

## CHAPTER 2

### THE NEW SOUTH WALES LEGISLATIVE COUNCIL

This chapter traces the history and development of the New South Wales Legislative Council from colonial times. Since the advent of responsible government in 1856, the Council has been the subject of three major reconstitutions of its membership, in 1861, 1933 and 1978. In addition, there have also been major changes to the provisions governing deadlocks between the Council and the Assembly, especially in relation to appropriation and taxation bills. The Council has also been the subject of numerous other attempts at reform, together with various attempts to abolish it. These reforms and attempts at reform or abolition are not just of historical interest. They reflect the continuing struggle between differing political forces to define the role and functions of the Council within the New South Wales system of government.

Today, through many upheavals, the Council has evolved to perform a number of key functions. It represents a differently formulated constituency to the Assembly, allowing the representation of groups and views that are less likely to gain currency in the lower House. It continues to have a role as a check on the popularly elected government in the lower House, much as it did at the advent of responsible government in 1856. It also continues to have a role in the making of laws. Often its law-making function goes hand in hand with its scrutiny function.

#### THE DEVELOPMENT OF THE COUNCIL

##### 1823–1856: The Colonial Council

The Legislative Council is the first and oldest legislative body in Australia. It was established in 1823 under an Imperial statute known as the *New South Wales Act 1823* to advise the Governor in making laws and ordinances for the peace, welfare and good government of the colony.<sup>1</sup> It consisted of between five and seven

---

1 *New South Wales Act 1823*, 4 Geo IV, c 96 (Imp), s 24.

members appointed by the King. The business of the Council was conducted in secret, since members were required to take an oath of secrecy not to directly or indirectly communicate or reveal to any person matters brought under consideration of the Council.<sup>2</sup>

The Governor presided over the meetings of the Council and only the Governor could initiate legislation, although where a majority of members dissented from any proposed law, with grounds and reasons entered in the minutes, the proposed law did not pass. However, the Governor had power to override its decisions if a proposed law was essential to peace and safety and could not without extreme injury to the colony be rejected. In such cases the Governor was required to have the support of one or more members of the Council and record his grounds and reasons in the minutes.<sup>3</sup> The Governor was also required to obtain a certificate from the Chief Justice that a proposed law was not repugnant to the laws of England but was consistent with such laws as the circumstances of the colony would admit.<sup>4</sup> The Governor was further required to transmit to England within six months all laws passed by the Council and such laws were laid before both Houses of the British Parliament. The King could disallow a law within three years of its being made.<sup>5</sup>

The first Council, consisting of five nominated officials,<sup>6</sup> met for the first time on 25 August 1824.<sup>7</sup>

The Council initially operated without any rules and orders to regulate its proceedings, except the 1823 Act and instructions to the Governor, but it soon began to develop its own body of practice and conventions based on those of the British Parliament.<sup>8</sup> However, it was not until December 1827 that three members were appointed to draft formal rules and orders for the conduct and despatch of business, which were adopted on 31 December 1827.<sup>9</sup>

In July 1825, the Council was reconstituted to consist of seven members, four executive and three non-executive.<sup>10</sup>

---

2 *Ibid*, s 32.

3 *Ibid*, s 24.

4 *Ibid*, s 29.

5 *Ibid*, ss 30 and 31.

6 William Stewart, Lieutenant-Governor; Francis Forbes, Chief Justice; Frederick Goulburn, Colonial Secretary; James Bowman, Principal Surgeon; and John Oxley, Surveyor General.

7 *LC Minutes* (25/8/1824) 2.

8 See, for example, the appointment of a committee of members on the subject of a Female Factory at Parramatta, *LC Minutes* (21/11/1824) 14-15; address to the Governor requesting a return on convictions by magistrates, *LC Minutes* (25/7/1825) 17-18; address to the Governor for records of punishment by magistrates, *LC Minutes* (30/8/1825) 20-21; witnesses called to give evidence to the Council, *LC Minutes* (15/9/1825) 22; petition received against a bill, *LC Minutes* (27/9/1825) 22-23.

9 *LC Minutes* (31/12/1827) 39-40. The initial standing orders numbered 24 in total.

10 The three non-executive members represented the landed interests, wealthy free settlers and squatters.

In 1828, the *New South Wales Act 1823* was replaced by an Imperial statute now known as the *Australian Courts Act 1828*.<sup>11</sup> The Act increased the size of the Council to between 10 and 15 members, all nominated by the Governor.<sup>12</sup> Members were no longer required to take an oath of secrecy, thus allowing public discussion of legislative proposals. The Governor was required to give eight days notice in newspapers of proposed laws and ordinances, except in an emergency.<sup>13</sup> Although the legislative power of the Council remained unchanged, two-thirds of the members were required to be present to deliberate and the Governor could no longer enact a law without the approval of the majority of the members of the Council.<sup>14</sup>

In 1842, further changes to the Council were introduced through the *Australian Constitutions Act (No 1) 1842*, to take effect from 1843.<sup>15</sup> For the first time, the Council was to be partly elected, with 24 members elected by a limited franchise granted to male property owners – the first form of representative government in Australia – and 12 members appointed by the Crown. Among the distinguishing features of the new Council was the power to initiate legislation and the replacement of the Governor at meetings of the Council with an elected Speaker.

This introduction of representative government in New South Wales in 1842, together with the first election for membership of the Council in 1843, was the catalyst for increasing demands for self-government, creating tensions between the New South Wales government and the Colonial Office in London, and between the elected portion of the Council and the Governor. Between 1843 and the early 1850s, there ensued an extended period of struggle for independence based on demands for plenary legislative power to be held by the New South Wales Parliament and limitations on the Crown's power in London to disallow or refuse assent to New South Wales laws concerning local matters.

Ultimately, the British adopted a more prudent and conciliatory approach to the colonies in Australia than they had in North America. The *Australian Constitutions Act (No 2) 1850* gave the colonies of New South Wales, Victoria, Van Diemen's Land,<sup>16</sup> South Australia and Western Australia the power to amend their Constitutions, including the power to introduce a bicameral legislature, subject to reservation of such bills for the Queen's assent.<sup>17</sup>

In 1851, the membership of the Council was expanded under the *New South Wales Electoral Act 1851*<sup>18</sup> to 54 members, with 18 nominated by the Crown and 36 elected on a limited franchise.

---

11 *Australian Courts Act 1828*, 9 Geo IV, c 83 (Imp).

12 *Ibid*, s 20.

13 *Ibid*, s 21.

14 *Ibid*, s 21.

15 *Australian Constitutions Act (No 1) 1842*, 5 & 6 Vic, c 76 (1842) (Imp).

16 Now Tasmania.

17 13 & 14 Vic, c 59 (1850), s 32.

18 14 Vic, No 48.

Following further agitation for responsible government and two select committee inquiries into a new Constitution in 1852<sup>19</sup> and 1853,<sup>20</sup> both chaired by William Charles Wentworth, a model based on a nominated Council and an elected Assembly was adopted.

### 1856: Responsible government

The *Constitution Act 1855*<sup>21</sup> provided for the adoption of responsible government in New South Wales, including a nominated Legislative Council and a Legislative Assembly elected by male voters, subject to property qualifications. Importantly, while the Legislative Council retained the name of the former colonial Legislative Council, it was a very different and legally distinct institution. In particular, it reverted to being a nominee body. It was not to be popularly elected again until 1978. The new Council was to consist of not less than 21 members, appointed by the Governor on the advice of the government of the day, initially for a five-year interregnum period<sup>22</sup> during which time the reconstitution of the Council could be considered further, and thereafter for life, unless the Constitution was amended to provide otherwise.

The new Parliament, with a Council of 32 nominated members and an Assembly of 54 elected members, met for the first time on 22 May 1856. There were no political parties in the modern sense, although there was a division between proponents of colonial liberalism<sup>23</sup> who generally held a majority in the Assembly, and conservatives and landholders who held a majority in the Council.

From the outset, both liberals and conservatives regarded the role of the Council as that of a House of Review – a safeguard, or check, within the constitutional settlement against impetuous or ill-considered majority rule, embodied by the Assembly. As stated in the report of the 1853 select committee into the new Constitution, the Council was to be ‘a safe, revising, deliberative, and conservative element between the Lower House and Her Majesty’s Representative in the colony’.<sup>24</sup> However, within this broad consensus as to the role of the Council, there remained considerable difference of opinion as to the kind of safeguards that the Council was to offer. Conservatives inevitably tended to view the Council as a defender of the rights of property and a bastion against the ignorant majority, with the power to modify or even block proposed legislation contrary to the interests of conservatives and landholders. As such, they favoured a nominated Council, as

---

19 ‘Report from the Select Committee appointed to prepare a Constitution for the Colony’, *LC Votes and Proceedings* (1852) Vol 1, p 475.

20 ‘Report from the Select Committee appointed to prepare a Constitution for the Colony’, *LC Votes and Proceedings* (1853) Vol 2, p 117.

21 18 & 19 Vic, c 54 (Imp).

22 The maximum term of the Legislative Assembly.

23 Two early successes of the colonial liberalists were the adoption of secret ballots and universal manhood suffrage in 1858.

24 ‘Report from the Select Committee’, above n 20, p 119.

indeed was appointed in 1856. In the conservative camp, the *Sydney Morning Herald* had this to say on the role of an appointed upper House:

It now remains to see whether the Upper House will fulfil the objects of its institution. It was never intended to govern the country; it was never designed to originate great legislative change; it was never meant to be the battlefield of parties. Its office is to interpose between the Executive and the Lower House, to modify measures which in substance are inevitable, and to prevent a sudden resolution from plunging the country into irreparable wrong. It is required that it should set an example of firmness and décorum, that all its movements should be calm, dispassionate, and inoffensive, and yet that it should know when to announce itself as the constitutional check upon its mercurial and less mannerly neighbour – the Assembly.<sup>25</sup>

By contrast, liberals tended to support a legislative review model of the Council, able to assist the Assembly in the legislative task by scrutinising and where necessary making modest modifications to proposed legislation to assist in its understanding and application, but without significantly modifying the content or intent of the statute. As such, they favoured an elective Council, which would tend to return a more liberal membership.<sup>26</sup>

From these early beginnings, the constant theme of the history of the Council has been one of continual struggle over the role, powers, composition and appointment or election of the Council.

### **1856–1861: The five-year interregnum and reconstitution**

Under the *Constitution Act 1855*, the Council was given very strong powers, equal to those of the Assembly, except that the Council lacked the right to initiate taxation and appropriation bills (money bills). The Council could, however, amend or reject any bill sent from the Assembly, including money bills. This extensive legislative power given to the Council was envisaged by the drafters of the Constitution as ‘an effectual check on the democratic element in the Assembly’. It was also envisaged that the Council would ‘be competent to discharge with efficiency, the revising, deliberative, and conservative functions which will devolve on it’.<sup>27</sup>

This extensive power accorded to the Council under the constitutional settlement was given in the full recognition that a fiercely independent and uncooperative Council could be brought to heel by ‘swamping of the House’, threatened or otherwise.<sup>28</sup> Swamping was the practice by the government of appointing enough new members to the Council in order to gain the numbers to pass legislation,

---

25 Editorial, *Sydney Morning Herald*, 15 May 1856, p 4.

26 Clune D and Griffith G, *Decision and Deliberation: The Parliament of New South Wales 1856–2003*, The Federation Press, Sydney, 2006, pp 66–77.

27 ‘Report from the Select Committee’, above n 19, p 477.

28 While the Constitution specified a minimum of 21 members of the Council, it did not specify a maximum.

and was accepted as the method by which serious deadlocks between the two Houses were to be resolved, should the Council's use of its extensive legislative powers exceed political limits.<sup>29</sup> To prevent swamping reducing the Council to an absurdity, however, the Governor had discretion to reject the advice of his ministers recommending appointments to the Council. In reality, conservatives did not believe that the circumstances would ever prevail where the political pressure was such that the Governor would consent to swamping of the House.<sup>30</sup>

At the same time, the decision to make the Council a nominee chamber under the constitutional settlement served to prevent the Council from challenging the underlying assumption that government was made in the lower House. Put simply, a nominated upper House was unlikely to usurp the primacy and democratic legitimacy of the elected Assembly.

Of the 32 nominated members who took their seats in the new Council on 22 May 1856, all were conservative representatives of the professional, landed or merchant classes. However, from the very beginning there was controversy over the role of the Council, the rights of the Assembly and the role of the Governor.

During the interregnum period from 1856 to 1861, the conservative Council clashed repeatedly with the elected Assembly, especially as the Assembly became more radical during and after the second Cowper Ministry from 1857 to 1859. In particular, between 1858 and 1861, various important government bills were defeated in the Council, including the Chinese Immigration Bill 1858, the Electoral Law Amendment Bill 1858, the Appropriation Bill 1860 and the Robertson land bills of 1860. Partly as a result of this, six Ministries in the Assembly fell during the years 1856 to 1861.

The power of the Council to thus thwart government legislation prompted a number of early attempts at reform of the composition of the Council, based on proposals for popular election of its members. Between 1859 and 1861, four bills were introduced to make the Council elective.

The Forster Ministry (1859-1860) made two failed attempts in the Assembly in February 1860, the second of which resulted in the resignation of the Ministry.<sup>31</sup> Under these proposals the Council was to consist of 30 elected members representing four electoral districts which were to comprise, in varying numbers, the 28 Assembly electoral districts.

---

29 This practice refers to the experience of the *Great Reform Act* of 1832 in the United Kingdom, where the threat of 'swamping' the House of Lords with new members was used in order to secure government legislation extending the franchise.

30 Clune and Griffith, above n 26, pp 109-110.

31 The Elective Legislative Council Bill 1860 was introduced in the Assembly and the second reading discharged and the bill withdrawn on 9 February 1860. The Elective Legislative Council Bill (No 2) 1860 was introduced in the Assembly and the second reading negatived on division on 25 February 1860.

The first Robertson Ministry (1860-1861) also made two failed attempts to reform the Council. The first, the Legislative Council Bill 1860, was introduced in the Council in October 1860. This bill proposed an elected Council of 30 members representing the 28 Assembly electoral districts, with the two Sydney districts returning two members each. Ten members were to retire at elections every two years. The President was to be elected from among the members. After the first Council election and election of a President, the Council was then to determine by lot which 10 members were to retire in rotation every two years. The order for the Bill's second reading was discharged on 6 November 1860.<sup>32</sup>

In January 1861, in a second attempt, the Robertson Ministry introduced in the Assembly the Legislative Council Bill 1861, which was similar to the 1860 bill. The bill was sent by the Assembly to the Council for concurrence. Debate on the second reading was adjourned in the Council in April 1861 despite the fact that the Council itself was shortly to expire in May 1861.<sup>33</sup> Further consideration of the bill was interrupted by prorogation.

With Robertson having failed at reform of the Council, the Cowper Ministry attempted to secure the passage of its legislative agenda in the Council – notably the passage of the Robertson land bills – through the only other method available to it – by swamping the Council. On 10 May 1861, to the consternation of conservative forces and under considerable pressure, Governor Sir John Young agreed to Cowper's request for 21 appointments to the Council for the term of the Council's last sitting day. However, on this occasion the swamping misfired when the President of the Council, Sir William Burton, not being consulted about the appointments, felt he had been treated with discourtesy, and resigned as President and as a member and withdrew from the chamber followed by several other members. With the Chair of Committees also being absent, the Clerk declared the House adjourned until the next regular sitting day, which was after the end of the first five-year appointments to the Council.<sup>34</sup>

Nevertheless, the experience of the swamping of 1861 had a chastening effect on conservatives. As Connolly writes:

In 1853, the leading conservatives in New South Wales had felt sufficiently confident in their society to choose a nominated Legislative Council, knowing full well that it could be swamped to break a constitutional deadlock with the Assembly. They had not believed that democratic pressures would be so strong that the Governor could be coerced into using the power of swamping 'unwisely'.<sup>35</sup>

---

32 *LC Minutes* (6/11/1860) 35-36.

33 *LC Minutes* (19/4/1861) 131.

34 *LC Minutes* (10/5/1861) 201.

35 Connolly CN, *Politics, Ideology and the New South Wales Legislative Council, 1856-1872*, Unpublished PhD thesis, Australian National University, 1974, p 314, cited in Clune and Griffith, above n 26, p 111.

### 1861–1925: Failed reform

The reconstituted Council, which met for the first time on 3 September 1861, had 23 members appointed for life by the Governor on the advice of the Executive Council. Twelve were reappointed from the previous Council. However, the new Council was purged of some of its most extreme conservative elements, with appointments agreed to by Cowper and Governor Young and of general acceptance to all parties, as well as the electorate and the press. William Charles Wentworth agreed to be President on the condition that:

[T]he Council is not to be swamped on any future occasion, until after the rejection by it of some vital question upon which the opinion of the country had previously been taken, after a dissolution of the Assembly for that express purpose.<sup>36</sup>

Effectively, the position adopted from 1861 was that the Council would continue to have a role to play as the House of Review, but that its power to block the legislative agenda of the government should be exercised carefully and responsibly where the government's policies had the endorsement of the people at the ballot box. At the same time, where government overstepped its electoral mandate, the integrity of the Council against unreasonable swamping by the government would be protected and maintained by the Governor.

The Council had emerged from the initial five-year interregnum period intact, but with a tacit admission that the Assembly was supreme in respect of appropriation and taxation matters, and that the Council could not, through virtual legislative blackmail, force governments to resign because they were unable to implement either promised social and political reforms, or more importantly to pass money bills. It is notable, for example, that the Cowper Ministry in 1861 finally secured the passage of its Crown lands bills<sup>37</sup> through the reconstituted Council.

Nevertheless, Cowper remained committed to reform of the Council on an elective basis. To this end the third Cowper Ministry (1861–1863) introduced in the Council in November 1861 the Legislative Council Bill 1861, which revived the earlier Robertson Bill of 1861. The bill was referred to a select committee,<sup>38</sup> chaired by William Charles Wentworth, who had vigorously opposed the principle of an elected upper House. Shortly before the session ended, the committee presented a progress report in which it considered adoption of Hare's system of election.<sup>39</sup>

---

36 Correspondence with Young, 14 June 1861, cited in Clune and Griffith, above n 26, p 112.

37 Crown Lands Alienation Bill 1861 and Crown Lands Occupation Bill 1861.

38 *LC Minutes* (12/12/1861) 95.

39 Mr Thomas Hare was an English Barrister who in 1857 laid down the chief features of the single transferable vote system of proportional representation. Under Mr Hare's system of election, 30 members were to be elected every five years plus an additional 15 members as reserves for vacancies. The term of members was five years. See the 'Progress report from the Select Committee on the Legislative Council Bill', *LC Journals* (1861–1862) Vol 8, p 753; see also *LC Minutes* (13/1/1862) 113.

The Cowper Ministry reintroduced the 1861 bill into the Council in June 1862 where it was again referred to a select committee chaired by Wentworth.<sup>40</sup> The committee reported in August 1862 with an amended bill in which the committee proposed a Council of 30 elected members under a quota preferential system with the whole State as one electorate. Ten members were to retire each three years. The Governor could also appoint an additional 10 members for life.<sup>41</sup> The bill was amended in the Council and sent to the Assembly where it was discharged on 26 November 1862.

It was at this time that a new political division began to appear in New South Wales over the fiscal question of free trade versus protectionism. In May 1872, Henry Parkes became the first liberal/free trade Premier. He was to be Premier five times between 1872 and 1889. George Dibbs, Premier on three occasions between 1885 and 1894, and later William Lyne were to become the leaders of the Protectionists.

Parkes favoured an upper House elected on a wide franchise, so in 1872 when the Council rejected his Border Duties Convention Bill 1872, he also attempted reform of the Council on three occasions.

In January 1873 Parkes introduced the Legislative Council Bill 1873 into the Assembly but it was later withdrawn. A second Legislative Council Bill 1873 (No 2) was then introduced and sent to the Council in March 1873. The bill proposed the election of 36 members from 12 provinces. The existing 31 nominee members were to be retained but when their numbers were reduced to 16 by resignation, death or otherwise, the number of elected members of the Council was to be increased to 48. The term of office was to be six years at first and ultimately eight, with 12 members retiring every two years. The bill also provided that the Council could only reject, but not amend appropriation bills and bills imposing a rent, tax or impost. When the bill was received in the Council, before putting the motion for first reading, President Murray, after referring to various authorities, observed that where any alteration was to be made in the constitution of one House of Parliament, that alteration must be introduced in the House immediately affected by it. An amendment was then successfully moved to the first reading that the Council declines to take into consideration any bill repealing those sections of the *Constitution Act 1855* which provides for the constitution of the Council unless such bill originate in the Council.<sup>42</sup>

In September 1873 the Parkes Ministry reintroduced the Legislative Council Bill 1873 into the Council, given the Council's earlier objection to the bill originating in the Assembly. The second reading of the bill was amended to refer the bill to a

---

40 *LC Minutes* (18/6/1862) 18.

41 *LC Minutes* (22/8/1862) 18; see also the 'Report from the Select Committee on the Legislative Council Bill', *LC Journals* (1862) Vol 9, p 533.

42 *LC Minutes* (2/4/1873) 110-111, 121.

select committee chaired by Joseph Docker.<sup>43</sup> The motion failed to give the committee leave to take evidence and call for persons and papers, but this was rectified on the following sitting day.<sup>44</sup> The committee reported in February 1874 and proposed an elected Council with four provinces each returning nine members initially and afterwards 12. One-third of the members were to retire every three years. A motion for adoption of the committee's report was amended with the Council stating that the recommendations of the committee were not in accordance with the documents and evidence of the committee.<sup>45</sup>

In November 1874 the Parkes Ministry again attempted reform of the membership of the Council with the introduction in the Council of the Legislative Council Bill, which was similar to the earlier two bills. Although members were summoned to attend the House on the day fixed for the second reading and during the continuance of the debate,<sup>46</sup> consideration of the bill was interrupted by prorogation one week later. Parkes lost office at the subsequent election and although he was to become Premier three more times he did not again attempt electoral reform of the Council.

In 1880 in his third Ministry (1878-1883) Parkes tried instead to alter the powers of the Council, introducing a bill to declare that the intention of section 1 of the *Constitution Act 1855* was that the Council had the power to reject money bills, but had no power to amend or alter any such bill. This bill lapsed on the prorogation of Parliament.

During the various Parkes Ministries, the membership of the Council was also expanded considerably as Parkes sought to secure his legislative agenda. Council membership rose to 35 during the second Parkes Ministry (1877), to 53 during the third Parkes Ministry (1878-1883) and to 62 during the fourth Parkes Ministry (1887-1889).<sup>47</sup> This growth in the membership of the Council corresponded with an apparent decline in the discretion of the Governor over appointments to the Council. As responsible government developed in New South Wales, the Governor became less inclined to reject ministerial advice for the appointment of new members except on very solid grounds.<sup>48</sup>

While relations between the liberal/free trade Parkes Ministries and the Council followed a pattern of somewhat muted political conflict, relations between the Council and the government were to break down more fundamentally with the election of George Reid (1884-1889), the second free trade Premier. Reid introduced a new program of liberal legislation, based on free trade and direct taxation.

---

43 *LC Minutes* (8/10/1873) 20.

44 *LC Minutes* (9/10/1873) 23.

45 *LC Minutes* (26/3/1874) 143-145.

46 *LC Minutes* (19/11/1874) 26.

47 Hawker G, *The Parliament of New South Wales, 1856-1865*, New South Wales Government Printer, Sydney, 1971, p 143.

48 Keith A, *Responsible Government in the Dominions*, 2nd edn, Clarendon Press, Oxford, 1928, p 114.

However, opposed to Reid was a partisan Council which was very unsympathetic to his legislative agenda.

The political touchstone that provoked open conflict between Reid and the Council was the Land and Income Tax Assessment Bill, defeated in the Council by 41 votes to four on 20 June 1895. It was a trigger for the dissolution of Parliament and an election openly fought by Reid on the powers of the Council. Reid specifically invited the electorate to ‘clear the fossils’ out of the ‘rotten and corrupt’ Council.<sup>49</sup> Reid went on to state:

[T]here never was such a body of men in this world who had sworn to do their duty to the people who more steadily, selfishly, and deliberately betrayed the public interest to serve their own personal ends.<sup>50</sup>

Reid won the election, and gained the appointment of 10 new members to the Council. The Land and Income Tax Assessment Bill was reintroduced and a free conference of managers<sup>51</sup> between the two Houses was held in an attempt to reach a compromise. After four days of negotiation, and with the very real threat of swamping of the Council, a compromise was reached on amendments to the bill.<sup>52</sup>

In accepting the compromise, the Council appears to have accepted that as a nominated house it could not hold out against the mandate of the Government as expressed in the polls, but nevertheless continued to assert its power to amend taxation measures.

Reid also attempted reform of the Council. In August 1895 the Constitution Act Amendment Bill 1895 was introduced in the Council.<sup>53</sup> The bill proposed that the number of members of the Council be fixed at 60 – to preclude further swamping. Members were to be appointed by the Governor on the advice of the Executive Council for terms of five years. Twelve members were to retire each year, but were eligible for re-appointment. The bill also proposed arrangements for resolving disagreements between the Houses. Where the Council did not return an appropriation bill within one month, the bill could be sent for assent on a two-thirds majority resolution of the Assembly. The Council could amend but not reject bills dealing with taxation, authorising public works and raising of loans, and the Assembly could determine if the bill was to be presented, with or without amendment, for assent. All other deadlocked bills could be put to a referendum by majority resolution of the Assembly if rejected or unacceptably amended by the Council in successive sessions. Where a bill failed at a referendum, it or a similar bill could not be put to another referendum for three years. The bill was

---

49 *LA Debates* (18/8/1895) 280.

50 *Ibid.*

51 A free conference of managers is a form of communication between the Houses to discuss disagreement over bills. See Chapter 12 (The Legislative Process) and Chapter 21 (Relations Between the Houses) for more details.

52 *LC Minutes* (27/11/1895) 134.

53 *LC Minutes* (28/8/1895) 18.

heavily criticised in the Council and an amendment to the second reading that the bill be read a second time 'this day six months' was carried by 39 votes to 13, effectively defeating the bill and preventing it being introduced again that session.<sup>54</sup>

In the period between 1879 and 1902 there were also several unsuccessful attempts to introduce and pass bills in the Council to curtail the powers of the Council over appropriation and taxation bills and for the resolution of disagreements between the Houses.<sup>55</sup> Another bill, the Referendum Bill 1896, which originated in the Assembly, met the same resistance of the Council as in 1873, when it declined to consider any bill affecting the powers of the Council unless the bill originated in the Council.<sup>56</sup>

The coming of federation in 1901 saw a further shift in the political landscape. With the removal of the fiscal question of free trade verses protectionism to the federal arena, a new political division arose between the new modern reformist Labor Party, with a legislative agenda of industrial, social and constitutional reform, and the free traders who renamed themselves the Liberal Party.

### **1926: Lang's first attempt to abolish the Council**

The early part of the 20th century was one of tumultuous change and conflict concerning the constitution, powers and very existence of the Council.

In 1898, the New South Wales Labor Party adopted abolition of the Legislative Council as part of its party platform. The basis of this move was two-fold: the Council's membership was perceived to reflect the interests of wealth and privilege and to be inherently conservative; and the existence of a second chamber was held by Labor to be anathema to the sovereignty of the elected government in the Assembly.

On 21 October 1910, the first Labor Ministry in New South Wales, that of James McGowen, took office. Over the next 15 years, various Labor ministries maintained an uneasy relationship with the Council. For example, during the period 1911 to 1913, the McGowen Ministry had a number of bills rejected by the Council for being overbearing or unsound, or because they were thought not to be in the public's best interest. However, following the June 1913 elections, when the Holman Labor Ministry was returned with a decisive majority, much of the previously rejected legislation was accepted by the Council in a modified form, in recognition of the expression of the public will at the election.

At the same time, elements within the Labor Party continued to press for the abolition of the Council. The Annual Conference of the Labor Party in 1916

---

54 *LC Minutes* (26/9/1895) 46.

55 See the Constitution Act Amendment Bill 1880; the Constitution Act Amendment Bill 1895; the Constitution Act Amendment Bill 1900; and the Constitution Act Amendment Bill 1901.

56 *LC Minutes* (4/11/1896) 203.

censured the Holman Ministry for failing to take action to abolish the Council. However it was not until the election of Premier John (Jack) Lang in June 1925 that Labor was in a strong enough position to move to abolish the Council.

The Lang Ministry came to office with a legislative program of social and economic reform which from the outset ran into problems in the Council. In response, Lang prepared the grounds for the abolition of the Council through the traditional method of swamping the House. Two new Labor members were appointed in July 1925<sup>57</sup> and a further 25 in December 1925.<sup>58</sup> Documents tabled in the Council on 12 January 1926 show that before agreeing to make the latter appointments Governor de Chair sought an undertaking from Premier Lang that the new members would not be used to abolish the Council, but Lang refused. The Governor was prepared to appoint 15 members, but Lang complained that the Governor had rejected the advice of ministers and insisted that no less than 25 members was adequate. Eventually the Governor agreed to the appointment of 25 members, under protest that the number was more than was needed.<sup>59</sup>

Shortly afterwards, on 20 January 1926, the Lang Ministry introduced in the Council the Constitution (Amendment) Bill, which provided for the Council's abolition. The second reading debate on the bill was adjourned on 22 January 1926 by a narrow 44 votes to 43 and the session concluded three days later. In the next session, an attempt to restore the bill to the Notice Paper on 23 February 1926 was defeated by 47 votes to 41.<sup>60</sup> The bill failed to pass when two Labor members crossed the floor and five, including four of the 25 Labor members appointed in December 1925, were absent for the vote. In effect, a number of Lang's new appointees had not supported the vote to abolish the Council. All seven were subsequently expelled from the Labor Party.

In March 1926, following the enactment of legislation<sup>61</sup> to enable the appointment of women to the Council, Lang unsuccessfully asked the Governor to appoint a further 10 members to the Council, again presumably with a view to abolishing it. On this occasion, the Governor refused to make the appointments, apparently on the grounds that Lang was not able to demonstrate that he had an electoral mandate for such fundamental constitutional change as abolition of the Council. Petitions by the Lang Ministry to the Dominions Office in London also failed.

At the election on 8 October 1927 the first Lang Ministry lost office.

---

57 *LC Minutes* (12/8/1925) 3.

58 *LC Minutes* (21/12/1925) 130.

59 *LC Minutes* (12/1/1926) 142. See also papers and correspondence between Governor de Chair and Premier Lang relating to the appointment of 25 members to the Council, *Joint volume of Parliamentary Papers* (1929-1930) Vol 1, p 343.

60 *LC Minutes* (23/2/1926) 26.

61 *Constitution (Amendment) Act* 1925.

### 1928–1930: Entrenchment of the Council and further failed reform

In response to Lang’s attempts to abolish the Council, and with the example of Queensland Labor’s 1922 abolition of that State’s upper House fresh in its mind, the new conservative Nationalist Bavin Ministry acted in 1928 to safeguard the existence of the Council. The Constitution (Legislative Council) Amendment Bill, introduced in the Council in May 1928, inserted a new section 7A ‘manner and form’ requirement into the *Constitution Act 1902* to protect the Council from abolition.<sup>62</sup>

Following the passage of the Constitution (Legislative Council) Amendment Bill through both Houses in the following session, the bill was reserved for assent on 26 March 1929. Assent was given on 5 November 1929.<sup>63</sup> However, the government did not issue a proclamation to bring section 7A into effect until 24 September 1930, with the section actually coming into force on 1 October 1930.<sup>64</sup>

The new section 7A, still in force today, entrenched the Council by requiring that no bill to abolish it, or alter its constitution or powers, could receive royal assent unless it was passed by both Houses and approved at a referendum by a majority of the electors. Moreover, section 7A was itself entrenched, with the result that it could not be altered or repealed except by a bill similarly approved at a referendum.

The delay in the proclamation and commencement of the *Constitution (Legislative Council) Amendment Act 1929* from March 1929 to October 1930 was to permit the Bavin Ministry to enact further legislation to reconstitute the Council and codify its powers before the requirements of the new section 7A came into effect.

In this regard, on 19 September 1929, the Bavin Ministry introduced in the Council the Constitution (Further Amendment) Bill 1929.<sup>65</sup> The bill provided for a Council of 60 members which was to be elected indirectly by the members of both Houses voting under a system of proportional representation. Members were to be elected for a term of nine years, with one-third retiring every three years. Members had to be at least 30 years of age and be capable of sitting and voting as a member of the Assembly.

The Constitution (Further Amendment) Bill 1929 also sought to reform the deadlock provisions governing relations between the two Houses. Clause 4(2) of the bill, as introduced in the Council, provided that the Council could reject but not amend money bills, or suggest amendments that would increase any proposed charge or burden on the people. Further, a bill was not to be taken as a money bill if it only contained provisions for the imposition or appropriation of fines or penalties, or fees for licences or services.

---

62 *LC Minutes* (9/5/1928) 18.

63 *LC Minutes* (19/11/1929) 68.

64 Proclamation published in the *Government Gazette*, No 144, 26 September 1930, p 3779.

65 *LC Minutes* (19/9/1929) 23.

The bill was the subject of detailed debate and was amended in both Houses. Most attention focused on the powers of the Council in relation to money bills.<sup>66</sup> After a number of amendments were made in each House,<sup>67</sup> a final form of wording of clause 4 was agreed to providing, in part, for appropriation bills to be presented to the Governor for assent even where they had been rejected, unacceptably amended or not passed by the Council.<sup>68</sup> As Premier Bavin had given a commitment that the bill would be submitted to the electors at a referendum,<sup>69</sup> the bill was not presented for assent at this time.

The machinery legislation to provide for the referendum on the bill was put in place by the *Constitution Further Amendment (Referendum) Act 1930*, which provided for the referendum to be held on 17 May 1930. However, in the context of the economic crisis caused by the start of the Great Depression, the referendum was postponed, initially to be held in conjunction with the next general election and, finally, to a date to be fixed by the incoming government. Accordingly, the *Constitution (Further Amendment) Bill 1929* was never enacted.

At the election on 3 November 1930, the Bavin Ministry lost office, and the Lang Ministry was returned to office.

### **1930–1932: Lang’s second attempt to abolish the Council**

Following his re-election, Premier Lang once again set out to abolish the Council. On 3 December 1930, Lang introduced two bills, one to repeal section 7A of the *Constitution Act 1902* and the other to abolish the Council.<sup>70</sup> On the advice of the President, Sir John Peden,<sup>71</sup> that a referendum was necessary to abolish the Council, the Council allowed both bills to pass without division, with the intention of challenging the bills in the courts. An injunction was then secured in the Court of Equity preventing assent to the bills on the basis of their failure to observe the requirement of section 7A to conduct a referendum.<sup>72</sup> The plaintiffs were members of the Council headed by Arthur Trethowan, a founder of the Country Party. The Full Bench of the New South Wales Supreme Court,<sup>73</sup> the High Court of Australia<sup>74</sup> and ultimately the Privy Council in London in 1932<sup>75</sup> subsequently held section 7A to be valid and a referendum necessary for its repeal. The

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

67 *LA Debates* (19/11/1929) 1472, 1481, *LC Minutes* (29/11/1929) 88-90, (3/12/1929) 113-115, *LC Debates* (3/12/1929) 1893.

68 *LA Debates* (4/12/1929) 1975-1985, *LC Minutes* (4/12/1929) 118.

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

70 *LC Minutes* (2/12/1930) 22.

71 Dean of the Law Faculty at the University of Sydney.

72 *LC Minutes* (11/12/1930) 39.

73 *LC Minutes* (20/1/1931) 51, *Trethowan v Peden* (1930) 31 SR (NSW) 183.

74 *Attorney-General (NSW) v Trethowan* (1931) 44 CLR 394.

75 *Attorney-General (NSW) v Trethowan* [1932] AC 526.

bills failed to meet the manner and form requirements of section 7A and could not be presented for assent unless approved at a referendum.

While the fate of the 1930 bills was being determined by the courts, Premier Lang continued to push for further appointments to the Council. On 20 November 1931, 25 additional members were appointed to the Council,<sup>76</sup> giving Lang control of both Houses and increasing the membership of the Council to 109. The new appointments included the first two female members of the Council, Catherine Green and Ellen Webster. However, troubles with faction fighting in the Labor Party and the crisis of the Great Depression subsequently curtailed Lang's struggle with the Council. Finally, in perhaps the most dramatic constitutional event in the State's history, Governor Sir Philip Game exercised his reserve powers as guardian of the laws and conventions of the Constitution to dismiss Lang from office on 13 May 1932 after Lang sought to prevent the Commonwealth Government from seizing New South Wales revenues for interest owed by the New South Wales Government to foreign bondholders.

### **1933: Reconstitution and reform of the deadlock provisions**

Following the dismissal of the Lang Ministry, the conservative United Australia Stevens Ministry took office on 16 May 1932 with a commitment to reconstitute the Council. The public were now seen to be receptive to a reconstitution of the Council, and in particular placing the Governor beyond the pressures and criticisms associated with attempts to swamp the Council. Less certain was the form that the reconstitution would take. Various schemes went before a Cabinet sub-committee, including a nominee House, an elected House and one partly nominee and partly elected. Arguments were expressed in favour of both direct and indirect methods of election.

Advocates of the direct election option based their claims on the Bryce Report of 1918,<sup>77</sup> which contended that such a 'plan would produce a Chamber both homogenous and directly responsible to the people ... it would enjoy their confidence and mirror their views and ideas', and that with frequent elections, renewed public opinion would refresh and strengthen a second chamber.<sup>78</sup> However the conservative Stevens Ministry favoured the indirect option.

The Stevens Ministry also took the opportunity to swamp the Council's membership, with appointments in June<sup>79</sup> and September 1932,<sup>80</sup> resulting in a peak of 125 members on 21 September 1932.

---

76 *LC Minutes* (24/11/1931) 370.

77 Conference on the Reform of the Second Chamber, London, 1918.

78 *Ibid*, p 6.

79 *LC Minutes* (17/6/1932) 5 (2 members).

80 *LC Minutes* (8/9/1932) 15 (17 members were appointed but only 16 took their seat), (14/9/1932) 24 (two members), (21/9/1932) 35 (one member), (9/11/1932) 116 (Mr McKillop resigned without taking up his earlier appointment).

On 13 September 1932, the Stevens Ministry introduced the Constitution Amendment (Legislative Council) Bill 1932 into the Council.<sup>81</sup> The bill revived the 1929 proposals for the reconstitution of the Council with 60 members indirectly elected by members of the Council and Assembly voting simultaneously in their own Houses as one electoral body, using a system of proportional representation. The terms of members were to be 12 years, with one-third of members being elected every three years.

The bill also provided for the insertion of sections 5A to 5C in the *Constitution Act 1902*, providing for the resolution of deadlocks between the two Houses.

Following extensive debate the bill passed the second reading in the Council by 53 votes to 25.<sup>82</sup> After consideration in detail and amendment in committee,<sup>83</sup> the bill was forwarded to the Assembly on 29 September 1932. Subsequently, on 13 December 1932 the Council sent a special message to the Assembly requesting that the bill be proceeded with notwithstanding any question respecting the privileges of the Assembly arising from the fact that the bill originated in the Council.<sup>84</sup> The Assembly agreed to the bill on 16 December 1932 with minor amendments which were agreed to by the Council.<sup>85</sup>

A second machinery bill, the Constitution Further Amendment (Legislative Council Elections) Bill providing for the conduct of elections for the Council and the system of voting, was introduced and passed by the Council on 15 December 1932<sup>86</sup> and agreed to by the Assembly on 20 December 1932.<sup>87</sup>

A third machinery measure, the Constitution Further Amendment (Referendum) Bill, providing arrangements for the holding of a referendum on 13 May 1933 on the bill to reconstitute the Council, was introduced in the Assembly and passed both Houses on 16 December 1932.<sup>88</sup> The Constitution Amendment (Legislative Council) Bill 1932 was approved at the referendum by a narrow majority of 40,904 (716,938 votes in favour to 676,034 against), and became the *Constitution Amendment (Legislative Council) Act 1932* (No 2 of 1933).<sup>89</sup>

Soon after the referendum was held and before the reconstitution bill and the bill providing for the elections to the Council received assent, Mr Piddington, a barrister and associate of Lang, and four Labor members of the Council sought an injunction in the Supreme Court on 19 May 1933 to restrain the bills being submitted to the Governor for assent. The main argument in the Supreme Court

---

81 *LC Minutes* (13/9/1932) 20; *LC Debates* (14/9/1932) 158.

82 *LC Minutes* (21/9/1932) 37.

83 *LC Minutes* (28/9/1932) 48.

84 *LC Minutes* (13/12/1932) 174.

85 *LC Minutes* (16/12/1932) 205-206.

86 *LC Minutes* (15/12/1932) 190-191, 198.

87 *LC Minutes* (20/12/1932) 215.

88 *LC Minutes* (16/12/1932) 210.

89 *LC Minutes* (22/6/1933) 14.

was that the referendum was invalid as section 7A of the *Constitution Act 1902* required that a copy of the bill the subject of the referendum was to be provided to or made available to each elector. The Court rejected the argument in *Piddington v Attorney General (NSW)*, holding that ‘submission’ in section 7A means nothing more than holding a vote of the electors as to whether they assent to or disapprove of the bill.<sup>90</sup>

On 22 June 1933, Mr Concannon,<sup>91</sup> a Labour member of the Council, moved a motion to refer nine questions regarding the validity of the reconstitution bill to the Supreme Court, but the motion was defeated on division by 49 votes to 36.<sup>92</sup>

In another action Mr Doyle, a member of the Council, also sought an injunction in the Supreme Court advancing similar arguments as in *Piddington*. Doyle also challenged the validity of the machinery elections bill alleging that the bill should have been submitted to a referendum in accordance with section 7A.<sup>93</sup> The Supreme Court dismissed the action<sup>94</sup> and Doyle was also unsuccessful in an appeal to the Privy Council.<sup>95</sup>

The *Constitution Amendment (Legislative Council) Act 1932* (No 2 of 1933) inserted sections 5A to 5C into the *Constitution Act 1902*. Still in force today, section 5A, together with section 5B, finally entrenched the principles previously held to be convention since 1861 with regard to the supremacy of the lower House over money bills. In relation to all other bills, section 5B provides for certain procedures to be followed in order to resolve disputes between the Council and the Assembly. The provisions of sections 5A and 5B are discussed in greater detail in Chapter 12 (The Legislative Process).

Following a series of four elections held in November and December 1933 to elect the members of the Council, the reconstituted Council of 60 members met for the first time on 24 April 1934. Its power to insist on changes to the government’s monetary policy was now denied. However, its independence remained intact. No longer could it be swamped by appointments made by the Governor on the recommendation of the Premier. Rather, it was indirectly elected by members of both Houses acting as an electoral college. In addition, the Council remained an independent body, capable of exerting its powers in separation from the Assembly and the Executive and defending its role as a House of Review. Moreover, the Council retained the power to amend or reject non-financial legislation. As a House of Review, the Council could, through mature judgment and political and social farsightedness, allow for the expressions of public opinion on non-financial legislation. It could provide an opportunity to tidy up bills which may

---

90 (1933) 33 SR (NSW) 317 at 324

91 Mr Concannon was one of the four members in *Piddington’s* action.

92 *LC Minutes* (28/6/1933) 24-25.

93 Mr Piddington KC appeared as counsel for the plaintiffs.

94 *Doyle v Attorney-General* (NSW) (1933) 33 SR (NSW) 484.

95 *Doyle v Attorney-General* (NSW) [1934] AC 511.

have been hastily drafted before passing the lower House. Its smaller membership could also allow for a more leisurely, inquiring level of debate on bills.

### **1934–1961: Labor’s further attempts to abolish the Council**

Abolition of the Council remained Labor policy after the 1933 reconstitution, despite the enactment of section 7A of the *Constitution Act 1902*. There were three further unsuccessful attempts by Labor to reform or abolish the Council during the period 1934 to 1961.

The first two attempts occurred during the period in which the McKell Labor Ministry (1941-1947) was faced with a conservative Council. The Constitution (Legislative Council Reform) Bill 1943, introduced in the Assembly, sought to reform the Council as a first step towards its abolition. Under the bill, the Council would have been directly elected, with the State divided into 30 electorates, each made up of three Assembly seats, and each returning two members. The deadlock provisions in section 5B of the *Constitution Act* were to be amended and, most importantly, it was proposed to repeal section 7A. The bill was fatally defeated in the Council when an amendment to the second reading motion that the bill be read a second time ‘this day six months’ was carried on division by 34 votes to 21, thus preventing the bill being considered again in the same session.<sup>96</sup>

The Legislative Council Abolition Bill 1946, introduced into the Council on 4 December 1946, simply sought to abolish the Council. The bill provided for abolition of the Council, if approved by the voters at a referendum, and that a second chamber should not be created in the future unless approved by the voters at a further referendum. The bill was defeated at the second reading when, with the numbers being equal at 29 ayes and 29 noes on the question that the bill be now read a second time, President Farrar, referring to the practice and precedent as set out in eminent parliamentary authorities, cast his vote with the noes ‘in order to preserve the status quo of the Legislative Council’.<sup>97</sup>

Commentators have expressed varying views as to the seriousness of the McKell Ministry’s attempts at reform and abolition of the Council in 1943 and 1946. The timing of both bills, close to the end of a session preceding an election, was awkward, although in the case of the 1946 bill, the timing may have been due to the granting of leave of absence to three members of the opposition at that time and the possibility of getting the Legislative Council Abolition Bill 1946 passed. On the other hand, it has been suggested that the existence of the conservative-dominated upper House, with which agreement could be reached on most important legislation, was useful to McKell as a means of keeping in check the expectations of more radical supporters.

---

96 *LC Minutes* (14/12/1943) 78. Under the then standing order 168 a bill ordered to be read a second time ‘this day six months’ cannot be considered again in the same session.

97 *LC Minutes* (11/12/1946) 32.

From 1948 to 1959, the balance of power in the Council shifted to the Labor Party. However, when Labor lost this balance of power in the Council in 1959 following a split in the Labor Party and the formation of the Democratic Labor Party, the Heffron Labor Ministry again sought to abolish the Council through the Constitution Amendment (Legislative Council Abolition) Bill 1959, introduced into the Assembly in November 1959. Like its 1946 predecessor, the bill again provided for the abolition of the Council and a prohibition on the establishment of a new second chamber unless approved by the voters at a referendum.

This attempt at abolition raised many significant issues in terms of parliamentary practice, law and politics. When the bill initially reached the Council on 2 December 1959, the Council immediately resolved by 33 votes to 25 to send a message to the Assembly returning the bill and declining to take the bill into consideration on the grounds that a bill affecting the constitution of the Council should have originated in Council.<sup>98</sup> Seven Labor members who had voted for the motion returning the bill to the Assembly without consideration were subsequently expelled from the Labor Party. After the necessary interval of three months, in accordance with the deadlock provisions of section 5B, the Assembly again returned the bill to the Council on 6 April 1960, and the Council again resolved on the same day, 34 votes to 24, to return the bill to the Assembly on the same grounds as before.<sup>99</sup>

In accordance with section 5B, the following day on 7 April 1960, the Assembly sent a further message to the Council requesting a free conference of managers of the two Houses. The Council sent back a message to the Assembly that, as it had neither rejected nor failed to pass the bill within the meaning of section 5B, it did not consider any situation had arisen where a free conference of managers of the two Houses was either necessary or proper, and refused the request for a free conference.<sup>100</sup> Nevertheless, on 13 April 1960, both Houses received messages from the Governor convening a joint sitting on the bill in the Council chamber on 20 April 1960. The joint sitting ultimately took place in accordance with section 5B of the *Constitution Act 1902* and lasted for nearly two hours. Only government members from the Council attended the joint sitting, the opposition refusing to participate.

On 12 May 1960, the Assembly resolved that the Constitution Amendment (Legislative Council Abolition) Bill be submitted to a referendum. Later that day, the Hon Colonel Hector Clayton, Leader of the Opposition in the Council, instituted legal proceedings in the Supreme Court seeking an injunction to prevent the referendum being held. The argument submitted by the plaintiffs was that the Council had returned the bill to the Assembly without deliberation, and had not rejected or failed to pass the bill as required by section 5B. The Full Court of the Supreme Court in *Clayton v Heffron* found for the defendants on the grounds that the words ‘rejects or fails to pass’ were intended to cover entirely the

---

98 *LC Minutes* (2/12/1959) 137-138.

99 *LC Minutes* (6/4/1960) 203-205.

100 *LC Minutes* (7/4/1960) 213-215.

situations where the Council withholds consent to a measure.<sup>101</sup> The Court also held that a free conference not being held did not render the Governor's actions in convening a joint sitting invalid and, further, that the Council's lack of participation in the process did not prevent the bill being put to a referendum. Special leave to appeal to the High Court was denied, with the Court ruling that the failure of the Council to participate in the free conference did not bring the procedure prescribed by section 5B to a halt.<sup>102</sup> Ultimately the government's handling of the constitutional requirements under section 5B was upheld.

In January 1961, Premier Robert Heffron announced that the referendum would be held on 29 April 1961. However, the conservative parties led a spirited campaign opposing abolition of the Council. The bill was defeated at the referendum with 802,512 votes in favour of abolition and 1,089,193 against. This translated to 57.6 per cent of votes against abolition of the Council.<sup>103</sup>

This was the last formal attempt to abolish the Council.

### **1978: Reconstitution and direct election of the Council**

The third major reconstitution of the Council occurred in 1978, when the Council became directly, rather than indirectly, elected.<sup>104</sup>

In April 1976 during the election campaign that led to the election of the Wran Labor Government in May 1976, Mr Wran, Leader of the Opposition in the Assembly, promised if elected to government to have a referendum to decide the number and future method of election of the Council.

In June 1977, Premier Wran introduced in the Assembly the Constitution and Parliamentary Electorates and Elections (Amendment) Bill which provided for a reduction in membership of the Council from 60 to 45 and for members to be directly elected by the people. The process of reform was itself groundbreaking, both in the way it was conducted and the outcome. Details of the reform process and compromise reached over the bill at a free conference are discussed in more detail in Appendix 2.

Briefly, when the bill was received in the Council it was referred to a select committee. When the bill was not returned to the Assembly within two months, and after the required interval of a further three months under the provision of section 5B of the *Constitution Act 1902*, the bill was reintroduced in the Assembly, and again sent to the Council. This bill was also referred by the Council to the earlier select committee. When the select committee reported, the Council rejected the bill on the second reading and returned the bill to the Assembly. The Assembly then requested a free conference of managers under section 5B. At the free

101 (1960) 77 WN (NSW) 767 at 785-786 per Evatt CJ and Sugerman J, 805-807 per Herron J.

102 (1960) 105 CLR 214 at 215-216 per the whole Court.

103 There were 49,352 informal votes recorded.

104 See Jeckeln LA, *Reform of the Legislative Council of New South Wales in The Table: The Journal of the Society of Clerks-at-the-Table in Commonwealth Parliaments*, (1979), Vol 47, pp 72-83.

conference, which extended over several days, a compromise was reached on the reconstitution of the Council and the method of election of the Council. At the request of the Council, the Assembly returned the bill to the Council where it was amended to give effect to the agreement reached at the free conference.

The amended Constitution and Parliamentary Electorates and Elections (Amendment) Bill finally passed both Houses on 8 March 1978. Three bills to give effect to complementary changes and set the date for a referendum on the reform bill passed both Houses on the same day.<sup>105</sup> The Constitution (Referendum) Bill set 17 June 1978 as the date for the holding of the referendum on the reform bill. The Constitution (Amendment) Bill repealed a requirement in section 7 of the *Constitution Act 1902* to require bills reforming the Council, when approved at a referendum, to be reserved for Her Majesty's assent and laid before both Houses of the Imperial Parliament. The Constitution (Referendums) Bill clarified the application of the *Parliamentary Electorates and Elections Act 1912* to the conduct of referendums.

In accordance with section 7A of the *Constitution Act 1902* the reform bill was submitted to voters at a referendum on 17 June 1978. The referendum achieved overwhelming support, with 2,251,336 votes in favour and 403,313 against.

Under the *Constitution and Parliamentary Electorates and Elections (Amendment) Act 1978* the Council was reduced from 60 members indirectly elected by the members of the Council and the Assembly voting simultaneously to a House of 45 members directly elected on a State-wide electorate under a system of optional preferential proportional representation, with a voter being required to vote for a minimum of 10 candidates and with 15 members retiring at each election. The quota for election to the Council was 6.25 per cent of the total formal votes. Casual vacancies in the Council were to be filled by the Governor by a person from the same party who was next on the group list of candidates at the election when the member who caused the vacancy was elected. When a vacancy could not be filled under this method a joint sitting of both Houses was to be held. The term of members remained three terms of the Assembly.

The Act also provided for the gradual replacement of those members indirectly elected before 1978. Thirty members were to retire at the first periodic Council election due later in 1978 and 14 at both the second and third periodic Council elections, due in 1981 and 1984 respectively. The retiring members were replaced with 15 directly elected members at each election. Thus it was not until 1984 that the Council finally became fully reconstituted as a House of 45 members directly elected by the people.

Schedule 4 to the 1978 reform Act also provided rules for the election of the President of the Council.<sup>106</sup>

---

<sup>105</sup> *LC Minutes* (8/3/1978) 891-893.

<sup>106</sup> Clause 11 provided that the President be elected in the same manner as the President of the Senate until standing orders of the Council otherwise provided. It was not until new standing orders were adopted in 2004 that rules were so provided for the election of the President.

### 1978 onwards: Electoral and membership reform

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

In 1981, the three-year term of the Assembly was increased to four years, consequentially increasing the term of Council members from nine years to 12 years.<sup>107</sup>

In 1987, a system of 'group voting ticket' or 'above the line' voting was introduced similar to that used in the Australian Senate. Under this system, a voter could vote for individual candidates below the line. Alternatively, a voter could indicate a preference for a group by voting above the line and the voter's preferences were distributed in accordance with a 'group voting ticket' lodged by the party with the Electoral Commissioner.<sup>108</sup> The system of 'group voting ticket' was abolished in 1999.

Further changes in 1990 provided for the registration of political parties; groups were allowed to lodge three group voting tickets for the Council, instead of one or two; and party names were added to ballot papers for the Council.<sup>109</sup>

In February 1991 the conservative Greiner Ministry introduced the Constitution (Legislative Council) Amendment Bill 1991 in the Assembly. The bill proposed a reduction in the number of members of the Council from 45 to 42, and also a reduction in their term of office from 12 years to eight years, being two terms of the Assembly. The bill also provided for 21 members to be elected at each periodic Council election, thus reducing the quota of votes a candidate required for election to the Council from 6.25 per cent to 4.55 per cent. The method of filling casual vacancies was also to be changed from a candidate 'next in the group' to bring the system into line with the method used in the Senate. A casual vacancy was to be filled at a joint sitting of both Houses by a person of the same political party as the original member. It was also proposed that the system of voting be altered to require a voter to vote for a minimum of 15 candidates instead of 10 as required previously. The bill passed the Council without amendment.<sup>110</sup> Since the reconstitution involved a reduction in members, the last three members elected to the House in 1988 were to lose their seats on the reconstitution of the House.

As required by section 7A of the *Constitution Act 1902*, the *Constitution (Referendum) Act 1991* provided for the Constitution (Legislative Council) Amendment Bill 1991 to be submitted to a referendum on the date of the next general election. Mrs Bignold, one of the members who was to lose her seat under the reconstitution, challenged the validity of the Act in the Supreme Court for naming the date of the

---

107 *Constitution (Legislative Assembly) Amendment Act 1981*

108 The ticket voting system, modelled on the system operating in the Australian Senate, was first used at the periodic Council election held in 1988.

109 *Constitution and Parliamentary Electorates and Elections (Amendment) Act 1990*, Sch 1 (6), (13) and (14).

110 *LC Minutes (20-21/3/1991)* 95-98.

next general election as ‘the day for the taking of the poll’ rather than appointing a particular day.<sup>111</sup> In dismissing the application Kirkby J concluded that the naming of the day for the next general election was a valid appointment under section 7A(3) even if the exercise of the power is by reference to the acts of others.<sup>112</sup>

The bill was approved at the referendum held with the general election on 25 May 1991, with 1,864,529 voters in favour and 1,364,863 against.

In April 1991 the Greiner Ministry also introduced the Constitution (Legislative Council) Further Amendment Bill 1991 in the Council. The bill provided for the office of President to be vacated and a new President elected when the Council first met after each periodic Council election. Previously the President continued in office until removed or the office holder ceased to be a member, such as when the member’s term expired. The bill also required the President to be elected in the same manner as the President of the Senate until standing orders were made by the Council. The quorum for meetings of the Council was also to be changed from 12 to eight members, exclusive of the President or other person presiding. The bill also sought to alter the voting rights of the President and Chair of Committees by providing for a deliberative vote only and not a casting vote, similar to the Senate. Consideration of the bill was interrupted by the prorogation of the House. When the bill was reintroduced in August 1991 the deliberative voting proposal was omitted by an opposition amendment in committee.<sup>113</sup> The Assembly agreed to the amended bill without further amendment in December 1991.<sup>114</sup>

Following the May 1991 general election, and the formation of a minority government, on 31 October 1991, Premier Greiner and three non-aligned independents in the Assembly signed a memorandum of understanding, commonly known as the Charter of Reform, which amongst other things included an undertaking to provide for fixed-term parliaments.<sup>115</sup> Accordingly, in October 1991 the Greiner Ministry introduced in the Assembly two bills to provide for a fixed four-year term of Parliament: the Constitution (Fixed Term Parliaments) Special Provisions Bill and the Constitution (Fixed Term Parliaments) Amendment Bill. The first bill provided that the next general election would be held on 25 March 1995 and that the Assembly could only be dissolved sooner on the following grounds: if a motion of no confidence in the government was passed; a supply or appropriation bill was rejected or failed to pass the Assembly; or no government which has the confidence of the Assembly is formed within eight days. The bill itself also contained entrenchment provisions to ensure that it could not be repealed or

---

111 *Bignold v Dickson* (1991) 23 NSWLR 683.

112 *Ibid* at 698. Special leave to appeal to the High Court was refused.

113 *LC Minutes* (25/9/1991) 149, *LC Debates* (25/9/1991) 1730-1731. An amendment to alter the quorum to 14 was defeated on the casting vote of the chair, *LC Debates* (25/9/1991) 1728-1729.

114 *LC Minutes* (3/12/1991) 308.

115 *LA Debates* (31/10/1991) 4004-4038 contains a copy of the Memorandum of Understanding.

amended except by a referendum. It also provided that a referendum on the second bill was to be held at the next general election. The second bill provided for the entrenchment in the *Constitution Act 1902* of fixed four-year terms with future elections to be held on the fourth Saturday in March each four years. It was required to be submitted to a referendum under section 7B of the *Constitution Act*.

Both bills were referred to a joint select committee and the committee reported to both Houses in December 1991 supporting fixed-term parliaments and suggesting some minor amendments to the bills.<sup>116</sup>

The first bill passed the Council in December 1991.<sup>117</sup> The second bill was subsequently reintroduced in the following session and passed by the Assembly in November 1992.<sup>118</sup> The bill passed the Council in the next session in May 1993.<sup>119</sup> The bill was overwhelmingly approved at the referendum held with the general election on 25 March 1995, with 2,449,796 votes in favour and only 795,706 against.<sup>120</sup>

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

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

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

---

116 *LC Minutes* (3/12/1991) 296.

117 *LC Minutes* (11/12/1991) 374.

118 *LC Minutes* (19/11/1992) 443.

119 *LC Minutes* (21/3/1993) 179.

120 It became the *Constitution (Fixed Term Parliaments) Amendment Act 1993* No 1 of 1995.

proposed imposing more stringent requirements for registration of parties, together with an increase in the amount of the registration fee.<sup>121</sup>

While the Egan proposals never came to fruition, further changes were introduced to the Council election system by the Carr Ministry in November 1999 through the *Parliamentary Electorates and Elections Amendment Act 1999*. These changes included the abolition of group voting tickets, which had enabled parties to control the distribution of the preferences of electors voting 'above the line'; the introduction of provisions permitting voters to record more than one preference for parties or groups 'above the line'; and stricter requirements for the registration of political parties, including setting a minimum number of members for registration, a substantial application fee for registration, and the requirement for a party to be registered for 12 months before an election.<sup>122</sup>

### THE ROLE OF THE COUNCIL TODAY

The past 150 years has seen a continuous struggle to define the composition and powers of the Council within the New South Wales system of government. From 1856 to 1861, the Council was a House in transition with members appointed by the Governor for a five-year interregnum period; from 1861 to 1933 the members of the Council were appointed by the Governor for life on the advice of the Executive Council; from 1934 to 1978 the Council was indirectly elected by members of the Council and Assembly voting simultaneously in their own Houses; since 1978 the Council has been directly elected by the people, initially for terms of 12 years and since 1991 for terms of eight years. Over the same period, the Council has undergone change from a chamber with powers equal to those of the Assembly, except that the Council lacked the right to initiate money bills, to a chamber which can no longer block supply, and which operates under deadlock provisions in the Constitution concerning bills other than appropriation bills.

The perceived role of the Council has also changed. The early Council of 1856 to 1861 was a conservative House of Review, which actively sought to intervene in, and in some cases block, the legislative agenda of the proponents of colonial liberalism and free trade in the Assembly. The Council that emerged from the 1861 reconstitution was purged of some of its most extreme conservative elements and was more willing to offer support to the Assembly in reviewing and fine tuning legislation. With the growth in political parties in the late 1800s and early 1900s, the Council entered an era of conflict and often obstruction, first with the free trader Parkes and Reid Ministries, and later with Labor administrations, notably those of Premier Lang. Labor's conflict with the Council culminated in the late 1920s and early 1930s when successive administrations sought to control an

---

121 The Hon Michael Egan, 'Egan announces proposal to reform NSW Upper House', Media Release, 2 June 1999.

122 *LC Minutes* (10/11/1999) 199. Minor amendments were made to the bill in the Council, *LC Debates* (10/11/1999) 2559-2569.

increasingly party-dominated House. Further Labor attempts to abolish the Council were resisted. It was not until 1978 that the Council became directly elected.

From an ideological perspective, the Council spent most of the 20th century condemned by the left, regarded as an anathema to the sovereignty of the elected government in the Assembly and a bastion of conservatism, to be abolished when opportunity provided. However, with the Wran Government's reforms to the electoral system of the Council in 1978, the attitude of the Labor Party to the Council has softened. Indeed, today, some elements of the left champion the role of upper Houses in enhancing democracy. From a conservative perspective, the Council has always fulfilled a role as a chamber of independent second thought and, for much of its history, a protector of conservative values. Seldom has any conservative government had to deal with a Council hostile to its legislative program.<sup>123</sup>

Today, the Legislative Council has emerged from its tumultuous history with a membership distinct from the Assembly, but nevertheless with relatively equal powers and, critically, the legitimacy to use those powers. Under this model, the executive government's domination of the Assembly is balanced against a Council which holds the government to account for its actions and omissions.

The role of the Council today includes three clear functions: to represent the people, to scrutinise executive government as a 'House of Review' and to legislate.

### **To represent the people**

The Council provides an alternative and complementary system of representation to that of the Assembly, enhancing the democratic quality of the Parliament. Under the change made in 1991 to the number of members elected to the Council at each periodic Council election, the quota required for election to the Council is approximately 4.55 per cent of the total votes cast State-wide. This means that representatives of a number of minor parties and independents can be elected to the Council to represent their constituents in a way that would not be likely in the Assembly.

In addition, the filling of only one-half of the Council seats at each periodic election ensures that the Council reflects the views of the electorate at different stages, not just at the date of the last election. The longer term of Council members (eight years) compared to Assembly members (four years) allows for the development of expertise in parliamentary processes and public affairs, and for members to bring a longer term perspective to bear on matters before the House. The State-wide electorate also relieves Council members to some extent of the burden associated with individual geographical constituencies, giving them more opportunity for participation in the work of the House.

The electoral system for the Council is discussed in further detail in Chapter 4 (Elections).

---

123 Clune and Griffith, above n 26, pp 693-697.

### **To scrutinise executive government as a ‘House of Review’**

The Council acts as a ‘House of Review’ by both scrutinising the actions of the executive government and by holding it to account. Although the government is made in the lower House, under the system of responsible government in New South Wales, the government is nevertheless accountable to the Council, as was observed by the High Court in *Egan v Willis*.<sup>124</sup>

Indeed, the reality of responsible government in New South Wales is that the executive has come to dominate the lower House through the mechanism of strict party control. This is a feature of the Westminster system of governance, under which government is formed by convention in the lower House of Parliament where the government of the day generally holds an absolute majority. As a result, the Legislative Council in New South Wales has a crucial role in super-intending the activities of the government.

It is notable that since 1988 the government of the day has lacked control of the Council in terms of having an absolute majority of members of the House, a situation that many suggest has seen a revival in the activism and effectiveness of the Council in its traditional role as a House of Review. Lack of government control of the House has coincided with an increased level of Council scrutiny of executive government action.

An important element of this scrutiny function is the examination of financial measures and spending proposals developed by the executive government, including money bills. While section 5A of the *Constitution Act 1902* provides that a bill for the appropriation of money for ‘the ordinary annual services of government’ cannot ultimately be blocked by the Council’s failure to pass it in a form acceptable to the Assembly, the Council nevertheless has a role in overseeing the expenditure proposals of the executive. In particular, this function is carried out through the annual budget estimates process.

Other important elements of this function are the direct questioning of ministers in the Council and orders for the production of government papers to expose to public scrutiny the operations of government departments and agencies. The Council has a responsibility continuously to probe and check the administration of the law by the government and public service, including insisting on ministerial accountability for the administration of government.

The scrutiny function of the Council is also carried out through the Council’s committee system. Committees comprise a selected number of members of the House, generally between six and 12, formed specifically to inquire into a specific issue or field of government administration. Committee inquiries may be established to inquire into matters of public importance, including the impact of changes in legislation and government policies on the community. Parliamentary inquiries are distinguished by the power of the Parliament and its committees to compel

---

124 (1998) 195 CLR 424.

witnesses to attend and to answer questions, and the protection of parliamentary privilege afforded to all participants in the process. This role gives rise to the concept of Parliament as the 'Grand Inquest of the Nation'.

The role of the Council in scrutinising the actions of the executive government is discussed further in Chapter 16 (Relations with the Executive), Chapter 17 (Documents), Chapter 18 (The Inquiry Power) and Chapter 19 (Committees).

### **To legislate**

The Council also has a law-making function. As noted earlier, under the *Constitution Act 1902*, the two Houses have equal powers in the making of laws, save in respect of money bills. The Council has power to amend, reject, withdraw or fail to pass any bill submitted to it by the Assembly, except an appropriation bill for ordinary annual services of government. In the event of a deadlock between the Houses, section 5B of the Act provides for certain procedures to be followed in order to resolve the deadlock.

Often, the law-making function of the Council goes hand in hand with its scrutiny function, with ministers asked to explain and justify bills put before the House.

The Council thus provides protection against a government with a disciplined majority in the Assembly from introducing extreme measures for which it does not have broad community support.

The Council may also initiate non-financial legislation. The ability of members of the Council to initiate non-financial legislation means that the Council is not confined to considering only those legislative proposals brought forward by the executive government.

In addition, the Council has a responsibility to review delegated legislation made by the executive under the authority of primary legislation, such as statutory rules, by-laws, ordinances, orders in council and various other 'instruments'. Either House of Parliament may disallow a regulation made by the executive government, and the concurrence of the other House in the vote of disallowance is not necessary.

The legislative role of the Council is discussed further in Chapter 12 (The Legislative Process), Chapter 13 (Financial Legislation), Chapter 14 (Delegated Legislation) and Chapter 15 (Committee of the Whole House).

### **CONCLUSION**

The merits of upper Houses have been debated for centuries by constitutionalists and political theorists, together with the question of the composition and electoral basis of second chambers. As John Stuart Mill wrote in 1888:

[T]he question of the two chambers has occupied a greater amount of the attention of thinkers than many questions of ten times its importance, and has been regarded as a sort of touchstone which distinguishes the partisans of limited from those of uncontrolled democracy.<sup>125</sup>

Those who dismiss the need for a second chamber may readily agree with Abbé Sieyès, constitutional drafter in Revolutionary France, who maintained: 'If a second chamber dissents from the first, it is mischievous; if it agrees, it is superfluous'. However, those who uphold the value of a second chamber point to the danger of having supreme legislative power vested in one House. As *Odgers' Australian Senate Practice* notes, all free systems of government need checks and balances against any excessive concentration of power.<sup>126</sup> Similarly, John Stuart Mill, in support of bicameralism, warned of the:

[E]vil effect produced upon the mind of any holder of power, whether an individual or an assembly, by the consciousness of having only themselves to consult ... A majority in a single assembly ... easily becomes despotic and over-weaning, ... [and thus] ... makes it desirable that there should be two Chambers; that neither of them may be exposed to the corrupting influences of undivided power.<sup>127</sup>

The Council often comes under criticism for, in effect, fulfilling its functions as a House of Review. In particular, governments often claim a mandate when elected, and may object if they encounter difficulty in securing a majority in the Council for some of their legislative proposals. This in turn may lead to claims that the membership of the Council is in some way undemocratic. Such criticisms can lead to calls for the abolition, or at least reform, of the Council.

Lack of control of the Council may be inconvenient, even a frustration, to an elected government. However, such a consideration is secondary to the greater good of responsible checks and balances exercised by a second chamber elected by universal adult suffrage and closely reflecting the diversity of opinion in the State at different times, and not just at the occasion of the last Assembly general election.<sup>128</sup>

The Legislative Council is the most important of the constitutional checks and balances on excessive concentration of power under the New South Wales Westminster system of responsible government. The fact that neither of the two major sides of Australian politics has held an absolute majority in the Council since 1988 has enhanced the Council's capacity to provide effective oversight of government through legislative review, scrutiny of government spending and questioning of government ministers and officials. The Council is one place where government can, of right, be questioned and obliged to answer. The constitutional provisions for the resolution of deadlocks between the Houses have been tested and are well entrenched.

---

125 Mill JS, *Considerations on Representative Government*, Longman Green, London, 1888, p 97.

126 Evans H (ed), *Odgers' Australian Senate Practice*, 11th edn, Department of the Senate, Canberra, 2004, p 11.

127 Mill, above n 125, pp 97-98.

128 *Odgers*, 11th edn, p 11.