships were so bad—many of the convicts were very sick—Redfern felt very strongly that they should have a doctor to tend them. But it came back to bite him, in lots of ways, because James Bowman came on his ship and arrived with Bigge.

The difficulty with Bowman is that he actually knew Macarthur before, and he had sailed back previously to New South Wales with Macarthur, so they had become very good friends. When Bigge was going around asking people if they had any complaints about Macquarie, Bowman actually said he did have one complaint against Macquarie. He complained that no-one had put up shelves for him in his house when he had moved to New South Wales. So that was a problem, and Macquarie was obviously guilty because of that. He became very close to the exclusivists, particularly Macarthur, and he ended up marrying Macarthur's daughter Mary. So he became very solidified with them and the exclusivists.

The third man was very different. John Oxley was a surveyor. Governor Macquarie had originally appointed him to explore the Lachlan and Macquarie rivers. Governor Macquarie loved naming things after himself, as you know; we are standing on Macquarie Street now. So he sent John Oxley off to explore the Lachlan and Macquarie rivers. There was a thought that they flowed into a large inland sea, and John Oxley perpetuated this myth for a long time. He made many mistakes in his time, really. He perpetuated the idea that the interior was all an inland sea, because he had got so far inland and had ended up in marshland, so he had assumed the rest was sea. He had many failures, but he did have some successes. He charted a really good map of the interior of New South Wales during his time, and some of his successes included going up and down the coast to Port Macquarie, Shoalhaven and Jarvis Bay and then inland to Dubbo and Tamworth.

He was really dedicated to his profession, and people always remarked on how eager he was to go on expeditions far from home. One of the reasons was that he often felt he had little to stay at home for, because, behind the scenes, he was nursing a broken heart. He had wanted to marry the Macarthurs' eldest daughter, Elizabeth, and he asked John Macarthur, in London, if he could marry her. He asked him for permission. She was 17 at the time. Elizabeth Macarthur was delighted that John Oxley wanted to marry her—17 was a kind of reasonable age for a marriage proposal—and John Macarthur was really quite pleased too. Elizabeth Macarthur was delighted because it was quite a good match, really. But John only agreed to the betrothal on condition that Oxley settle his debts. Unfortunately, his debts grew bigger. John refused to consider his betrothal anymore and finally cancelled the engagement. Oxley never really recovered from that. He was always talking about Elizabeth and always asking about Elizabeth, but, unfortunately, John Macarthur would never allow them to marry.

In the end, he found comfort elsewhere. He had three daughters out of wedlock and married the third mother because he felt he should. The poor other two mothers—he obviously didn't feel he needed to marry them. Poor Elizabeth never ended up marrying at all, which was such a shame in those days, because that was the one thing that women really wanted to do. She had a second suitor, William Charles Wentworth, who we all know, but when John Macarthur found out that his father, D'Arcy Wentworth, had been charged three times at the Old Bailey with highway robbery, he cancelled that engagement as well. He had been acquitted each time but, for John Macarthur, once a stain, always a stain.

The fourth member of the Legislative Council was Lieutenant-Governor William Stewart. Brisbane disliked him because he was too emancipist for Brisbane's ways, but he did quite well. He was the Governor for 18 days between the two governors. There was a gap between Brisbane and his successor, Ralph Darling, and he stepped into the role during that time. One of the biggest things he did was hold an inquiry into the female orphanage. That was an orphanage that had been set up by Anna Josepha King—Philip Gidley King's wife—because she was alarmed at seeing so many young girls wandering the streets of Sydney, and the only way that they would be able to make a living, perhaps, would be prostitution. She was worried that men would take advantage of them, so she actually started up an orphanage, which was a fabulous thing to do, really. She became the patron of the orphanage.

When the Gidley Kings left New South Wales and the Blighs came in, she asked Mary Bligh to preside over the orphanage. Mary Bligh was Governor Bligh's daughter. His wife refused to come over with him, presumably because she did not want to be in the cabin with him for six months at sea. Who would? She said she got seasick, but she was needed back in London, really, to network and make sure that Bligh wasn't getting into too much more trouble, because, as we know, the Rum Rebellion was the third rebellion against him. He was always causing problems wherever he went, but his fantastic wife, Elizabeth, always managed to calm the waters. So it was really handy for her to stay in Britain, and she said she needed to stay there because her grandchildren were being born. Her eldest daughter, Harriet, had one baby and was having another, so she said she could not possibly leave and come over with Bligh. So poor Mary, his second eldest daughter, got stuck instead, even though she got equally seasick.

Mary Bligh was asked to look after the orphanage when Anna Josepha left. She was quite reluctant to, at first, but then agreed to. She became quite alarmed because there was a report from one of the orphanage's committee members. There was a young couple who looked after the orphanage, and then they decided to quit because they wanted to move to live closer to their children. Bligh decided to appoint a reverend who had been transported over here; nobody quite knew what his offence was. He and his wife were appointed the master and mistress of the orphanage, but it didn't last for very long before one of the committee members of the orphanage reported on him, saying that the master of the school, Reverend Newsham, preached in the afternoon on Sundays and took unwarranted liberties with the girls on Mondays. So the couple were immediately dismissed, and Newsham was sentenced to 200 lashes and then to stand in the pillory in the town centre three times, where, tied to a wooden frame, he could be insulted, kicked, spat on and pelted with vegetables, rotten eggs and even excrement by the local population—quite deserved, I think. After that he was sent to Newcastle for a punishment of hard labour, and Elizabeth Macquarie later took over as patron of the orphanage.

William Stewart conducted another inquiry into the orphanage and made sure that everybody who was running the orphanage was actually there for exactly the right reasons. There is another picture of him. Frank was talking about the mounted police service. He achieved many things in his time, as well. He fixed postal rates, and he formed the first mounted police service, which is still in Surry Hills today. I was looking at the new shopping centre. Do you remember the old shopping centre in Surry Hills? It used to be called "murder central", because, I think, a few people had been murdered in there. It has now been completely renovated and it's mixed use with apartments, shops, retail and offices. It is actually going to be opened in the next few weeks and it's right next door to the mounted police headquarters. I had never realised that it was such a big site, but it is still there, which is fantastic.

William Stewart also chaired a protest that proposed reviving transportation, after it finished in 1840. The Molesworth committee said that transportation was a terrible evil and a terrible blight. It was a ghastly situation for convicts. They were really taken advantage of and were often treated with unfathomable cruelty. So transportation finally finished in 1840, but in 1850 there were representations to revive transportation to start again. William Stewart, to his credit, protested against that. He was a very independent man and, unlike Oxley, he had a very happy marriage, so that was really nice.

The last member of the Legislative Council, Francis Forbes, was perhaps the best known man. He was the new Chief Justice and the head of the judiciary and Legislative Council. He was a close friend of Brisbane, as he and his family had stayed at Government House with Brisbane when he first came to New South Wales because their house wasn't quite ready when he arrived on our shores. He introduced the first real trial by jury in the nation, and that was the 12 free settlers or men who'd been born in New South Wales. The only trials by jury before had always been the officers of the Rum Corps, and there was no independence there at all.

Francis Forbes became a very strong enemy of the Macarthurs. He wanted land for the settlers rather than for Macarthur's huge Australian Agricultural Company. John Macarthur was really angry that Forbes was stopping his progress. They crossed each other in a number of legal disputes as well. Francis Forbes wouldn't kowtow to the Governor either. At that time it was Darling, and Darling tried to control the press and Forbes refused to let him, which was pretty amazing. Samuel Marsden, the hardliner chaplain and missionary, became another enemy. Samuel Marsden had an awful lot of enemies—just like Bligh, in lots of ways—but Forbes remained very independent to the end.

Forbes was also very much for the end of transportation. He gave evidence to the Molesworth committee against transportation, and he was very much in favour of free immigration. Another of his acts was to pass the Bushranging Act, where you could arrest on suspicion, contrary to English law. In Britain people were quite alarmed that you could just arrest people on suspicion of being about to commit a crime, but he managed to carry many people with him and persuade them to back him, so that actually passed. He was given a knighthood in 1837. But it was a really tough time because there were so many divisions within society then—much more than there are now. We still have lots of divisions, but the divisions then were really quite terrible. It was very difficult to continue in any sophisticated, civilised way. He ended up with a terrible nervous condition and took early retirement. He died just four years after his retirement, aged just 57—very young.

It's really great to be marking the 200th anniversary of the forming of this first Legislative Council. You have to think that the members had a much tougher time of it then than they do now. Perhaps it's a much easier time; you get much better pension benefits. There are divisions now between the different parties and the Independents, but back then the divisions were really deep-seated. Now the processes that have gradually been developed have really helped people govern in a much more united and unified way. Those first famous five put into place those processes, and we have to commend them for that. They had a really difficult time. They were trying to balance their personal lives and their professional lives, and often one suffered much more than the others. The ones who had wives were often much better supported than those who had been denied wives, because often the women there were trying to very much support their husbands.

Elizabeth Macquarie is a great example. She did an awful lot to help Lachlan Macquarie retain power for a long time, and also she was so dedicated to him. One of the things that really attracted me to her was that when the Bigge report was read in Parliament, Lachlan Macquarie made it his life's quest to have his rebuttal voiced in Parliament back in Britain. When that was consistently refused—he died, sadly, with the rebuttal not having been read—Elizabeth Macquarie refused to accept her widow's pension until that rebuttal was read. It lasted a long time. She was living in penury—she had no money—but she consistently refused to accept the pension until that rebuttal was read. I think those really courageous moments in women's lives are important and really have to be celebrated as well.

In the Rum Rebellion we had 300 armed men with their muskets loaded marching on Government House, and the only person who went out to try and stop them was Mary Bligh. Incredible! They were having a dinner

party at Government House. A messenger came and told them that the Rum Corps were marching and were intent on rebellion, and they thought probably to murder Bligh. They arrived at the gates. Everybody at the dinner party—Bligh went upstairs. We've seen that picture that Frank showed of him hiding under the bed, which is probably not true but just a bit of propaganda at the time. Mary rushed out and stood at the gates and tried to stop them. They had their guns—all loaded guns—and she had a parasol. She beat them back with her parasol. I think that was pretty incredible. She was dressed all in black and still in mourning for her husband, who'd just died of TB. She was incredibly courageous. The men pushed past her and came to the house. She stood on the stairs because she thought they might be going upstairs to see her father, and she tried to beat them back with a parasol yet again. Obviously they pushed past her but she still kept calling for them to leave, whereas nobody else did.

I think the women are often ignored in these situations. It would have been wonderful to have seen a woman appointed to the Legislative Council. It's great that we have women now but maybe not quite enough. Anyway, that's me. That's finished. Thank you very much.

The Hon. JEREMY BUCKINGHAM: Thank you very much for that, Sue. That was a fascinating exploration of the Council's first members. As per the previous sessions, we'll take some questions from the floor and from online if they're there.

Ms SUE WILLIAMS: Easy questions.

Associate Professor DAVID ANDREW ROBERTS: I have a question.

Ms SUE WILLIAMS: No, you ask the hard questions!

Associate Professor DAVID ANDREW ROBERTS: I'm in the front row and my lunch was paid for; I feel obliged. Sue, that was lovely. You've got a real talent for drawing out some of the personal stories, and it's a great reminder for someone like myself that there's human stories beneath it all. However, I'd invite you to be a bit more critical of these people, particularly Macquarie. Even this claptrap about Macquarie being the champion of emancipists—I mean, that's a narrative he wove for himself. When he was talking about emancipists, he was talking about Redfern and Hutchinson and his mates. I think what he actually did for the emancipist class needs to be tested. Nonetheless, it's just probably that I'm cranky and critical about these things but I'm going to challenge you to name the character from the Legislative Council that you find the most odious, and why.

Ms SUE WILLIAMS: I think probably James Bowman. I had a bit of a set against him because William Redfern was a really good guy. He was incredibly courageous. He never set a foot wrong—well, he did later on; he went a bit mad, really. But at the time he was a really upstanding citizen. Macquarie had promised him that role of Surgeon-General, and Bowman came in and completely disregarded all of Redfern's history. Redfern had been sent over because of the Irish riots and stuff. He'd never really done anything wrong, so he had an enormous injustice paid to him. I think all credit to Macquarie for recognising that and for promoting him. Redfern delivered Elizabeth Macquarie's baby, finally. She'd had six miscarriages and Redfern had really been quite devoted to her, tending her after those miscarriages.

Maybe this is a criticism of Macquarie. She never understood why she had miscarriages. But in retrospect now, from what we know about medical science, we believe Macquarie had syphilis. Syphilis, as well as affecting the man, often affected the woman in that it wouldn't enable her to carry a baby to full term. So we think, in retrospect, that that's why she suffered so many miscarriages. That was Macquarie's fault. If he hadn't been sleeping around so much before he met her, it might have been a better outcome; although, he was married once before, so he may have contracted syphilis from then. But nearly all the army officers had syphilis because they would take comfort wherever they could. It is a funny phrase, isn't it, really. But if you think any day you might be killed in battle, maybe that's the kind of thing that men do. Maybe women don't; I don't know. Yes, I think Redfern was a fantastic guy at the beginning, and he became really embittered because of Bowman. I think Bowman could have made room for Redfern within New South Wales society.

The Hon. JEREMY BUCKINGHAM: One of the characters I'm particularly fascinated by is William Stewart because he wasn't on the original Council. He was appointed. It was the first decision, to appoint William Stewart. He was a major general and one of the most effective soldiers in the whole British army. Why was it necessary to appoint William Stewart, and what do you know of what he did, particularly in the Bathurst area? As a slight anecdote, I was a stonemason, as the Clerk has alluded to. You may not know and people may not know—they might find it interesting—that there is a huge stone cairn or plinth to the west of Bathurst that is abandoned. It's in the bush, it's unattended to, and it's actually the grave of William Stewart. He was given all the land out at Bathurst. That's where he built his family. But it has been forgotten. Why did they appoint William Stewart, this amazing soldier, and what do you know of what he did in the early days of the colony?

Ms SUE WILLIAMS: He was considered a really upstanding person. The Legislative Council really wanted to have the prestige of having well-known people. Many of the people who had come over had actually

fought in the Napoleonic Wars as well. He had covered himself very much with glory. They felt very much that the Legislative Council would be looked up to much more with people like that involved. It's very sad that his grave is now so neglected, but that was true of many of the first Legislative Council members. There was so much attention still on the governors and still on figures like John Macarthur. The Legislative Council, because it didn't have an enormous amount of power—they introduced some very valuable things, but they were still very much, as Frank said, a rubber stamp for the Governor—it was really hard for them to become involved in the cult of personality.

I went to Waterloo recently. You go around Waterloo and it's amazing because you would think that Napoleon had won the Battle of Waterloo from the museum and from everything there. Everywhere there are these little figurines of Napoleon. There is nothing about the Duke of Wellington. You think, "Maybe I got my history wrong", and you look back and think, "No, he did actually lose."

The Hon. JEREMY BUCKINGHAM: Just.

Ms SUE WILLIAMS: Well, that's right. He was probably the first person who had this cult of personality and who propagated that, really. I think many of the Legislative Council members weren't really involved in that kind of thing. Macquarie worked very hard on his public image, but then he had the newspaper to blow his trumpet. It's very sad that some of our most important people are not recognised today, but I think we are reclaiming our history very much. With something like this, we are recognising these people. Hopefully we will start attributing much more credit to them in future.

The Hon. JEREMY BUCKINGHAM: In the absence of any questions, thank you very much, Sue, for your attendance. That was absolutely fascinating.

Ms SUE WILLIAMS: Pleasure.

The Hon. JEREMY BUCKINGHAM: I will now hand back over to Jenelle.

Ms JENELLE MOORE [Usher of the Black Rod]: Sue, thank you, on behalf of the parliamentary staff, for bringing to life the founding members of the Legislative Council.

(Short adjournment)

THE CONSTITUTION ACT OF 1842 AND THE STRUGGLE FOR RESPONSIBLE GOVERNMENT

Professor Emerita ANNE TWOMEY, University of Sydney

Ms JENELLE MOORE [Usher of the Black Rod]: Welcome back, everybody. It has been such a fantastic day. I can't believe that we are now almost at the end of the day. We've got so much to go back and reflect on and digest after this. It has been just amazing learning. To introduce our final session, I have the great pleasure of welcoming Ms Abigail Boyd, MLC, member of The Greens. Ms Boyd is Temporary Chair of Committees in the Legislative Council, chair of Portfolio Committee No. 3, chair of the Public Accountability and Works Committee and deputy chair of the Regulation Committee. She has been an active member of a multitude of committees since her election to the Legislative Council in 2019 and was the national secretary of the Australian Greens from 2017 to 2018, before entering the Council. Prior to entering Parliament, Ms Boyd worked as a solicitor in London and in Sydney. Her policy interests include climate change, economic inequality, domestic and family violence, animal welfare, disability, and young people. Please join me in welcoming Abigail Boyd to the stage.

Ms ABIGAIL BOYD [Member of the Legislative Council]: Thank you, Jenelle. Welcome to our final session. The Constitution Act of 1842 signalled a vital shift in New South Wales' democratic landscape. For the first time, a majority of the Legislative Council's membership would be elected by the people, although one-third were to remain as appointees of the Governor. From this pivotal moment soon flowed other shifts in our constitutional landscape, as in the ensuing years New South Wales moved to a bicameral Parliament, then a proportionally elected Council and, finally, a fully elected Council in 1978.

To guide us through these developments, I have the great privilege of welcoming our final speaker, Professor Emerita Anne Twomey. Anne is a professor emerita of the University of Sydney, where she taught constitutional law for many years. She has also worked for the High Court of Australia, the Commonwealth Parliamentary Research Service, the Senate Legal and Constitutional Committee and the Cabinet Office of New South Wales. Anne published the authoritative text on the Constitution of New South Wales, which I happen to have on my desk upstairs, and has written extensively on our State's constitutional history. Please join me in welcoming Anne.

Professor Emerita ANNE TWOMEY: Thank you very much. It's an absolute delight to be here today. What an extraordinarily impressive opening there was. It sounds way more exciting than the Constitution of 1842. Because of that, might I say, this talk is going to be structured in three parts. In the first part I'm going to take you through that overview of how we move from 1823 to 1842 and up to 1855, and then I'm going to go down a little rabbit hole, because I discovered something quite interesting from around 1840. So I'm going to take you into an area which I'm pretty confident most of you know almost nothing about and which is very interesting, before returning to the exciting, alcohol-fuelled election of 1843 and what happened thereafter.

Starting off with the less exciting beginnings here, because New South Wales was settled by the British as a penal colony democracy here was put on the slow track. The Governor was initially treated as, effectively, the governor of a large prison with full power, and the development of democratic institutions reflected the gradual growth of the free population of settlers. Indigenous Australians were not taken into account in those calculations, although, as we'll see a little later, the Indigenous people of New Zealand were indeed treated differently.

By now you will have heard all about the Constitution of 1823, which established the Legislative Council, the bicentenary of which we celebrate this year. It signalled the need for the Governor to consult others rather than just being, effectively, the sole ruler of the colony, but it was still an appointed body so it was not representative of the people. Its size and its role were extended in 1825 and 1828, but from 1828 it sort of plateaued and rested there for a while. In 1842 representative government was introduced in New South Wales with a Legislative Council comprised of 36 members, two-thirds of whom were directly elected by those who were enfranchised in the colony, which of course was a limited franchise; and one-third of them, primarily the government officials, were chosen by the Crown. The fact that the majority of this, what they called a "blended parliament" or a "blended house", were to be elected did give the House its representative status, but the Governor still in effect chose who comprised the Government itself. So it wasn't fully democratic and fully representative in that context.

The role of the Governor was wound back a bit but the Governor could still reject a bill or reserve it for consideration in London and only the Governor could initiate money bills. As we all know, money is power; particularly when it comes to government, money is its ability to function. Moreover, the Legislative Council couldn't control two of the most important things at the time, and that was the sale of land and the cost of

government. There was a civil list in schedules that was attached to the 1842 Constitution, which set the salaries of the Governor, the judges and the public servants, and this could not be altered by the Legislative Council, so it had no real control over a considerable proportion of the budget. This led, unsurprisingly, to significant dissatisfaction.

The final step on this democratic journey occurred in 1855 with the attainment of responsible government. This involved establishment of a bicameral Parliament with a nominated upper House, being the Legislative Council, and a fully elected lower House, the Legislative Assembly. As in Westminster, the Government was formed by those who commanded the confidence of the lower House. The Governor's powers were again reduced so that he primarily acted upon the advice of his responsible Ministers, although the Governor did retain some reserve powers about matters such as the appointment and removal of the Premier and the dissolution of the Legislative Assembly. That's the short version of what happened, or, as my son would call it, the "tl;dr".

The 1842 Constitution was effectively that pivot point in the middle between the 1823 "Let's start off and create a Legislative Council" and the 1855 "Let's give it responsible government and have a bicameral Parliament". This is the point between the two. As you can imagine, in between all of these stages there were many grievances and much lobbying, and there was a grand remonstrance. I quite liked the words that they used in those days. You had a remonstrance, and the other one I really like is they used to have indignation meetings. I think we should have more indignation meetings, frankly. So there were grand remonstrances and petitions and complaints, and there were even threats of insurrection if greater liberty and freedom was not granted. Those threats were given substance by the discovery of gold. The discovery of gold made all the difference because it meant that the colonists would have the funds to actually rebel if they chose to do so.

The British, having already lost their American colonies, did walk a more considered line in relation to their Australian colonies and gave just enough freedom to avoid having a revolution, while still retaining significant oversight and a degree of control through measures such as the power to disallow legislation, the requirement for certain bills to be reserved for royal assent, the continued application of the doctrine of repugnancy—so if a local law was repugnant to, which meant inconsistent with, a British law that applied in Australia then the local law was invalid—and also the ability to give the Governor instructions. The Governor's instructions would come from Britain. Most of those control mechanisms actually continued for a very long time—until 1986, with the enactment of the Australia Acts, when they were finally removed.

In this talk originally I was planning to go through that pretty standard history, until, when reading back into it, something quite interesting caught my eye, in 1840, and it led me down a rabbit hole. So I'm going to take you down the rabbit hole with me for a bit before returning to the 1842 Constitution. For starters, what's the context in 1840? It was a critical year for New South Wales because it was the year that the British Government decided to abolish transportation of convicts to New South Wales. That led to mixed feelings because, on the one hand, the colony celebrated the fact that it was recognised as developing beyond being a penal colony to being a colony of free settlers because that attached consequential democratic institutions being developed and recognition that the settlers there should have the full rights of free Englishmen. But on the other hand, it was problematic because it would exacerbate an existing economic crisis.

Convicts provided the cheap labour that was essential to develop the colony and essential to its economy. Without a ready supply of transported convicts, the price of land in New South Wales would have to be raised so that free settlers, when they came to New South Wales, would have to work longer as labourers providing that labour before they could become landowners. The British Government gave effect to this policy by an order in Council on 22 May 1840. It removed New South Wales from the list of places where convicts could be sent and it imposed a new structure for the sale of land accordingly. A bill was then introduced into the Westminster Parliament in July 1840. This is interesting because that bill would have given representative government in 1840, so two years before we finally got it.

So what went wrong? The bill was abandoned later in 1840 by the Whig Government of Lord Melbourne, which was tottering at the time, because they received a petition from the people of New South Wales protesting against the reforms, particularly in relation to land sales. This is where it starts getting interesting. Nonetheless, some kind of legislation was required. Why? Because when they had extended the Constitution of New South Wales to expand the Legislative Council in 1828, they gave it a 10-year limit and so once the 1828 Constitution expired, it had to be renewed and it was renewed on a yearly basis. Every year they prolonged it, they had to legislate to do so.

They needed to put in this legislation, which was simply a matter of maintaining the status quo for another year until they could have another attempt at bringing representative government to New South Wales. This otherwise innocuous Act, described as a continuance Act, which simply created a holding position, did have one

clause in it that was of interest. That clause initially provided for the division of New South Wales into three districts. So you take off the top part, which was the Moreton Bay district, later to become Queensland, and the bottom part, the Port Phillip district, later to become Victoria. So it would have dismembered the whole of what was essentially a very large New South Wales to create the much smaller New South Wales that we know today. This was not popular amongst the people—at least, amongst the people in Sydney. I think it probably was for those in Brisbane and Melbourne.

Edward Macarthur, one of the many Macarthurs who were of importance at the time, was in London. He lobbied hard to prevent the colony from being dismembered in this way by a mere continuance bill, and he succeeded. Instead, the provision was altered so that it only allowed the British Government, by letters patent, to turn any islands that were dependencies of New South Wales into separate colonies. This was the bit that caught my eye because this was how New Zealand was separated from the colony of New South Wales. How could something so momentous slip by virtually unnoticed in otherwise unremarkable procedural legislation?

As this was when New Zealand ceased to be part of New South Wales, when exactly did it start being part of New South Wales? I asked myself that, being somewhat ashamed that I didn't actually know the answer. That's what piqued my interest. My guess is that most of the people here don't know that either, except for the lady I met on the way downstairs who was talking about it with someone. I thought, "Oh, my goodness, my thunder has been stolen." This is what I'm going to talk to you about. The story here is a very strange one. We tend to think of the process of European colonial powers going out there and colonising being about acquiring as much territory as you possibly could to push out the boundaries of your empire. At least, that's what I've always thought in my mind. But this story is actually one of the distinct reluctance on the part of the British to claim sovereignty over New Zealand, until they were effectively forced into it.

It all starts, as you could imagine, with James Cook. He was sent, first of all, to map New Zealand—which was well known to exist—before going on to explore for the Great Southern Land. That's what Cook did. He did go comprehensively around New Zealand, doing a lot of mapping, and he did make those claims of sovereignty. He did it not just once but twice, for good measure. He did so at Mercury Bay on 15 November 1769 and on 31 January 1770 at Queen Charlotte Sound. Neither claim, of course—or, indeed, his later claim to Australia—were legally effective because, to make them effective, you needed to actually settle and take control of the relevant territory, and that didn't happen. At most, these claims of sovereignty that were made by explorers were basically a system of first dibs. It was the British coming along saying, "We claim dibs on this", in the hope that it would stop someone else or another colonial power from doing so.

When the First Fleet arrived in Sydney in 1788, Governor Phillip's commission extended not only to the eastern half of the continent of Australia but also to "all the islands adjacent in the Pacific Ocean that were within the latitudes that encompass New South Wales". It depends very much on how far you think "adjacent" goes, because within those latitudes was New Zealand. That led to an interesting question: What's the distance for "adjacent"? Can you take "adjacent" around the entirety of the globe? Probably not. So how far does it extend? It seems that the early governors of New South Wales actually did think that they had jurisdiction in relation to New Zealand. But, interestingly, the British government initially decided to make no clear assertions one way or the other in relation to sovereignty. They just left the position ambiguous.

Without any formal process of colonisation, what happened anyway was that Europeans began to settle there and live there. Some were whalers and sealers involved in those trades. Others were escaped convicts from New South Wales, runaway sailors and anyone, frankly, trying to avoid the law. New Zealand became an extremely dangerous place, particularly for Māori people and for the settlers, who indeed were sometimes in conflict. Settlers bought from the Māori people large tracts of land, often for very little consideration. In one case, a huge area of New Zealand was apparently acquired for a checked shirt and an iron pot.

More worryingly, often muskets and gunpowder were exchanged for land. That resulted in intertribal Māori musket wars, and that involved the destruction of some Māori tribes and enslavement of others. It was pretty catastrophic. New Zealand became known as a centre of "vice and lawlessness". This was because, literally, there was no law that bound the European settlers and there was no policing or punishment of wrongdoing. You can just imagine what the society, on that basis, was like.

The British settlers in New Zealand then began to demand protection for their lives and property. While the British government denied that New Zealand actually fell within its dominions, it did pass a law in 1817 to punish murder in New Zealand and it conferred jurisdiction on the New South Wales Supreme Court to try offences that had been committed in New Zealand, despite denying sovereignty. It's a bit tricky. Again, this wasn't really very effective. People in New Zealand just basically laughed at it. A second attempt in 1831 was to send a British resident to New Zealand. That was the name I picked up hearing on the passageway: It was a Mr James Busby. He also proved to be ineffective and law and order was not achieved.

Pressure mounted on the British government during the 1830s from two additional sources. First, there were the missionaries, who sought to protect the interests of the Māori people while at the same time trying to Christianise them. And then there were the people who wanted what was called "organised colonisation". That was Edward Wakefield, who, by the way, has a very unusual personal background, if you want to have a look at that. Edward Wakefield, who of course was involved in the Wakefield scheme in South Australia, and his New Zealand company wanted to have organised colonisation in New Zealand which was funded by land grants. They didn't want the British to come over and take control over the sale of land; they wanted to be able to do the sale of land themselves in order to fund the immigration.

Both the missionaries and the New Zealand Company opposed each other's schemes and spent a lot of time lobbying the British Government. The British Government did not want to claim sovereignty over New Zealand, due to the cost of it and the "arduous responsibility of protecting the inhabitants of so extensive a dominion". Basically, it was going to cost them too much money and too much effort. It was too far away across the other side of the world and they just weren't interested. But, at the same time, they did recognise the evils of unauthorised colonisation, with massive land grabs going on, which were known as "land sharking", as well as the risks to their own subjects if other countries came in and claimed sovereignty in New Zealand.

This is where they started worrying, because the French were sniffing around. The French had increased their presence in the Pacific significantly and even went so far as to appoint a Roman Catholic Bishop of New Zealand, who arrived in 1838. This sent some of the more evangelical Protestants in the British Government absolutely wild at the idea of New Zealand becoming a Catholic country. The need to impose right, goodness and Protestantism on them was regarded as very important. There was a Frenchman who bought a large tract of land around Akaroa. Anyone who's been to New Zealand and Akaroa will know it was a French settlement there. He bought land in Akaroa and then went back to France and tried to convince the French Government to establish a colony there and to have a settlement, which he did. Once the French agreed to send ships to New Zealand to settle in Akaroa, the race was on between the British and the French.

The British Government initially wanted to avoid legislating in relation to New Zealand and the claim for sovereignty. Why? Because Wakefield and his friends were very good lobbyists and would get into the British Parliament and lobby the members there. They didn't want to have to try and do this through parliamentary means. In May 1839 they asked the British law officers for an opinion on whether the prerogative could be used to annex New Zealand to New South Wales so that it became a part of New South Wales, and you could then extend the power of the New South Wales Governor and the Legislative Council over those annexed New Zealand territories without having to do legislation. For any of you here who are involved in the New South Wales Parliament, you would be very familiar with this type of tactic. The law officers agreed that this could be done without legislation.

On 15 June 1839, letters patent were issued that enlarged the jurisdiction of the New South Wales Governor, Sir George Gipps, to extend over any territory which may be acquired in sovereignty by Her Majesty within New Zealand. The British Government considered that it would be safer. This is quite interesting. They decided it would be preferable not initially to establish New Zealand as a colony on its own, because they didn't want to give a legislative body immediately to New Zealand because the few British settlers who were there were very self-interested in acquiring huge tracts of land et cetera. And so they thought that if the New South Wales Parliament and New South Wales Government, being sufficiently distant that they had no self-interest in relation to land acquisitions in New Zealand, were the ones to actually legislate about it, it would be fairer to the Māori people, who they saw as being potentially subject to abuses.

That was the theory: "Let's get New South Wales to do it, and just annex New Zealand to New South Wales." But the British also had to send someone off to New Zealand to take the action that would involve the acquisition of sovereignty. They sent a fellow named Captain Hobson off to New Zealand with instructions to negotiate with the local chiefs for the cession of a portion of their territory, and upon achieving that Hobson would become Lieutenant Governor of that territory. This is quite interesting if you compare it to the method by which sovereignty was claimed in Australia. You often hear people these days talking about cession and that the land was not ceded by local Aboriginal people here, and that's because cession was never an issue here. No-one even tried cession. It's just not a thing that was happening here. But cession was an issue in relation to New Zealand. There are probably many reasons for that difference, and we don't have time to go into them here. But, nonetheless, in Australia, sovereignty was claimed by virtue of settlement and occupation and control over the land; in New Zealand, the initial attempt, at least, was to achieve sovereignty by cession through treaty with the local chiefs of the Māori tribes.

Hobson, on his trip to New Zealand, arrived in Sydney first on 24 December 1839 to confer with Governor Gipps before travelling on to New Zealand. To ward off further land sharking, Gipps issued a proclamation on 14 January 1840 which said that no title to land purchased in New Zealand in the future would be recognised unless it was derived from the Crown and future acquisitions from Māori chiefs would be illegal.

That was to stop the exploitation of Māori chiefs by taking land for a pot and a shirt and then claiming you had a large tract that you now owned. This proclamation also said that commissioners would be appointed to investigate all past purchases, so the people who'd obtained very large portions of land by ripping off Māori tribes were also to have their title investigated as well.

Gipps also issued proclamations declaring his extended sovereignty over such parts of New Zealand as may be acquired by the Crown and declaring Hobson to be then the Lieutenant-Governor over those territories. Hobson then arrived in New Zealand and then quickly proceeded to negotiate what we now know as the Treaty of Waitangi, which was initially signed by 45 chiefs on 6 February 1840. It ceded all rights—at least in the English version, I should say—and powers of sovereignty exercised by the chiefs over their territories to Queen Victoria in exchange for protection, recognition of their ownership of lands and waters, and the rights and privileges of British subjects. There are, of course, disputes about the difference in wording between the Māori version and the English version and what was understood to have actually occurred.

Eventually up to 540 chiefs signed the treaty, but it still didn't cover the entirety of New Zealand. Once the French started again sniffing around—that little convoy of ships heading for Akaroa—there was this great race to particularly claim the South Island. They couldn't actually get around and get enough people to cede territory, so instead they just said, "Okay, we're claiming sovereignty by virtue of settlement and occupation." They did so just before the French settlers arrived in 1840.

The annexation of New Zealand to New South Wales was not popular in New Zealand. The settlers there did not want to be tainted with the convict stain of New South Wales but, equally, the people of New South Wales were unhappy at having foisted upon them the burden and expense of governing this new colony. Both sides were quite relieved when, six months later, the British Government slipped into that 1840 continuance bill a provision that permitted the separation of the islands of New Zealand from New South Wales, establishing them as a separate colony. That was the point, in 1840, when New Zealand ceased to be part of New South Wales and ceased to be within the jurisdiction of the Legislative Council.

I see that my time has now expired. The rest of what I was going to say was simply that, coming back to New South Wales, we did have an election in 1843 to establish this new Legislative Council. The election was somewhat marred by a very large amount of drinking, singing, violence, throwing of eggs and lettuces and, at least according to one author, the throwing on the stage during the hustings of a dead cat. Now, I have to say, I have often heard the phrase "throwing a dead cat on the table", and I do wonder whether or not it was the 1843 election that did that. But in a search through Trove of all the newspaper accounts, I found nothing about a dead cat. If anyone actually finds a primary source to tell me that a dead cat was thrown onto the stage during a hustings, I'm quite interested to know that.

The 1843 election was indeed, shall we say, extremely controversial. But, nonetheless, we did have an election. The one thing about the election was that it united people, and it united them against the British Government. Creating a representative parliament in New South Wales created a forum for everyone to complain about the British constantly interfering, and that was the process that then led up to our bicameral Parliament in 1855. I hope you enjoyed my little excursion into the history of New Zealand, because the 1842 Constitution itself is not quite as exciting as you might imagine. But, nonetheless, I hope you all learnt something useful. Thank you.

Ms ABIGAIL BOYD: Wow! Thank you, Anne, for such a fantastic—I was going to say "summary of our constitutional development", but I think it was more about indignation meetings, dead cats and New Zealand, or something. It was fascinating, thank you. We will now be taking questions from the audience and also from our audience viewing proceedings over the livestream.

Associate Professor CAROL LISTON: Thank you. That was really terrific in terms of New Zealand. I think we had all known, for example, that the Reverend Samuel Marsden was a great advocate for missionising in New Zealand and was, in fact, rather better thought of over there than here. But my question concerns 1840 and one William Charles Wentworth, who reputedly bought the entire South Island of New Zealand. His treaty with the Māori chiefs, which is in the State Library, includes all of their facial tattoos as signatures. I assume that this is, in part, him noticing what is going on when perhaps others don't. Did you come across him in your rabbit hole?

Professor Emerita ANNE TWOMEY: I did, although I didn't actually come across—I'll go and have a look in the State Library at the treaty, because I would be quite interested to see it. Yes, there were quite a few stories about that sort of thing. For example, there was also a story of a number of chiefs from the South Island coming on a visit to Sydney because one of the less reputable whalers, who was doing a fair bit of land sharking, had brought them to Sydney for the purposes of negotiating the sale of the South Island. Governor Gipps tried to negotiate a treaty with them and was outraged when they decided to go with the whaler bloke instead. The problem with all of this is when you are in an environment where it's not clear what the law is and people are just going

out there and saying, "I'll give you a pot and a shirt", or whatever—or worse, muskets—for land. And they were buying huge tracts of land. A lot of it was utterly disreputable. I haven't seen William Wentworth's one. I know he was terribly involved in all sorts of aspects of it around this time, so it doesn't surprise me.

But, nonetheless, the whole point of the letters patent and establishing a commission to inquire into these things was that the actions were disreputable and if the British were going to take control, in terms of applying law to New Zealand, they needed to sort this stuff out. The French, by the way, kept their land at Akaroa. They didn't wipe out everything that had been done beforehand. It had never occurred to me before what would happen if you didn't colonise, when people had settled there but the Crown hadn't taken sovereignty. It just hadn't occurred to me that that was actually as problematic as the Crown coming in and taking sovereignty. There were problems on both sides, whether you did or you didn't.

QUESTION: I'm just worried about those poor landholders who got all that land from the Māori people for a shirt. When the Crown came in, did they have to give up that land, or did they retain land?

Professor Emerita ANNE TWOMEY: I don't know enough about that side of things. I suspect that there are lots of people in New Zealand who have looked into that more. I think a lot of it was ruled as invalid and ineffective. But I wouldn't feel too sympathetic for the people who spent with their pot and their shirts to get the land. I guess it's similar to the whole point that I made in the beginning about Cook claiming sovereignty but it was ineffective because they weren't actually occupying and controlling the land. It was the same in relation to these people making these sorts of land grabs. If you were actually occupying the land to the extent that you had built structures on it or you were farming it, I suspect they probably let you keep it. But, if it was just a big theoretical land grab—"I've taken the entirety of this area," or this island, or whatever it is—then no, it's just not effective, and I think that's the problem.

Professor FRANK BONGIORNO: Thanks, Anne. All of this is happening in the aftermath of the Batman treaty, and your description of Gipps' grappling with what was happening in New Zealand is strikingly similar to Governor Bourke's response to the Batman treaty. I just wondered if there is anything in the sources that you looked at that makes that connection?

Professor Emerita ANNE TWOMEY: I agree. I think one of the big differences is there seems to be a big shift in British consideration of how to deal with sovereignty. If you go back to the beginnings of Australia and colonisation, perhaps because their aim was that they wanted to colonise because they were turning it into a penal settlement and they had a purpose for doing it, they were less receptive to consideration of "Well, we are going to have to ask someone and we are going to have to negotiate." The other big difference, of course, between Aboriginal people and Māori people is, at least from the British point of view, they recognised the power structures in New Zealand, where you had a chief and there was a person that you could negotiate a treaty with; whereas the different structures in Aboriginal society, with Elders and a much flatter structure, didn't have that kind of authority to negotiate or authority to cede. Exercising that and entering into treaties in Australia was much more problematic.

These are, I should say, naive comments from someone who was just dabbling a toe in, not doing serious work in this regard. Of course, one of the interesting things with New Zealand is that by the time they come to claim sovereignty, people have been living in New Zealand, who were European settlers, with Māori for quite a long period of time. You don't have the same issues about translation and those sorts of things because people had been communicating and getting on with each other and living in a society with each other for 20, 30, 40 years and you had those kinds of relationships. It's a completely different kettle of fish to just turning up one day in Sydney Cove and saying, "Ha-ha! We're here and we're taking all your land." It's just a different environment in which they were operating.

Although the Batman stuff happened significantly later in relation to the settlement of the Port Phillip district, I think the governors then were still working in that same framework of how they colonised Australia by using settlement and occupation, and not using cession, and not going down the treaty route. What's interesting is that the British, all the way through this—at least looking at it from the late 1830s—did accept that the Māori people had sovereignty over their land and that they did need to have cession to take that land. What was funny—not really funny, I guess, but interesting—in reading all the materials is how they tried to get the cession and then all of a sudden, when they realised that the French boats were coming, it was suddenly, "Don't need cession any more; we're just taking it." The primary work on this that I was reading, which is a very good book by a fellow named McLintock, said that ultimately you've got to make a distinction between cession, which was the idealistic view of how you should acquire sovereignty, as opposed to discovery, occupation and settlement, or conquest, which were in practice the legal ways of obtaining sovereignty. He just saw the whole cession business as a bit of idealism, which is interesting.

Ms ABIGAIL BOYD: I was interested when you were talking about how, in 1840, people were expressing their displeasure at the idea of Queensland and Victoria being broken off from New South Wales. In 1840 how did people express their displeasure?

Professor Emerita ANNE TWOMEY: There were indignation meetings, of course, which, as I say, I do want to bring back. A lot of it was lobbying. There was a lot of lobbying going on of the British Government. They kept on sending petitions and grievances, so there were formal parliamentary processes by which they were sent across, and so objections were made. I should say that this was largely concentrated from the people in Sydney. The context here is that we are in an economic depression. The wool market collapses, the Bank of Australia falls over, so we've got tightening economic circumstances, and their concern is that once you have to pay separately for the mechanics of the Government in Victoria and the mechanics of the Government in Queensland, you are adding significantly to the public costs of running the place and that was going to be not feasible in the circumstances. Those were the sorts of arguments that were made.

If you go and look at the reverse and say, if I'm living in the Port Phillip district, that I'm absolutely outraged that my representation is in a Legislative Council in Sydney, where I can't really elect a local person from my area to go there because the amount of time it takes to travel there to a parliamentary sitting means that they have to give up their business and their job and everything like that, and then that means "Do I actually have to have a Sydneysider representing me?", that's not adequate either.

Eventually—this is the part I was going to put originally in my speech—the people from the Port Phillip District got annoyed by this. This was a bit later on, in the late 1840s. The first campaign was to have non-election, and so they refused to nominate anyone to the Legislative Council of New South Wales. The New South Wales people said, "That's not a goer. Have another go; do it again." Then they started making joke nominations. They'd nominate the Duke of Wellington and Lord Palmerston and all that sort of stuff. The Duke of Wellington wasn't defeated at Waterloo but he was in Melbourne, believe it or not.

Then they did actually elect Earl Grey. He was the Secretary of State for War and the Colonies in the United Kingdom and they actually elected him to the New South Wales Legislative Council. He is distinguished by the fact that he eventually lost his seat in the New South Wales Legislative Council for not turning up, which is not very surprising. It was a little lesson that went through to Earl Grey that the people in the Port Phillip District really did want to be separated off from New South Wales. They really did want their local Parliament. They wanted to be represented by their own people who knew their own circumstances, and this idea of appointing someone in London was to say to him, "Look, someone in London knows as much about us as someone in Sydney does." That was the point of the joke, and it was effective.

The British did cut off Victoria from New South Wales. You can sympathise with them. You'll often find people saying, "Federation is terrible. We should get rid of all the States." But people actually do want to be represented by people who live in their community and who know their concerns. They don't want to be governed by someone a long way away who just doesn't have that local connection. For all the complaints about Federation and getting rid of the States, the reality is I don't think anyone would really want it if they thought too much about it.

Ms ABIGAIL BOYD: What a fantastic note to end on. Thank you very much. That is all we have time for. Thank you again to everyone who shared their questions, and please thank Anne. I will now hand over to our esteemed Mr President, Ben Franklin.

The PRESIDENT [The Hon. Ben Franklin]: Please once again join me in thanking Professor Emerita Anne Twomey and Ms Abigail Boyd for facilitating such a wonderful, if slightly surprising, possibly tangential, but absolutely fascinating closing session. I love the idea of bringing back the indignation meetings, although if any of you have ever seen budget estimates you will know that they are pretty much alive and well.

Ladies and gentlemen, our goal for this conference has been to explore the unique factors that formed the backdrop to the adoption of the New South Wales Act 1823; to unearth new facts and stories; to explore our shared history with our bicentenary partners; and to bring to life the foundations laid for 200 years of evolving democracy and the rule of law. I hope you'll agree with me that we've achieved just that over the past two days. I, for one, have learnt an extraordinary amount.

I extend my sincere thanks to our absolutely outstanding panel of speakers: from yesterday, Professor Stephen Garton, AM, Bret Walker, AO, SC, former Clerk Lynn Lovelock—and the extraordinary amount of research that she went through for her presentation—Chief Justice the Hon. Andrew Bell, Virginia Bell, AC, and Keith Mason, AC, KC; and from today, the Hon. Daniel Mookhey, Associate Professor Carol Liston, AO, Margaret Crawford, PSM, Carmel Phelps, Associate Professor David Andrew Roberts, Sue Williams, Professor

Frank Bongiorno, AM, and Professor Emerita Anne Twomey. Please give a round of applause for all of our presenters.

I also thank our emcees and my colleagues the Hon. Chris Rath, the Hon. Penny Sharpe, the Hon. Damien Tudehope, the Hon. Greg Piper, the Hon. Rod Roberts, the Hon. Jeremy Buckingham and Ms Abigail Boyd. I thank the Clerk and all of the Black Rod team for their extraordinary hard work and dedication in coordinating this conference. As a relatively new Presiding Officer of only six months' standing, this is exactly the sort of thing I want to do more of. I think it is important that we understand the critical nature of our institutions. We live in a time when institutions around the world are being undermined and people are losing faith in them, whether that be the rule of law, the free press or parliaments themselves. There is nothing more important than for all of us to be able to understand why they're important and what their foundations are and to look to the future with optimism and in a way that we can all contribute.

I thank the standout AV team from CTS at the back of the room. I thank Hansard for transcribing the conference—yes, every word that has been said these past two days will, in fact, be in black and white for all time—and Parliamentary Catering for what I think you'll all agree has been an outstanding set of catering that has attended to our needs so well.

Finally, and most importantly, I extend my own thanks and those of everyone at Parliament to you, our attendees. I was told to expect our audience to be the highlight of the conference experience, and I have to say that's proven to me to be true. You have engaged so deeply and warmly. It has been a real privilege to have you here with us in the New South Wales Parliament. I really hope you have enjoyed your two days here in the Parliament of New South Wales and that you will join us once again at many future events that we have, particularly over the next 12 months as we celebrate the bicentenary of the Legislative Council.

The conference adjourned.