

At Cross-purposes?

Governments and the Crossbench in the
NSW Legislative Council, 1988-2011

– David Clune



The Legislative Council in session in 1999 with a record 13 crossbenchers

part four

Part Four of the Legislative Council's
History Project



President's foreword

This publication is very timely, coming so soon after an election that has seen the crossbench in the NSW Legislative Council expand to 11, its largest size in several parliamentary terms. No government has had a majority in the Council since 1988 and all have had to work with a crossbench of varying size and composition.

Whenever governments are faced with 'hung' parliaments or upper houses with non-government majorities there is much concern with the role of the crossbench. How are governments to implement their electoral mandate while accommodating the interests of minor parties and independents? Do minor parties and independents have disproportionate influence on political outcomes? Can crossbench members use their positions to improve legislation and hold governments to account, or are their interests too diverse for effective collaboration?

The fourth in the series of Legislative Council History Monographs attempts to provide some insights into these questions during two distinct terms of government: the Coalition Government from 1988 to 1995 and the Labor Government from 1995 to 2011. In this time, the crossbench grew from five in 1988 to eight after the 2007 election, peaking at 13 in 1999. It is based on interviews conducted as part of the Council's oral history project.

We read about the development of the Legislative Council as a house of review, the art of negotiation, and the impact on legislation. Parliamentary Historian, Dr David Clune, brings the story to life through the words of party leaders, leaders of the government (including Michael Egan, John Hannaford, John Della Bosca and Tony Kelly), and members of the crossbench from Fred Nile and Lis Kirkby onwards, as well as other key players.

I commend this fascinating and insightful monograph to all those who wish to understand the role of the crossbench and the techniques of effective negotiation, as well as all those interested in understanding the Legislative Council today. Once again, history usefully illuminates the present.

In conclusion, I would particularly like to thank each of those members who gave so generously of their time to contribute candidly and insightfully to this important project.

John Ajaka
President

Preface and Acknowledgements

This publication is based on interviews conducted as part of the Legislative Council's Oral History Project* by Mr David Blunt, the Clerk of the Parliaments, and Dr David Clune, Consultant Historian to the Project:

- Hon John Hannaford, 16 July 2013
- Hon Jack Hallam, 8 December 2015
- Hon Michael Egan, 9 February 2016
- Hon Dr Elisabeth Kirkby, 11 February 2016
- Hon Ron Dyer, 5 July 2016
- Hon John Jobling, 7 July 2016
- Hon Jenny Gardiner, 12 September 2016
- Mr Tony Kelly, 17 April 2018
- Hon John Tingle, 23 April 2018
- Hon Ian Cohen, 7 May 2018
- Hon John Ryan, 15 June 2018
- Hon Robert Webster, 16 July 2018
- Hon Patricia Forsythe, 20 July 2018
- Hon Dr Helen Sham-Ho, 31 July 2018
- Ms Sylvia Hale, 28 August 2018
- Hon Richard Jones, 12 September 2018
- Hon John Della Bosca, 12 November 2018
- Hon Duncan Gay, 10 December 2018
- Rev Hon Fred Nile MLC, 26 April 2019.

The theme of this monograph is the rise of the crossbench to the balance of power in the Legislative Council after 1988 and how it affected the role and performance of the upper house. The period chosen, 1988-2011, represents

* For more detail about the project see D Blunt and A Stedman, 'The NSW Legislative Council's oral history project', *Australasian Parliamentary Review*, vol 31 no 1, Autumn/Winter 2016.

complete periods of government by the Coalition (1988-95) and Labor (1995-2011). It is also that covered by the interviews. Building the monograph around these interviews hopefully conveys a sense of the events and dynamics of the period through the eyes of the participants.

The transcripts of all interviews conducted as part of the Oral History Project are available on the NSW Parliament's website: <https://www.parliament.nsw.gov.au/lc/roleandhistory/Pages/Legislative-Council-Oral-History-Project.aspx>

The original Hansard transcripts have been edited to eliminate extraneous material and repetition and to enhance clarity and readability. All quotes, unless otherwise acknowledged, are from this source. Sincere thanks go once again to the Hansard staff for their professionalism, support and interest in the project.

Full details of election results and the composition of the Council during this time can be found at: <https://www.parliament.nsw.gov.au/lc/pages/statistics-of-the-legislative-council.aspx>

Les Jeckeln, Greig Tillotson and Andrew Tink kindly read the manuscript in draft. The responsibility for errors and omissions remains my own. Natasha Carr of Studio Rouge has, once again, produced a fine publication. The photos of the interviewees were taken by Principal Council Officer Sam Griffith.

My sincere thanks go to the Deputy Clerk of the Legislative Council, Steven Reynolds, and Senior Council Officer, Kate Cadell, who have been a constant source of advice and support. Above all, I would like to acknowledge the companionship and contribution of the Clerk of the Parliaments, David Blunt. Without his commitment to the Council and its history this project would not have been possible.

David Clune
August 2019



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Part One: Events

1988 – 1995

From 1934 – 78, the Legislative Council was indirectly elected by members of both houses. Neville Wran, Labor Premier from 1976-86, was determined to reform a system he attacked as undemocratic and anachronistic. Few disagreed. After much negotiation and compromise, the Opposition agreed to a reconstitution of the Council, which was overwhelmingly approved at a referendum in June 1978. The new system provided for a house of 45 members directly elected on a State-wide basis by proportional representation, with one-third retiring at each general election. The quota for election was set at 6.25%, which opened the way for the election of minor party candidates.¹

The first popular election for the Council in September 1978 began the transition and after 1984 all MLCs were directly elected. Labor won control of the upper house at the initial election and retained it until its defeat in March 1988.

The Liberal-National Party Coalition Government of Nick Greiner had a solid majority in the Legislative Assembly but in the upper house the crossbench held the balance of power, setting a precedent that has persisted until the present. Labor dropped from 24 to 21 of the 45 MLCs and the Coalition increased by one to 19 (12 Liberal, 7 National). Reverend Fred Nile's Call to Australia Party (CTA, Christian Democrats from September 1997) had three MLCs and the Australian Democrats two.

The first crossbenchers were elected at the 1981 election, Fred Nile and Democrat Lis Kirkby. In 1984, former Liberal lower house Member Jim Cameron was elected as a CTA MLC. When he was forced to resign owing to ill-health, he was replaced by Marie Bignold in December 1984. Nile's wife Elaine joined them at the 1988 election, and Democrat Richard Jones joined Kirkby.

Bignold fell out with the Niles in 1988 and became an Independent briefly before her term expired in 1991. The Niles usually voted with the Government but it struggled to get Democrat support and Bignold was unpredictable. As well as the

1 See D Clune, *Connecting with the People: the 1978 reconstitution of the Legislative Council*, Legislative Council of NSW, 2017.



Fred Nile

Niles, the Government needed at least one other crossbench vote to win divisions. The result was that it suffered significant defeats in the Council from 1988-91.

In search of a more amenable upper house, Greiner reformed the Council. The size was cut to 42, with half the MLCs up for re-election at each general election. A consequence of these changes was that the quota required for election was lowered to 4.55%, thus increasing the likelihood of crossbench representation. Greiner's proposals were passed at a referendum held concurrently with the May 1991 election. The size of the house was reduced immediately and the new electoral system came into operation in 1995.²

After the 1991 election, Kirkby and Jones and the Niles made up the crossbench. The Coalition had 20 MLCs (13 Liberal, 7 National) and Labor 18. This made life easier for the Government as it needed only the support of the Niles to win divisions. The Coalition's crossbench troubles moved to the lower house, as it had to rely on the support of unaligned Independents John Hatton,

2 For a more detailed account of developments in this period see D Clune and G Griffith, *Decision and Deliberation: the Parliament of NSW, 1856-2003*, Federation Press, 2006.

Peter Macdonald and Clover Moore to stay in office. Ironically, the Government was sometimes able to use its power in the Council to defeat bills it could not stop in the Assembly.

Lis Kirkby found the task of being one of the first crossbenchers demanding:

I was there by myself under the old system when you were given an office and a desk and an amanuensis. The amanuensis system, as it was then called, was a very strange one. These poor women took down shorthand notes of what you might want to say and then handed you back what they had typed up. You had no personal staff. It was extremely difficult to keep abreast of the legislation. There were members of my party who had very strong views about various things and would bring both their professional expertise and their ideas to me, but they could not help me to implement them. Les Jeckeln, who was the Clerk when I was first elected, gave me useful advice about the house, but I had no personal staff to offer policy advice or assistance. So in order to get your ideas into some logical cohesion you really had to depend on your party and whatever assistance you could get from people with authoritative knowledge. I remember



Lis Kirkby

once saying to Michael Kirby: “If I am going to do this job then I think I had better get a law degree”. He said: “Oh, no, for heaven’s sake, don’t do that. You do not need a law degree—it will only make things more complicated; you need a degree of common sense”. When the upper house was fully elected, members were entitled to staff and resources and you got stronger support, but before that it was not very easy to make reasoned comments on any piece of legislation. So one just hoped one was doing the best one could, but it was a difficult period.

Fred Nile did not fare as well as Kirkby:

Neville Wran was very angry or disturbed when, after all the debate and the second upper house election, up popped Elisabeth Kirkby and me. He was not happy with that at all. I do not know what he said to Elisabeth or what he discussed with her. He may have thought she was perhaps acceptable to him, whereas I was not. He sent me a message saying he was very unhappy that I had been elected and that I would have no support from him. He said: “To start off with, I will not let you have an office. There is also a question about where you will sit in the chamber”. He was almost trying to force me out of parliament even though I had been elected with an overwhelming vote. He was quite serious about it.

When Nile asked about accommodation he was rebuffed:

They said that the Premier had said there was no office for me; all the offices had been allocated. James Cameron was the former Speaker and I became a friend of his. I said I would like to have a copy of the plan of the upper house. I assumed there was one showing all the offices and so on. He said he would get a copy for me. I found one of the Labor members, who had a position in the party, had been allocated two offices. He had his member’s office and another office to carry out his duties, which were more related to the party. I came back to the parliament and said that I had found there was a spare office and I told them the room number. So I bluffed Neville Wran into giving in and to shifting out the Labor member

so that I could have the office. That is how I got an office—after third world war style combat!

Nile said of his relations with Kirkby:

We were a bit at odds because the Australian Democrats were, in my view, a permissive and trendy party. She was not so black and white at the very beginning, but it became clear that she was happy about change on a lot of the moral issues, like legalising marijuana and so on. I strongly opposed that. But we became good friends and worked together. I think we even sometimes sat together. There was no hatred or rejection on my part of her and her party. We obviously had to work together on issues that were coming up in parliament where we could. We would have a joint position on them, which was possible on quite a few things. When it was dealing with the conduct or organisation of parliament, we had very similar views.

When the crossbench gained the balance of power after Labor's defeat in 1988, the major parties could no longer afford to ignore or marginalise minor party MLCs. Richard Jones recalled the situation clearly:

When I first arrived Labor was sitting there, shell-shocked after losing office, and I said: "Come on guys, get a spine. You have got to start from scratch". I was fresh and I had not got that attitude of, "Oh my God, we have just lost government after 12 years". It would have been a hell of a shock for them being on the other side on the Opposition benches. They took a while to gather themselves together. They were just sitting there in a state of shock for quite a while. We had to be their backbone. That sounds very arrogant but they were just bewildered. I did not have any experience prior to that so I did not know how frustrating it was to sit there as a member just watching things go past and not being able to have any effect. But for me holding the balance of power was a normal thing from day one. I think I was awestruck by the whole place and how on earth had I got there. I thought it was a very exciting time, of course. There was much more toing and froing. I just thought the whole place

became alive somehow. It is a wonderful chamber, really.

Kirkby was instrumental in making some significant changes to Government legislation:

A major achievement was the Industrial Relations Bill. We made some 300 amendments. The Minister, John Fahey, came and sat in the Legislative Council, and I believe that had never happened before, and debated all these amendments. He accepted some of them but obviously not all, because the Government had its own agenda. It was determined to break what it considered to be the excessive power of the unions. I think that ameliorating that legislation was one of my biggest personal successes. Also during the Greiner era there was the issue of changing teacher promotion and conditions which the Minister for Education, Terry Metherell, could not get through the upper house. I opposed it, which led to the Premier asking me to go over into his office and discuss the matter with him personally—I think initially to see whether he could make me change my mind. That was a very interesting interview and he was extremely courteous. I went over there with some trepidation because I believed I was probably going to be leant on. But it was not like that at all. He just discussed my views in a courteous manner and accepted them. When I was leaving he made a half-apology to me and said: “I am sorry; I should have talked to you earlier”. I was totally gobsmacked by that. It was one of the errors, I would say, of his administration that in the long run did not actually do them very much good.³

Jack Hallam went from being Leader of the Government to Leader of the Opposition in 1988, a position he held until 1991:

I still had the numbers with some crossbench support. So I was in a unique position and I was conscious of not abusing that. There was a new government in power and there were plenty of areas where we opposed and thought it through rather than playing politics. That was the period

³ The Industrial Relations Bill and the Teaching Services (Amendment) Bill were both subsequently withdrawn by the Government.

of Greiner's rise and he was quite popular, he was a formidable Premier. We had come out of office after ten years and there was a degree of tiredness. As the Leader of the Opposition in the Legislative Council, it was my attitude, and accepted by Opposition Leader Bob Carr, not to be generally obstructive. I remember one occasion though when we did jack up. In office, we introduced a bill to levy land taxes which provided the Aboriginal Land Councils with \$900 million. The new government wanted to amend that, to abolish it. I put a lot of work into my speech to justify our negative vote; we did not just use the numbers. A lot of work was put into stating our position.

The Government was finding its way in the new situation of crossbench control. John Hannaford became a Liberal MLC in 1984 and a Minister in 1990. He was Leader of the Government 1992 – 95 and Leader of the Opposition 1995 – 99:

I think there was community awareness amongst organisations—interest groups—that if you had lost the debate with government then you may be able to influence the debate in the upper house. We had to focus on how we governed. We had to put in processes to negotiate with the



Jack Hallam

crossbenchers. We had to put in place better communication measures between upper and lower house ministers, and we had to understand that the process could take time. I do not think the Government through to the 1991 election fully came to grips with the need to take time. It was a Government that was driven by aspirations for reform. It was focussed more on reform than the process of community involvement in governing. A consequence was that the Government effectively lost the 1991 election ... It was easier to focus on the Opposition, but not easy to understand how to deal with the crossbenchers. I do not think the Government did it very well.

Patricia Forsythe was a Liberal MLC 1991 – 2006 and on the staff of Planning and Local Government Minister David Hay from 1988 – 91. From the latter perspective she has commented:

Being on a minister's staff, I really engaged with the Legislative Council. I particularly say that because our portfolio had some quite controversial legislation in the period from 1988 to 1991 and we often seemed to be at the centre of controversy in the upper house. I spent a lot of time talking



John Hannaford



Patricia Forsythe

to the crossbench. Call to Australia, as Fred Nile's team was known then, would usually vote with the Government but one of his MLCs, Marie Bignold, had broken with him and became what I would call an unguided member and would choose to do her own thing. Then there were the Democrats. In the case of Elisabeth Kirkby, particularly, she always seemed to have the best staff, and her analysis of bills was first rate. You needed to talk to each of these members; you could not assume if you talked to one you had their party colleagues on the one side. In terms of effectiveness, from 1988 to 1991 the Council had been very effective, probably too effective as a house of review in the eyes of the Government, but we clawed back some numbers after the 1991 election. After 1991, legislation was usually able to be passed with the support of the Niles. In those days it was genuinely doing what I believed upper houses were meant to do in the sense of review.

Robert Webster was the National Party MP for Goulburn from 1984-91 then an MLC from 1991 – 95. He was a Minister from 1989 – 95 and Deputy Leader of the Government in the Council 1991 – 95. He has said of the 1991 – 95 Council:

Fred Nile was a very pragmatic Christian. I think he respected the fact that the government of the day had been elected and, therefore, unless it was part of their mandate that went totally against his Christian beliefs, he basically believed that he should support the government of the day—which is what I believe. I have to say, I had no trouble with the Niles. I always got on quite well with Lis Kirkby. She had things that she was interested in; she had quite good staff; her speeches were generally reasonable and well thought through. Richard Jones was a different character. He was quite an amiable guy to get along with, but he had some very unusual views. I suppose, in the modern era he probably would have been in the Greens rather than in the Democrats. Lis was more in the Don Chipp style.

The 1995 election saw the beginning of a wild ride for the Legislative Council with consequences that neither Wran nor Greiner could have envisaged.

1995 – 2011

Labor under Bob Carr won the March 1995 election. In the upper house, the Government had 17 MLCs and the Coalition 18 (12 Liberal, 6 National). Democrats Kirkby and Jones and the Niles were joined on the crossbench by the first Green, Ian Cohen, Shooter John Tingle, and Alan Corbett of the Better Future for Our Children Party. To complicate the picture, Jones in March 1996 became an Independent, as did Labor's Franca Arena in November 1997, and Liberal Helen Sham-Ho in June 1998. All, in various ways, had fallen out with their Parties. Lis Kirkby retired in June 1998 and was replaced by Democrat Arthur Chesterfield-Evans.

At the 1999 election, Carr was easily re-elected. In the Council, voters had to contend with a ballot paper so large it was popularly known as 'the tablecloth'. There were 264 candidates compared to 99 in the previous election. In 1987, Labor introduced a ticket system which permitted electors to vote 'above the line' for a party. When a voter ticked the party box, preferences were distributed according to the ticket lodged by the party with the Electoral Commission. Changes in 1991 allowed the name of political parties to be printed on the ballot paper. The great majority of voters used this system, ceding control of their preferences to parties. In 1995, Alan Corbett spent virtually nothing, did no campaigning and had little behind him except an appealing party name. He was elected with a miniscule primary vote (1.3%) because of preference flows. Under the Council electoral system, a preference on the 200th count has the same value as a primary vote. In 1999, others decided to try the same approach. Micro parties with appealing names mushroomed. Some were fronts created to manipulate preferences.

Election analyst Antony Green described it as a 'giant Lotto syndicate' with the prize being membership of the Council. Of the 'tablecloth' ballot paper Green said: 'If there'd been one more minor party entered before the close of registration it couldn't have been printed on a single sheet of paper. It was too big for envelopes, they had to construct a wider window to fit them through ballot boxes, bigger planes were required to fly papers to Broken Hill, bigger

forklifts were enlisted to move them around the warehouse'.⁴

The 1999 election resulted in a crossbench of 13, the same strength as the Coalition. Another Green, Lee Rhiannon, was elected, and Democrat Arthur Chesterfield-Evans was re-elected, as was Fred Nile. Pauline Hanson's One Nation elected an MLC, David Oldfield, as did the Party formed to oppose it, Unity, Peter Wong. Two micro party candidates won seats with low primary votes and high preference flows: Malcolm Jones of the Outdoor Recreation Party and Peter Breen of Reform the Legal System.⁵ The Party composition of the upper house was: ALP 16, Coalition 13 (9 Liberal, 4 National), Greens 2, Christian Democrats 2, Shooters 1, Democrats 1, One Nation 1, Unity 1, Better Future for Our Children 1, Outdoor Recreation 1, Reform the Legal System 1, Independents 2 (Jones and Sham-Ho). The Government needed six crossbench votes to win divisions.

There was general agreement that the tablecloth ballot paper and the manipulation of preferences should not happen again. The Government in 1999, with Opposition and crossbench support, made significant changes to the method of voting and the registration requirements for parties. Instead of allowing parties to control the process, voters could allocate preferences 'above the line' by numbering in turn the different groups listed. To be listed 'above the line', a party had to nominate a minimum of 15 candidates. If electors ticked only one box, their vote went to that group then exhausted. The registration requirements for parties were tightened. The minimum number of members required to register was increased from 200 to 750. New parties must be registered for 12 months before nominating or endorsing candidates.

Labor was re-elected under Carr in 2003, and in 2007 under his successor Morris Iemma. In the 2003 – 07 Parliament, Labor had 18 MLCs, the Coalition 13 (9 Liberal, 4 National), and there were 11 crossbenchers. After the 2007 election, the numbers were 19 ALP, 15 Coalition (10 Liberal, 5 National),

⁴ *Weekend Australian Magazine*, 15 March 2019.

⁵ Jones resigned in September 2003 after the Independent Commission Against Corruption found he had misused his allowances. He was replaced by Jon Jenkins. Breen joined the ALP in May 2006 but was forced to resign by the Party two months later after making controversial statements about a convicted murderer. He then formed the Human Rights Party.

and 8 crossbenchers. However, the composition of the crossbench changed. The terms of the Independents and micro party MLCs had expired. Thanks to the electoral system changes, the crossbench consisted of minor party blocs: 2 Christian Democrats (Gordon Moyes replaced Elaine Nile but left the Party in 2009), 4 Greens (Cohen, Rhiannon, Sylvia Hale elected in 2003, and John Kaye elected in 2007), 2 Shooters (Robert Brown, who replaced Tingle in 2006, and Roy Smith elected in 2007).⁶

Ian Cohen described the Council in his early years as an MLC as a working parliament:

The balance of power shifted to the small groups and away from the lower house to having that fulcrum solely in the upper house for those first four years. As a result of that, we were very active; we were constantly lobbied by community groups and we got very significant access to ministers' offices. By and large in those early days there was a sense of being the little brothers and sisters of the big parties and we were keenly sought out. I think we had a

⁶ For a more detailed account of developments in this period see D Clune and G Griffith, *Decision and Deliberation: the Parliament of NSW, 1856-2003*, Federation Press, 2006.



significant effect on getting ecologically sustainable development inserted as amendments in many pieces of legislation. I think those types of things were small wins that were able to be used so things were right in the bureaucracy from that time onwards.

John Della Bosca was an MLC 1999 – 2010, a senior minister and Leader of the Government 2005 – 09. As a former General Secretary of the NSW ALP (1990 – 99) he has much experience of electoral matters:

I have often toyed with the idea that maybe there should be a threshold, so that if you do not achieve that number of primary votes you cannot be elected to the Legislative Council. But then that in a way negates the system ... There have been a few things that I once thought were good ideas which I now think in practice have ended up being bad ideas. So I will have a bob each way and say that I can understand the argument but would be very reluctant to support any legislation that I have heard about yet because it seems to me to be unfair not to the candidate but to the voter ... I was involved in the how do we stop the tablecloth ballot paper problem and the manipulation of preferences. I think those reforms have been basically successful. I actually do have a concern about the party dictating the preferences. Theoretically people will follow the ALP ticket or the Liberal Party ticket or the Greens ticket or whatever. The idea that you vote above the line and that vote automatically follows the ticket of the political party you voted for I now have a reservation about.

Jenny Gardiner was NSW General Secretary of the National Party 1984-91 and an MLC 1991 – 2015. On the Greiner changes to the Council, she commented:

I think Nick Greiner, for a start, was one of the most politically naive Premiers in our history. He just did not seem to understand or think through the electoral and political consequences of some of the purist ideas that he had. But apart from the period when we had the micro parties, which was an abuse of the system via preference harvesting, once that was sorted out, the fact that you have the opportunity for smaller

parties to have a voice in the house is not a bad thing for accountability. Some may not agree, but I think a diversity of voices in a parliament is a good thing. It keeps the society more cohesive.

Duncan Gay was a Nationals MLC 1988-2017, and Leader of the Government 2014-17. He has mixed feelings about the rise of the crossbench to power:

I cannot say it has excited me because they represent peripheral interests and issues. It has given prominence to issues that probably would not normally get prominence, although within them there have been some outstanding legislators. You would not find anyone much better than Lis Kirkby, who was just amazing.

Patricia Forsythe gives this assessment of the 1999 – 2003 Council:

We have a system that was designed around an opposition and a government and tolerated the crossbench but, particularly when we reached 13, I am sure the system was not designed for that, and there were unintended consequences or amendments to much of the legislation. For the Government, the solution was to try to negotiate with each of



them to meet some of their agenda but I do not think that was what parliament was ever meant to be about. People being elected on less than 2% of the popular vote was to me far from a desirable outcome. The single issue person once elected is never going to be able to be there for more than that issue and that is not what government is about. I found that outcome less than desirable and disappointing. On the other hand, legitimate minor parties—the Greens, the Fred Nile group, and the Democrats when they were a force—had a role and a place.

John Ryan was a Liberal MLC 1991 to 2007, Deputy Liberal Leader in the Council 2003-2007, and before that an adviser to the Leader of the Government in the Council, Ted Pickering. He describes the micro party period as ‘flicking the switch to complete idiocy’:

My concern about the micro parties was that the electors had no idea what they were getting. It was a lottery as to which of them got elected in the first place. There was no scrutiny of them. Once elected they knew that they had a guaranteed term for eight years and there was no party structure to provide oversight of their decisions. And then there was the



John Ryan



Michael Egan

deliberate manipulation of the preferences. That is the concern I have with micro parties, that there is no public scrutiny. In those days, you also got a life pension once you had served seven years. So, basically they were paid for life by being elected to the upper house for a single term. I think that was the point at which it was problematic. Somehow or other, we had workable government during the time when the micro parties were about ... It was more luck than design that NSW's first experience with micro parties did not fare too badly.

Ryan believes that with minor parties with a broader electoral base people 'know what they are getting when they vote for them. If for example, the Greens agree to something they are held accountable to it at the next election as a party. It can cost them votes if they do not look after their constituents. They clearly have a constituency they have to deal with. Similarly for Fred Nile, he has a constituency'.

Michael Egan was a lower house MP from 1978 – 84, an MLC from 1986, and Treasurer and Leader of the Government in the Council 1995-2005. He found the crossbench, with some exceptions, 'pretty good' to work with:

At one stage when I was leader I had 13 crossbenchers to deal with. I had to get six of those 13 to support me on anything that we wanted through if it was controversial. And, generally speaking, I could either get the six that were, so to speak, on the left to vote for us or the six or seven on the right. So you played them off like that.

Della Bosca elaborates:

During my time as Mike Egan's deputy and my own time as Leader I think the idea of having a lot of different crossbenchers actually made it easier, even though in theory they were a block on the Government's program. Generally speaking, because there were so many of them, it was easier to negotiate proposals about amendments or not amending the legislation as proposed. You would think that the more crossbenchers there were, the more difficult it would be, but I think the more

crossbenchers there are, in some ways it makes it easier ... There was a group of crossbenchers who had what I would describe as “left leaning tendencies”, including the Greens, and we knew that there were certain things that were hot buttons for them, both positive and negative.

Then, of course, there were Fred Nile and his supporters and a few other crossbenchers who we knew, again, had certain hot button issues both for and against. We could negotiate on that basis for a start. We knew if we had something that was sensitive, for example, a pro-environment initiative, we could get the Greens to support us. We knew that we would get Allan Corbett and Richard Jones to support it; Fred Nile might or might not; and John Tingle probably would not if he thought it was intruding on people’s rights.

One of the hardest parts of Della Bosca’s job was dealing with his ministerial colleagues:

A lot of them had very little understanding of how the Council works. At 11 o’clock at night, after myself or other members of the Government had been sitting through hours and hours of arguments about amendments in the Committee stage and all that toing and froing, I would get an abusive phone call from the minister’s office downstairs saying: “Why hasn’t my legislation passed yet?” I would say: “Well, if we are lucky, it will be passed sometime around 4 o’clock in the morning; if not come back next month. It depends on John Tingle”.

Tony Kelly was an MLC 1987 – 88 and 1997 – 2011, and Leader of the House 2003 – 11:

For the smooth running of the house you had to negotiate a lot with the other side. A lot of the legislation—I think it would have to be 85 to 90%—would go through with the support of the Coalition. So a lot of the time you would negotiate with the Leader of the Opposition and quite often the crossbenchers to get legislation through in an orderly fashion. Sometimes you would pick and choose as to who would support

you to get legislation through. It might be the Shooters, it might be Fred Nile or it might be the Greens, depending on the legislation. It seemed to change every time. The crossbenchers to a large degree—in particular, Fred Nile and the Shooters—would support the government of the day unless it was an issue that impinged on their particular values. I think that probably those two groups supported the Government more than anybody else. There is a mistaken view out there that the Greens would support the Labor Party the vast majority of times. They supported us the least in my view.

The final, crisis-prone years of Labor were a more turbulent period, with the crossbench becoming increasingly restive. The most dramatic clash came on the eve of the March 2011 election. The Government legislated to sell the State's electricity retailers and the output of its electricity generators. In December 2010, General Purpose Standing Committee Number One, chaired by Fred Nile, decided to investigate the transactions. The Government prorogued Parliament, producing advice from the Crown Solicitor that the Committee could no longer operate after prorogation. The Legislative Council, however, argued that the Committee could function until the dissolution of the Assembly. The inquiry went ahead, setting a major precedent.⁷ The Committee's report, released on 23 February 2011, said that the Government had done everything in its power to frustrate its work. It was also strongly critical of the Government's actions in regard to the electricity sale.

Apart from this late flare-up, conflict in the Council was generally moderate from 1995 to 2011. Although it had to negotiate and compromise, Labor had few major difficulties in implementing its agenda despite lack of control of the upper house.

7 See T McMichael, 'Prorogation and Principle: the Gentrader inquiry, government accountability and the shutdown of parliament' *Australasian Parliamentary Review*, vol 27 no 1, 2012.

Part Two: Issues

House of review?

Under Labor control from 1978 – 88, the Legislative Council was largely ineffective in carrying out its role as a house of review. Ron Dyer was an MLC 1979 – 2003, a Minister in the Carr Government 1995 – 99, and Deputy Leader of the Government in the Legislative Council 1995 – 99. He is frank about the upper house's performance when the Government had the numbers:

It was perfectly possible and it sometimes happened that legislation, even contentious legislation, could pass through both houses within two days or, in the case of perceived urgency, even one day. I have never regarded that as appropriate. I think the purpose of the upper house is to interpose some delay for the purpose of careful consideration of a measure and reflection on all of the merits of what that legislation is seeking to do. I was a supporter of the Wran Government, but looked at from the perspective of the upper house and its role it was less than ideal to have a majority in both houses. It might be unexpected to hear me say that, but from that point of view, I think the house improved later on when the government of whatever colour had to consider other points of view and had to consider reports emanating from parliamentary committees.

John Della Bosca agrees that the Council's scrutiny role revived when the crossbench gained the balance of power:

I think the reality is that the more sunlight there is on legislation, the better it gets, that is the general rule. There are probably some frustrations for ministers wanting to achieve particular outcomes that are not shared by enough crossbenchers to get them through in the exact form they wanted, but I think the general idea that the executive can be second-guessed by a parliament is a good idea. It was the original idea behind Westminster government. But parties have become very disciplined and very mechanical in their processes and when you apply that to government, you end up with a risk that legislation will just keep on churning through. A

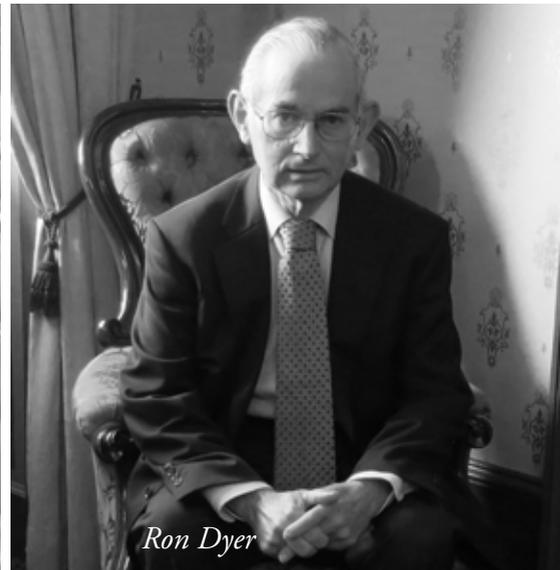
crossbench that is prepared to ask questions is going to be an additional filter on government over and above what party rooms can do.

Tony Kelly also sees the rise of the crossbenches as an overall plus:

If you always have the government in control of the house it ends up like Queensland basically—unicameral—whereas the crossbench having the balance of power makes governments a little more cautious about what they do, a little more accommodating, and it does allow for different groups to be represented. Whether you support the Greens, the Shooters or whatever, they are groups out there in the community. It gives them a voice that may get lost in a bigger party room. There obviously has to be a fine line somewhere as to how many crossbenchers there are because the government has got to be able to govern the State and you have to have smooth running of administration. I do not think it is necessarily a bad thing to have some crossbenchers.

Richard Jones believes that the crossbench had a positive effect on government:

I remember Ted Pickering once swung around in his seat and said,

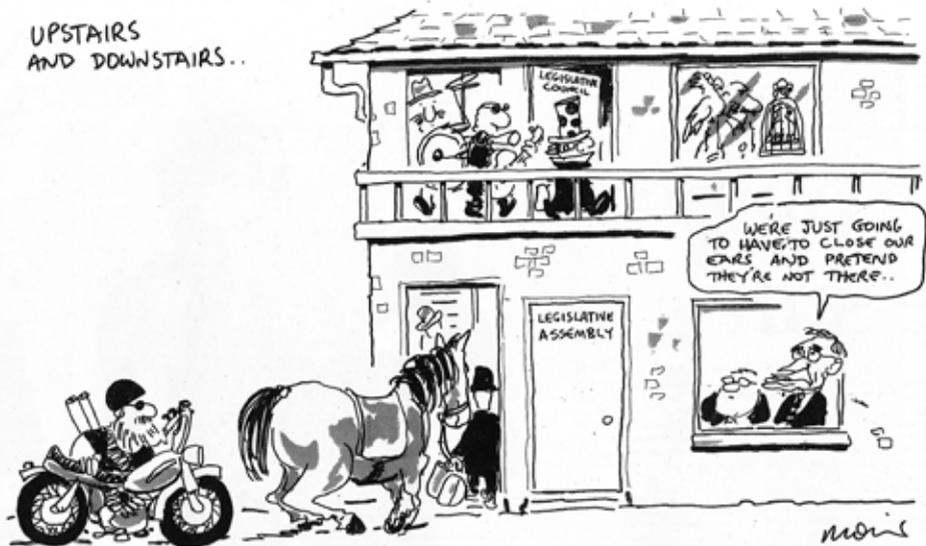


“You save us from ourselves, Richard”. Most people, at least our mob, were basically reasonable people. They were not trying to work against government. I never tried to work against government and nor did Lis Kirkby. When we had the balance of power—almost on our own for a while—we never worked against government. We were not there to try to get our own agenda up and try to overturn the government. We facilitated and smoothed government.

John Tingle is of the view that lack of major party dominance allows the Council to perform its review role more effectively:

I think it must, because it makes the government and the opposition, to a large extent, answerable in the house. If they are only answerable to each other—and in the good old days it was a gentleman’s club that met at four o’clock and adjourned for dinner at six—there was no point in it being there. But it is meant to be a proper house of review—and in that I think it is a lot more successful than the Senate has ever been in Canberra, having covered both as a journalist, admittedly a long time ago. If a government is unchecked, it can do anything it likes and it would be

Moir’s view of the 1999-2003 Legislative Council. SMH 28 April 1999. Courtesy of Alan Moir.



impossible for corruption not to occur. If the sort of corruption we saw in this house particularly, with members now in gaol, can occur under the level of checking and the challenging that occurs, if you do not have any, it would just be ramped up. Human nature is like that.

Robert Webster has some reservations about whether better scrutiny of the executive has resulted from crossbenchers having the balance of power:

I am sure it has on occasion, but I think it depends on the quality of the people and their motivation. If they are trying to get better legislation or better scrutiny, fine, but if they are just pushing a particular barrow I'm not so keen. In general, I suppose my answer is yes, but I am sure there are some very ugly examples of where they have misused their power for their own ends. Equally, there are probably some good examples of where they have used it beneficially. In principle, I am in favour of a house of review, but I do think there should be some over-riding principles, particularly where a government has gone to the people and obtained a mandate.



Robert Webster



Richard Jones

Scrutiny versus the mandate

A basic issue when crossbenchers have the balance of power is the balance between a government's mandate to govern and the house's right to scrutinise and amend. As one of the first crossbenchers, Fred Nile had to confront this issue at the outset:

Never having been in politics, I had to develop a political philosophy. One of the philosophies I developed was that I would respect the government's mandate. That was something I put in my heart: Fred, you are not here to be obstructionist; you are here to help the government to govern better and you should keep that as your prime purpose in being here. That is how I then developed my whole strategy to work with both Labor governments and Liberal governments. To my surprise, I had a great deal of success. If I worked with them and supported their published mandate, they in turn would support some of my proposals. It was strange, but I had more cooperation with my legislative proposals from the Labor Party and Labor governments than I did from the Coalition. I have never said that publicly before, but that was the practical reality.

Nile has consistently espoused the view that the crossbench should be constructive not destructive:

If we have that attitude, as we have had over the years, we can get concessions from the government. We have done that with the committee system itself, which the government was not enthusiastic about expanding because they knew it would lead to more scrutiny and more work. So governments have reluctantly agreed to those initiatives, which have given more power to the members and to the Council. I think it has proved of value in having an upper house that is cooperative and working with the government rather than working against the government, which I think is what has happened in Canberra. It is almost as if people have come in there with their own agenda to stop the government at every point; so you are not going to make much progress. In the Legislative Council I think over the years we have developed that spirit of genuine cooperation and

investigation while also still being critical of governments and speaking strongly in opposition to their policies.

Ian Cohen believes that an active crossbench does not necessarily cut across the mandate:

It is just keeping the bastards nervous, which they deserve. If you keep them up on that then you get reasonable governance. But you have to have a hand on their shoulder all along the line, from elections right through the legislative process, to their continuation in this incredibly privileged position of being a member of parliament, a member of the government and the executive and having so much power. It is a matter of “watchdogging” them all the way. I think the Greens have done a pretty good job of that overall.

Richard Jones comments:

We recognised the mandate, but some things were just beyond the pale. Some things we would never support and we told them so. We said: “Whatever you try, we will never, never support you on that”. Look at how much legislation was actually blocked. It was 1 or 2% or something of that order. It was not much, you see. It was a reasonable process so the outcomes were reasonable. Chaos did not ensue as a result of them negotiating to pass their legislation.

John Della Bosca believes the right balance between scrutiny and the mandate was achieved in the Council during his time in office:

There were days when we were pretty frustrated with the crossbench, of course, and probably there were many days that they were very frustrated with us, but I think on the whole it achieved exactly that outcome. I do not think there was any legislation you just could not get through because of the crossbench. There might have been punches pulled way back at the Cabinet level where a politically savvy Premier like Carr would say: “It’s pointless to even proceed with this because we will not be able to get it through the crossbench so why go through the agony?” There might have

been a few cases like that: “Let’s not even bother”. But whenever we really needed to we managed to get legislation through. I do not think we ever brought anything in that did not eventually get passed, though sometimes in a highly modified form.

John Ryan says of the right to review and the right to govern:

Generally speaking, members of the upper house have had a responsible approach. So I think the balance is pretty good. It varies from time to time. Recently there has been a vigorous discussion about confidential Cabinet documents. I was not in any way surprised in the eventual result. The upper house’s power to demand documents is pretty strong. Personally, I think that it is a good thing that it has those strong powers.⁸ Whilst I would rarely support the upper house blocking legislation, I have always thought it was a great thing that the upper house could reveal the consequences of government decisions and get information to the public. I think that is a crucial part of the democratic process.

Patricia Forsythe is more critical:

When the government lacked a working majority in the house it became more political and the role of the crossbench at different times has made the politics of it even starker. I am a great believer in the review process and at different times we certainly challenged the power of governments. There were times when the government found money, found resources to solve problems, or changed tack or recognised that there were things that could have been done differently and accepted amendments or shifted policy ... But I think those with the numbers have frequently used them just for more political ends rather than true scrutiny—base politics rather than proper scrutiny of government ... Certainly as the numbers on the crossbench have grown I think it has become very easy just to round-up numbers from the crossbench to—it is more than scrutiny—embarrass the government rather than get a genuinely improved outcome from the government.

⁸ On the Council’s power to call for documents see D Clune, *The Legislative Council and Responsible Government: Egan v Willis and Egan v Chadwick*, Legislative Council of NSW, History Monograph No 3, 2017.

Representing a minor party and representing the people

Minor party MLCs have a responsibility to represent the interests of their party and those who elected them. They also have a responsibility to act in the interest of all of the people of NSW. John Tingle is adamant there was no conflict between these roles:

It is amazing how they fitted together. Because the Legislative Council is elected by the whole State, I had to cover the State in my electioneering ... One of the interesting things was that my first legislative achievement had nothing to do with gun laws. It was put upon me by a family from Moree in western NSW whose son had been murdered on the farm by a trusted member of the family, a brought-in member. I moved successfully an amendment that gave the families of homicide victims the right at the time of passing of sentence to hand a statement up to the judge to be read as a family impact statement. To me, that is actually the best thing I ever did. And that had nothing to do with guns. It was purely because people had approached me and because I sometimes had that balance of power factor on the crossbench that I was able to push it through. The final answer is that even if I had not thought I had to represent as many people as I could in the State I would not have had any choice. I was continually lobbied about things that had nothing to do with what I was there for and I continually got reproached for things I had done which people who had nothing to do with guns disapproved of.

Richard Jones believes the key to reconciling the two responsibilities is that crossbenchers should not be rigidly ideological in their approach:

We had links to everybody. The community was represented via us. It was not just us having a brainstorm of an idea and presenting it to the government. These were all carefully thought out positions ... You need a broad cross-section of members without too much ideological baggage. The Shooters have their ideological baggage and I guess Fred Nile has in particular, but if you can get non-ideological, ordinary people in there, people who do not have a particular barrow to push, I think it is very

healthy for government. Do not forget governments are also influenced by vested interests, corporations, and they are obliged, they feel, to act in their interest. That is why good Independents can have a very powerful moderating influence, but they have to be non-ideological.

Helen Sham-Ho was a Liberal MLC 1988 – 98 and an Independent 1998 – 2003. In her opinion, crossbenchers have greater ability to represent the whole State than major party backbenchers:

I am not trying to criticise the Liberal Party but on the backbench you only had the right to vote as it was presented to you. You could discuss it, but unless you could talk down the minister you could not change a lot, because you were only one voice amongst so many. In the party room you only have one voice unless you can lobby the others. As a backbench member of parliament your right is not as effective as a crossbencher. Thinking back, I actually was not a real member of parliament when I was a backbencher. I was a party member but not a real member of parliament. Sometimes, backbenchers do not even know what legislation they are actually voting for.



Helen Sham-Ho



John Della Bosca

Ian Cohen's view is that the major parties are the ones with problems when it comes to representing the whole community:

When people are voting for minor parties there can be some mistakes where the party does not act the way it said it would during the election campaign. That is not unusual in the political game. Generally speaking, people voting for parties and organisations know what they are getting. If they are voting for the Shooters, they know why, and if they are voting for the Greens, they know why. If they were voting for major political parties, there are all sorts of disappointments with regard to ability, interest, lack of motivation, and people who have just been working their way up the greasy pole of union or corporate politics. They do not really have any grounding in the general community and they are not recognisable before they are elected, when they are elected and when they finish ... Unfortunately, democracy in this society is a reflection of donations from interest groups to the major parties. It is an investment by vested interests knowing that the major parties will support them, for what is a relatively minor donation to their coffers, to be able to spread their propaganda at election time. I do not call that democracy, and I do not think that the big parties are necessarily the purveyors of democracy. The formula is that they get enough money and run a campaign, and because they have the best funding they tend to win the election. That is a pretty poor form of democracy in my book.

The art of negotiation

With the crossbench holding the balance of power, communication and negotiation between all sides was vital if the Council was to function. John Hannaford's perception is that Labor in government developed a closer relationship with the crossbenches than the Coalition:

I suspect it is a skill that is developed within the Labor Party, dealing with union negotiators and the art of negotiation. The skill of compromise underpins the life of an industrial negotiator, something that is not often within the experience of Coalition members. I think that the

Labor Party did it very, very well. It was able to govern, I think, much more effectively. I think also it had learnt from the experiences of the previous Government. As an Opposition, they had from 1988 to 1995 the opportunity of experiencing how to deal with crossbenchers who are able to undermine a government or who try to mitigate a government's agenda. Once you have had the opportunity to learn that, you can apply it when you come into government. I think that the ALP applied it quite well. It gave the crossbenches more resources to deal with that situation. The art of negotiation, I think, was more significantly applied by Labor.

John Jobling was a Liberal MLC 1984 – 2003, Government Whip 1988 – 1995 and then Opposition Whip until 2003:

Generally, most of the legislation gets passed. I suppose it is in keeping with the commonly argued 80:20 rule where 80% is pretty easy and it is the other 20% you have the disagreement about. In the latter case, it is a matter of negotiation—if you cannot get it through, you have a think about it, undertake more discussions, see what amendments you can put in and if you can come to a reasonable compromise. I have always had the



John Jobling



Tony Kelly

view, and argued it with ministers, that 80% of something is better than 100% of nothing. Just to be bone-headed on either side produces 100% of nothing.

The crossbench met regularly with government and opposition. Fred Nile was instrumental in setting up this channel of communication:

I wanted to know what they were doing, and not just get an email or briefing note. I insisted on a few things, which I discussed with the crossbench, as crossbench rules, and they were enthusiastically in favour. The first was to have meetings with the government and the Premier, whether it was a Labor Premier or a Liberal Premier, to talk with them face to face about what they wanted to achieve and what I wanted to achieve so we had a complete understanding of each other. Secondly, I wanted to have total openness with the government in briefing me and the other crossbench members on what their plans were. We finished up by having regular meetings with the Premier and an adviser—because it tended to be a confidential meeting—and meetings with the government’s advisers on Tuesday every week. We would meet in a committee room upstairs. The government would have its list of bills and the actual advisers who drafted the bills would attend to explain what the bills were seeking to achieve, their purposes and so on, and answer questions and listen to our—not just me, but any of the crossbenchers who were there—concerns with aspects of the bills and what we would like to do to change it. If we were proposing an amendment we could ask whether the amendment would work and if they had any objections. We were talking to the public servants who were actually drafting the legislation and they were fairly—as far as I could tell—upfront with us. They would be direct. They would say: “You are going too far. I am sure the government would never accept that”.

Ian Cohen recalls a more personal level of communication:

Bob Carr put the “bookends”, as we called them – Ian Macdonald from the Left and Eddie Obeid from the Right – onto our case. The bad thing

was that they were always badgering us for results, but we had quite a bit of power as Greens in that situation. They would take our issues to Bob Carr and get us meetings with him. We had a lot of access and we were pretty effective. We did not quite understand the potential of Macdonald and Obeid but we could see that they were really ruthless and they wanted portfolios. They had this job of somehow controlling or keeping us happy. On the other side of the coin, Bob Carr was not unhappy to keep us happy, because he was basically a conservationist and had a lot of good connections with the Total Environment Centre.

John Tingle has less positive memories of government meetings with the crossbench:

The meetings were not always very successful because sometimes, without naming names, there were certain types of crossbenchers who tried to take over those meetings to say to the minister or to the advisers we were talking to: “Look, if you don’t do this, we will do so-and-so”. One of us had to usually pipe up and say: “Hang on, you are not speaking for me”. I sometimes found that meetings of crossbenchers *en masse* with ministers ended up in disaster. There were some members who really thought that they could speak for the lot of us and threaten the government.

Tingle had more success with informal communication:

Bob Carr arranged for the person with whom I dealt with most to be Jason Clare, who was one of his people and who now has been a Minister in a Federal Government. Jason and I got on like a house on fire. He quite often would say to me: “Well, Bob is not going to wear this”. We would see if we could work out a way for him to wear it; or “Bob really wants you to do this”, and I would say: “No, I’m not prepared to do it in its present form”. We had these informal discussions. He would just stick his head in my office door and we would talk. To me, that is how it is supposed to be. It is supposed to be negotiation, not confrontation.

Michael Egan says of crossbench meetings:

I was not part of each briefing on each bill but we certainly arranged that. I used to meet with them every week, only for about ten minutes, just to take them through what we would be doing that week, seeing if they had any issues of concern. Those meetings used to go well. I would occasionally brief them personally on a bill but generally that would be delegated to either the particular ministers or sometime even the departmental advisers.

Tony Kelly gives a perceptive summation of the benefits of consultations with the crossbench:

We are not Jesus Christ; we cannot think of everything. Quite often, because of their background, they will say, “But what happens if such and such happens?” and you say, “I did not think of that”. Quite often there are some genuine amendments that need to be put through. That, I think, is an advantage of the crossbenchers because they have a different view. As Leader of the Government, every Tuesday that the Parliament sat I used to meet and go through what I thought the legislation would be for the week and make sure they had our amendments and discuss other amendments that they might be putting up. We would circulate them and have a discussion on them and sometimes that meant that we would have to have some more one-on-one discussions and bring the government departments into them.

The need for negotiation raises the issue of deal-making and when does it become ‘log rolling’ or ‘horse trading’. Sylvia Hale, a Greens MLC from 2003-10, has a forthright view:

I do not approve of horse trading. When you get individuals or groups that do not have a coherent policy, they can flip-flop when it suits their agenda. But, if you have a serious commitment to policies and to the public interest, the opportunity and desire to horse trade is far more limited. I have seen incidences where a member will agree to one thing because it is opportune at that moment to do so but then subsequently

renege on the undertaking. That outcome is always possible when a small group is essentially unaccountable to a party.

Richard Jones has a different perspective:

The Greens were purer than pure. They have this stand and it is based on ideology. I was not ideological, you see; I did not have this fix on ideology. The Democrats were very fluid so I was able to negotiate in my own portfolios quite easily. But the Greens did not negotiate very much, presumably because they did not feel they had the flexibility to do it. I would do whatever I could to amend legislation to make it better.

Jones gives this example of his success in negotiating deals:

Ian Macdonald came to me in the chamber: “Mate, we want your vote on this”. I said: “I don’t know about that, Ian, I really don’t know”. “Mate, we’ve got to get it through. What do you want?” I said: “Oh, leave it with me”. I went up to my room and I phoned the environment movement and got on to Keith Muir of the Colong Foundation. I said I thought we had an opportunity, let’s try and get something for the



Sylvia Hale

environment. Keith Muir said: “Oh, yeah, well, we want \$5 million for the Dunphy Wilderness Fund, it has run out of money. We want to buy 48,000 hectares of old growth forest to link up the national parks so they have a wildlife corridor”. I said: “Okay.” I went back to the chamber and Ian said: “Well, what mate?” I said: “I want \$5 million for the Dunphy Wilderness Fund”. He said: “Mate, you gotta be joking. The Premier won’t want that”. I said: “Well, go and ask him”. So he went up and asked the Premier. Of course, Bob Carr said yes. He came back astonished about half an hour later: “The Premier wants to see you”. I said: “Okay”. I followed him up to the eighth floor to his office and Bob was walking around rubbing his hands: “Something I want for a change”. Because I knew that he had set up the Dunphy Wilderness Fund. Milo Dunphy was a personal friend of his and I knew that Michael Egan had the money in his slush fund and that he could fund it. So he said: “Call in Michael Egan”. I said: “Michael, I know you can do it because you have got a flush slush fund, you can do this stuff”. We went to Governor Macquarie Tower a few days later and we had the official re-funding of the Dunphy Wilderness Fund. I was standing there next to Lee Rhiannon and I think Ian Cohen was there and Bob Carr came striding in and said: “The cheque’s in the mail, Richard”.

John Ryan provides a good insight into how the process of negotiation worked:

Members of the government would consider themselves minders of members of the crossbench; the people who had become friendly with them ... There were people who had, if you like, a sunshine campaign as they had to make sure each crossbencher was being listened to and make sure they were comfortable. The other thing is that as the crossbench had a significant responsibility, particularly when there were only two or three of them, the government loaded them up with additional staff simply because to be able to comment on every single bill in the house was unrealistic otherwise ... They could not have possibly discharged that task without some assistance and they were frequently given it. Then, I

think, usually deals were done. I noticed that deals seemed to come to fruition towards the end of the year. It was a bit like every crossbencher got something. It was frequently something trivial.

The quality of legislation

The number of successful amendments to bills in the Council increased exponentially after 1988. When Labor controlled the upper house from 1978 – 88, just one non-government amendment was successful. By contrast, in the Carr Government's first term, 956 non-government amendments were passed. In the following Parliament, 29% of bills (157 of 536) were amended:

Of the 1,323 amendments that were carried, 591 (44.7%) were proposed by the Government, 139 (10.5%) by the Opposition and the remaining 593 (44.8%) by the crossbenchers. With only one representative, the Democrats proposed 85 (6.4%) successful amendments, the Christian Democrats 19 (1.4%). The Greens, on the other hand, were in the ascendant, proposing 138 (10.4%) successful amendments, a performance that was outstripped by Richard Jones who proposed 262 (19.8%) of the amendments that were carried.⁹

Did this lead to better legislation? John Della Bosca's view is that, on the whole, it did:

Some people would not see it that way and some people were frustrated at the time. But I think it did come out better. There were probably a few technical pieces of legislation that ended up as a bit of a dog's breakfast. During my very early time here, for example, there was the reform to the defamation laws. Many people would argue that legislation was two steps forward and three steps backwards. That was the result of a heap of crazy amendments and compromises.

John Ryan sees pluses and minuses in the increased amendment of bills:

It cannot be said to be a bad thing for the government when the

⁹ For more detail see D Clune and G Griffith, *Decision and Deliberation: the Parliament of NSW, 1856-2003*, Federation Press, 2006, pp516, 639, 681.

house goes into Committee, and examines the bill in detail. Basically, amendments are the means by which that detailed consideration occurs. Of course, it doesn't really happen in the chamber; it really happens outside when members negotiate with each other. It certainly brings a fresh appreciation. I know that there are some members—particularly when they are in government—who think: “It's all terribly irritating to have to consider every jot and tittle of the bill”. Personally I think it is a good thing. The only thing that ever worries me about amendments is that the incredible detail focusses attention on relatively minor pieces of legislation as dictated by the frustrations of a fairly distinctive constituency of the crossbench, such as shooters or strong environmentalists. For example, the Greens usually do not extend their scrutiny to things that do not concern them outside issues of the environment or industrial relations. Fred Nile was unlikely to scrutinise bills to that sort of degree if they did not necessarily involve the issues of conscience that he is traditionally concerned about or industrial relations, which seems to be another area of concern for him. The problem is that it is a pretty discrete level of concentration. It happens according to the frustrations of the people on the crossbench. However, the discussion in the chamber probably does embolden members of major parties to take amendments into their party rooms for consideration.

The crossbench played an important role in improving bills, according to Ian Cohen:

We kept working and pushing the boundaries of what the government wanted to do in legislation. I have to say that they were often very lazy. They would come out with legislation that had a fancy name but not much detail. I remember, between us, Richard Jones and I would run about 60 amendments each on certain things and bore the pants off everyone else in the house. But we thought: “At least it is getting on the record. That's a start. If nothing else, it is on the record. People can see it in the future”. Not to say: “We told you so”, but so they could pick up

those issues at a later date ... By and large government legislation coming through was as general as they could make it. They would leave a hell of a lot out as a result. That is where we sought to amend. I think that the actions of the crossbench very often put meat on the bones of the legislation. The government was often not happy but if they wanted our support they had to go with it.

Robert Webster described the lengthy Committee stage debates as ‘time-consuming and sleep-depriving. I believe in the Committee stage of a bill. I am sure you can achieve sensible and improved amendments. But, again, it depends on people’s motivation. Are they there to improve the bill or are they trying to make a point?’

The committee system

Two upper house Standing Committees were established by the Greiner Government, Social Issues and State Development. Labor under Carr added a third, Law and Justice. Without the influence of the crossbench, the Council committee system may well have remained static at this level. Instead, five General Purpose Standing Committees were established in 1997 with crossbench and Opposition support. Unlike the existing Committees, they were not controlled by the government and had the ability to initiate their own inquiries. They also conducted budget estimates hearings.¹⁰

Ian Cohen is a strong advocate for the Council committee system:

I think the committee system is one of the most important areas of communication between members and the executive. When you are on so many different committees, first of all you are having hearings with the interested public, experts and so on, so you are able to drill down. It is a bit like what we were trying to do as minor parties with the process of amendments in the Legislative Council itself. We were constantly seeking more information. That is where committees themselves were able to do a hell of a lot more in turning up information than what was happening on

10 On the history of the Council committee system see D Clune, *Keeping the Executive Honest: the modern Legislative Council committee system*, Legislative Council of NSW, History Monograph No 1, 2013.

the floor of the house. They are especially important. They were a feature of the democratic process that was really important and often quite enlightening. You would find out really solid, detailed material through committees ... They are an incredibly important part of the work of Parliament. Some of the most valuable work I feel I contributed in a small way to was working through the committees.

Richard Jones believes that 'the freer committees are, in the sense that the more they are able to be free acting agents, as the General Purpose Committees were, the better. It is an irritant for the government, of course; they do not really want accountability. The more we can make government accountable via these committees the better'.

Jones was the chair of General Purpose Standing Committee Number Five from 1997 – 2003:

I thought it was wonderful that we could self-refer inquiries. The Rural Fire Services inquiry we had was a really good one. We examined the whole thing and we talked to so many different people and really got the views of people on the ground. We went all over the countryside and really got to know their concerns. I was congratulated afterwards for the report. It was not my report; I did not write the report, we all know that. The report covered so much about what they were concerned about and they were so happy with it. That enabled us then to put all their concerns and make major reforms. Some of the inquiries had no effect, like the M5 tunnel. We tried and tried, but the Roads and Traffic Authority was so obdurate. They were like a kingdom of their own, a law unto themselves. I tried again and again on various issues with them, but they were just like: "No, we just do what we want to do. Basically, you can just get lost" ... The Standing Committee on State Development inquiry into coastal development back in 1989, I think was pretty good. I think it made government and councils aware of the need to conserve natural spaces and to work within the catchment capacity rather than allowing untrammelled development. The oil spill one was another good one: the

realisation that you do not put in chemicals and try to disrupt the oil; you actually allow it to break down naturally. That was an eye opener.

Sylvia Hale believes that committees serve a useful purpose in educating MLCs:

They are good because you have the occasion to travel collectively and it is an opportunity for people from different parties to get to know each other on a more friendly basis. Committees also oblige people who have firm positions to come to terms with specific issues and justify their stances in a way they can otherwise ignore, unlike voting on legislation, where the whips direct their members how to vote.

In Hale's view, lack of public service impartiality is an impediment to the effective functioning of the committee system:

I am acutely aware of the shortcomings if the public service itself feels that it cannot provide frank and fearless advice. I have noticed this in relation to motions for the tabling of papers. I called for papers in connection with the so-called training mine that led to John Maitland and Ian Macdonald going to gaol. It subsequently turned out that the department had relevant papers but had not made them available. Similarly, one of the first committees that I was on concerned the Sydney Harbour Foreshore Authority and the leases at Circular Quay. As we now know, Eddie Obeid had a particular interest in cafes there. I had been told this—I talked a lot to the people who were leaseholders at the Quay. They were saying they were really concerned about the way the Sydney Harbour Foreshore Authority was operating, but it was impossible within the context of that committee to get the truthful answers that I was genuinely hoping to get and would expect to get from an independent public service. The loss of the public service's independence has been to the significant detriment of good government.

Hale makes the point that the more politically contentious the inquiry, the less productive it is likely to be:

There were a number of committees that were investigating things that

were not particularly contentious: the spent convictions for juvenile offenders; altruistic surrogacies, though obviously Fred Nile was not too happy about that; and judge alone trials. On those sorts of things you could get a reasonable outcome because they were not front and centre of public attention. But with other things that were contentious public issues, such as the designer outlet centre at Liverpool, Badgerys Creek, Snowy Hydro, and privatisation of prisons, the committee reports were usually determined along party lines. The only thing you could do would be to write a minority report, but that had zero impact most of the time.

Helen Sham-Ho sees upper house committees as democracy in action:

It is only through parliamentary inquiries that we know what the people think because we have witnesses and we hear about issues that are relevant to the people at the time. You have different issues and parliamentary inquiries on those issues and stakeholders' views are collected. You make certain recommendations. I wish every committee was as lucky as my committees as most of their recommendations were adopted ... In 2000 I chaired the General Purpose Standing Committee Number Three inquiry about Cabramatta policing. I go to Cabramatta now and I am still recognised. Cabramatta changed its nature because of the inquiry's findings and their adoption by the Government. It has made Cabramatta vibrant and prosperous today. I was well-suited to be chair because I was a lawyer there for a couple of years. I knew the people there, I spoke the language and I knew the culture. We looked into the police problem at the time. There were a lot of drug problems as well. We cleared the drug problem up. Police resources were increased after the adoption of the report. It was a tremendous outcome. Now the Cabramatta and Fairfield areas are peaceful. That was very fruitful and I am pleased about the inquiry. It was a win-win situation. People who live and work at Cabramatta are still very grateful for our committee investigation.

While conscious of the value of the committee system, John Tingle did not regard it as a crucial part of his role as a crossbencher:

I feel that the committee system is a power that the Legislative Council ought to be exercising. The other house really cannot do it to the same extent, and should not, because a committee essentially is an exploratory committee looking at the way to do something or a review committee. It is better situated in a house of review. I think the committee system is very important but I think it can be overdone. I have seen many times when I was in Parliament that a lot of committees were set up just to delay things ... I think it is important but I do not think it is the centrepiece of administration, and it should not be ... Fred Nile likes being on committees. I do not think Elaine did very much. Alan Corbett said, after a couple of months: "I haven't got time to be on committees. I'm busy reviewing legislation". Ian Cohen only wanted to be on committees about the environment basically. For a crossbench member, a committee inquiring into something they are on about can be very useful. They can see what the others are thinking and maybe change their way of thinking, but I do not think that they should be the *sine qua non*.

Tingle sees short, *ad hoc* committee inquiries as the most effective:

I went on a couple of those, such as the inquiry into the Kariong youth detention centre. They are probably in many ways more effective than the long-running ones. You are asked to answer a question about the Kariong centre: "Has abuse been going on there?" You hold four or five hearings, you go up and look at it, come back and say to the Parliament: "Yes, there is" or "No there is not". To me that is just like a flying squad that you can put into use, but they are different from the other committees.

From his experience as a committee chair and minister, Tony Kelly believes the Council committee system makes a vital contribution:

I was involved in quite a lot of committees. A minister might have referred a matter to a committee—particularly the State Development Committee—or the house might have referred a matter to a committee. One was—I will use this as an example of members wanting to do the

best for the State—a committee on rural health. It was established by the house and chaired by Jenny Gardiner from the Nationals. Dr Brian Pezzutti, who was a Liberal, was there and I was there. We were down near Griffith. It was designed to try to improve health outcomes in country NSW, but at the same time it was an attempt to embarrass the Government. That was the way it was set up. We were down in Wagga, and somebody got up and criticised the health system of NSW and said: “We have the worst health system in the world in NSW”. Brian Pezzutti interrupted and said: “That’s just not true”. He said: “Australia has the best health system in the world, and NSW has the best health system in Australia”. It stunned me. At the break I said: “Brian, aren’t you supposed to be stirring the Government up, not helping us?” He said: “What I said is 100% true. We do have the best health system. That doesn’t mean it can’t be improved”. So there was Brian from the Opposition, but his primary focus—above the Party—was to get the best outcome for the State. That is just an example I give of how I think the upper house members work a bit differently to the other house, in that they are genuinely out there trying to do the best for the State, and of how the committee system works impartially.

Conclusion

The period of most conflict between the Government and the Council was 1988 – 91. A number of factors were behind this. The situation of crossbench control was novel and all players were inexperienced in dealing with it. Nick Greiner had a reformist zeal to push his agenda through and was intolerant of any roadblocks. The Government was not as adept as it should have been at negotiation and compromise. In the succeeding Parliament, by contrast, the Coalition needed only the support of Fred and Elaine Nile, which was usually forthcoming. Between 1988 and 1991, the Government won 39% of divisions in the Council. In the 1991 – 94 period this figure rose to 88%.¹¹

For most of the ALP Government's term from 1995 – 2011, relations in the upper house were relatively benign. In Carr's first term, the Government won 67% of divisions, and from 1999 – 2003, when the crossbench numbered 13, 77%.¹² There were, of course, periods of frustration, discord and discontent for both government and crossbench. Yet, the Council generally functioned effectively.

Labor did not have a large, controversial program to implement. The Government was adept at the art of the deal. In particular, Leader of the Government from 1995 – 2005, Michael Egan, was a skilful parliamentarian and accomplished negotiator who had the ability to accommodate most of the various interests in the house.

The crossbenchers, on the whole, acted responsibly and were prepared to negotiate to ensure stable government. There was occasional egotism, exhibitionism and extremism but it was not the norm. The Government realised that the crossbenchers sometimes had legitimate concerns that were worth listening to. All sides, by now, saw communication and 'give and take' as the customary order in the upper house. The general consensus was that a compromise outcome was better than nothing.

¹¹ D Clune and G Griffith, *Decision and Deliberation: the Parliament of NSW, 1856-2003*, Federation Press, 2006, pp580, 599.

¹² D Clune and G Griffith, *Decision and Deliberation: the Parliament of NSW, 1856-2003*, Federation Press, 2006, pp632, 679.

The 1999 electoral changes, which led to the election of minor party blocs rather than micro party candidates of dubious provenance, were a stabilising factor. It was easier for the Government to negotiate with groups with coherent agendas. Minor parties were more constrained in their behaviour as they had well-known aims and policies and could be held accountable if they did not act in accord with them. Usually, deal-making was about using a strategic position to progress a defined agenda.

In spite of its ideological diversity, the crossbench often came together to advance the rights of the house. It held the government to account by ordering the production of documents on controversial issues,¹³ strengthened the committee system, and supported other measures to increase scrutiny of the executive.

Lack of government control of the Council did not lead to confusion, disruption and disillusionment, as it has in the Senate in recent years. Governments, on the whole, were able to pass their legislation, though sometimes in a highly amended form. Often this was for the better. The Council's role as a house of review has revived. Its strengthened committee system plays a major role in ensuring accountability and allowing community input. Crossbench power had the potential to produce a dysfunctional Legislative Council. Instead, in the view of most of the participants, it led to better government.

¹³ See D Clune, *The Legislative Council and Responsible Government: Egan v Willis and Egan v Chadwick*, Legislative Council of NSW, History Monograph No 3, 2017.



Appendix: biographical details of interviewees

- **Ian Cohen:** Born 5 June 1951. MLC representing The Greens from 1995 – 2011. He was the first Green elected to the Legislative Council. Served on various committees, including the Standing Committee on State Development, Select Committee on Recreational Fishing, and General Purpose Standing Committee No. 5. Before entering parliament, Cohen organised and participated in a number of social, environmental and anti-nuclear campaigns.
- **John Della Bosca:** Born 18 July 1956. MLC representing the ALP from 1999 – 2010. He was Leader of the Government 2005 – 09. Della Bosca held a variety of ministerial positions, including Health, Industrial Relations, Ageing, Commerce, Disability Services, Finance, Education and Training. Before entering parliament, Della Bosca was General Secretary of the ALP (NSW Branch) 1990-99.
- **Ron Dyer OAM:** Born 11 April 1943. MLC representing the ALP from 1979 – 2003. Served as Minister for Community Services, Aged Services, and Public Works and Services. He was also Deputy Leader of the Government in the Legislative Council 1995 – 99 and Chair of the Standing Committee on Law and Justice 1999 – 2002. Before entering parliament, Dyer was a solicitor and a member of Minister of Justice Ron Mulock's staff.
- **Michael Egan AO:** Born 21 February 1948. MLC representing the ALP 1986 – 2005. Served in various portfolios, including Treasury, Energy, and Gaming and Racing. Held the positions of Leader of the Opposition in the Legislative Council 1991 – 1995 and Leader of the Government in the Legislative Council 1995 – 2005. Egan was also MP for Cronulla 1978 – 1984. Before entering parliament he worked as a public servant, for the Australasian Meat Industry Employees' Union, and as an adviser to Commonwealth Minister, Les Johnson.
- **Patricia Forsythe AM:** Born 1 March 1952. MLC representing the Liberal Party from 1991 – 2006. She held a variety of shadow ministries, including community services. Forsythe was Chair of the Standing Committee on State Development from 1993 – 1995. Before entering parliament, she was a high school teacher and adviser to Local Government and Planning Minister David Hay.

- **Jenny Gardiner:** Born 16 October 1950. MLC representing The Nationals from 1991 – 2015. She became Deputy Leader of the Party in the Council in 2003. Gardiner was a member of the ICAC, Privileges and Electoral Matters Committees and served on a number of General Purpose and select committee inquiries. She was Deputy President and Chair of Committees from 2011 – 2015. Before entering parliament, Gardiner was the General Secretary of the NSW Branch of the National Party from 1984 - 1991.
- **Duncan Gay:** Born 2 May 1950. MLC representing the National Party from 1988 – 2017. Gay held a variety of ministerial positions, including Roads, Ports, Freight, and the North Coast. He also served as Leader of the Government from 2014 – 2017. Gay served on the Standing Committee on Social Issues in 1988 and was Deputy President and Chair of Committees from 1991-99. Before entering Parliament, he owned a trucking company and managed his family's grazing property in Crookwell. Gay also served in the Australian Army.
- **Sylvia Hale:** Born 12 July 1942. MLC representing The Greens from 2003 – 2010. Served on various committees including the Legislation Review Committee, Select Committee on the Continued Public Ownership of Snowy Hydro Limited, General Purpose Standing Committees Nos. 2, 4, and 5, and the Standing Committee on Law and Justice. Before entering Parliament, Hale was a publisher and member of Marrickville Council.
- **Jack Hallam:** Born 10 September 1942. MLC representing the ALP 1973 – 1991. Served in various portfolios, including Agriculture, Fisheries and Decentralisation. Hallam held the positions of Leader of the Government in the Council from 1986 – 1988 and Leader of the Opposition in the Council from 1988 – 1991. Before entering parliament he was a farmer.
- **John Hannaford AM:** Born 21 January 1949. MLC representing the Liberal Party 1984 – 2000. Served in various portfolios, including Attorney-General and Health. Held the positions of Leader of the Government in the Legislative Council 1992 – 1995 and Leader of the Opposition in the Legislative Council 1995 – 1999. Hannaford was the first Chair of the Standing Committee on State Development. Before entering parliament he was a solicitor.

- **John Jobling OAM:** Born 21 April 1937. MLC representing the Liberal Party from 1984 – 2003. Jobling served as Government Whip (1988 – 1995) and Opposition Whip (1995 – 2003). He was also Chairman of the State Development Committee in 1995. Before entering parliament Jobling was a pharmacist.
- **Richard Jones:** Born 16 February 1940. MLC representing the Australian Democrats from 1988 – 1996. In 1996 he resigned from the Democrats and served as an Independent until 2003. From 1997 – 2003 Jones was Chair of General Purpose Standing Committee No. 5. Before entering parliament he worked in advertising and publishing and from the late 1960s onward was an activist for environmental, human rights and animal welfare causes.
- **Tony Kelly:** Born 25 August 1948. MLC representing the ALP from 1987– 1988 and from 1997 – 2011. Served as Deputy President and Chair of Committees from 1999 – 2003 and was Leader of the House from 2003 – 2011. Kelly held a variety of ministerial positions, including Emergency Services, Industrial Relations, Infrastructure, Justice, Juvenile Justice, Lands, Local Government, Planning, Police, Primary Industries, Regional Development and Rural Affairs. Before entering Parliament, Kelly was General Manager of Wellington Council.
- **Dr Elisabeth Kirkby OAM:** Born 26 January 1921. MLC representing the Australian Democrats from 1981 – 1998. Kirby served as the NSW Parliamentary Leader of the Democrats 1981 – 1998. She was a long-serving member of the Standing Committee on Social Issues and served on many other committees. Before entering parliament Kirkby was an actor.
- **Revd Fred Nile MLC:** Born 15 September 1934. MLC representing Call to Australia from 1981 – 1997 and since 1997 the Christian Democratic Party. He is currently the longest serving Member of the Legislative Council. Nile has served as chairman of many committees including Portfolio Committee No. 1 (from 2007 – 2018), Public Accountability Committee (2018), and the following Select Committees: Impact of Gambling (2014), Leasing of Electricity Infrastructure (2015), Partial Defence of Provocation (2013), and the Planning Process in Newcastle and the Broader Hunter Region (2014). Before entering parliament Nile served in the Australian Army and was a Congregational Minister.

- **John Ryan AM:** Born 20 September 1956. MLC representing the Liberal Party from 1991 – 2007. Ryan was Deputy Leader of the Liberal Party in the Legislative Council from 2003 – 2007. He was Chair of the Select Committee on the Proposed Duplication of North Head Sewerage Tunnel in 1997 and the Select Committee on the Increase in Prison Population in 2001. Ryan also served on the Standing Committee on Law and Justice and the Standing Committee on State Development. Before entering parliament, Ryan was a school teacher as well as a research officer for former Liberal Legislative Council Leader and Minister Ted Pickering.
- **Dr Helen Sham-Ho OAM:** Born 9 September 1943. MLC representing the Liberal Party from 1988. In 1998 Sham-Ho resigned from the Liberal Party and served the remainder of her term as an Independent. She was Chair of General Purpose Standing Committee No. 3. She was also a member of the Standing Committee on Law and Justice and General Purpose Standing Committee No. 1. Before entering parliament Sham-Ho was a social worker and solicitor.
- **John Tingle:** Born 2 November 1931. MLC from 1995 – 2006 representing the Shooters Party (now the Shooters, Fishers and Farmers), which he founded. He served on General Purpose Standing Committee No. 3 from 2003 – 2005 and the Joint Standing Committee on Road Safety from 1995 – 2006. Before entering parliament, Tingle was a journalist.
- **Robert Webster:** Born 16 September 1951. MP for Goulburn representing the National Party from 1984 – 1991 and a Nationals MLC from 1991 – 1995. Served as Deputy Leader of the Government and Leader of the National Party in the Legislative Council from 1991 – 1995. Webster held a variety of ministerial positions, including Planning and Energy, State Development and Tourism, and Housing. Before entering parliament, Webster was a grazier and a member of Crookwell Shire Council.

Legislative Council of NSW History Monographs:

D Clune, *Keeping the Executive Honest: the modern Legislative Council committee system*, Number One, 2013.

D Clune, *Connecting with the People: the 1978 reconstruction of the Legislative Council*, Number Two, 2017.

D Clune, *The Legislative Council and Responsible Government: Egan v Willis and Egan v Chadwick*, Number Three, 2017.

D Clune, *At Cross-purposes? Governments and the Crossbench in the NSW Legislative Council, 1988-2011*, Number Four, 2019.



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