

## **ARTICLES**

## 1843: The year it all began\*

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Although now not celebrated or remembered, 1843 was one of the most important years in NSW political history. It was the year in which NSW's first representative legislature came into being. The *Australian Constitutions Act (No. 1)* of 1842 provided for a Legislative Council of 36 members, 12 nominated and 24 elected.<sup>1</sup> A Legislative Council had existed in various forms since 1823 but all its members were nominees. The Governor had presided over previous Councils but in 1843 was no longer a member.<sup>2</sup> The trends, patterns and procedures established in 1843 continued for the rest of the new Council's existence.

### *The first members*

Of the 12 nominated members appointed by Governor Sir George Gipps on 17 July 1843, six were officials. Colonial Secretary Edward Deas Thomson was the head of the Government and Leader of the House. Thomson had been Leader of the House in the Third Council. He had arrived in the colony in 1829 to become Clerk to the Executive and Legislative Councils. Thomson won the respect of Governors Darling, Bourke (whose daughter he married), Gipps and FitzRoy. In 1837, he succeeded Alexander Macleay as Colonial Secretary, an office he was to hold until responsible government. Competent and industrious, Thomson had an unwavering commitment to his duty and the public good. His political views were conservative although not inflexibly so.<sup>3</sup> Next in seniority was Campbell Riddell who had been Colonial Treasurer since 1830. An exclusive, he had clashed with Bourke who had tried to remove him from the Executive Council. Riddell had 'an unenviable reputation for inefficiency'.<sup>4</sup> Lieutenant-Colonel John Gibbes had been Collector of Customs since 1834. He was a choleric man who constantly struggled with the confused state of his departmental accounts. William Lithgow was the colony's long-serving Auditor-General. He had made a number of important improvements to the colony's public finances after taking office in 1825 and had been held in high esteem by Governors Brisbane and Darling. Lithgow, however, was overwhelmed

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\* I would like to acknowledge the support of the Sesquicentenary of Responsible Government in NSW Committee. I would also like to thank Megan Clune for her assistance with research.

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by his expanding responsibilities. By 1842 his work was so far behind that he was in danger of being suspended. Major-General Sir Maurice O'Connell had been appointed commander of the military forces in the colony in 1838 after an eminent career. O'Connell had married the widowed daughter of Governor Bligh and had injudiciously associated himself with her ongoing partisanship in her father's cause.<sup>5</sup> O'Connell so incensed Gipps by voting against the Government on an important bill in December 1843 that the Governor unsuccessfully attempted to remove him from the Council. Colonial Engineer George Barney was also an official member. He was a seat warmer for Attorney-General John Hubert Plunkett, who was absent from the colony when the first appointments were made. When Plunkett returned from Europe, Barney resigned and Plunkett took his place on 7 August 1843.<sup>6</sup> A successful barrister in Ireland, he had come to NSW as Solicitor-General in 1832 and had been appointed Attorney-General four years later. Plunkett had carried out his onerous duties with aptitude and diligence. A Catholic and a liberal in politics, he was a staunch upholder of English legal and constitutional principles.<sup>7</sup> Although all the officials had experience in the previous Council, with the notable exceptions of Thomson and Plunkett it was not an impressive team. Thomson, Plunkett, Riddell and Gibbes were still in their places in 1855.

Of the six non-official nominated members, Alexander Berry, John Blaxland and Richard Jones had previously been members of the Council. All had been associated with the exclusive faction. Originally a doctor, Berry had acquired substantial landholdings in the Shoalhaven district. A 'cantankerous old Scotsman with reactionary views', he was 'the first settler in the district and for a long time lord of the whole'.<sup>8</sup> Blaxland was a large landowner who had been a noted opponent of Government policy in the old Council, particularly on financial matters. Jones was a merchant and pastoralist who was soon to vacate his seat because of bankruptcy. Of the other nominees, Thomas Icely also owned substantial acres and Edward Hamilton was an English barrister turned successful pastoralist. Both were moderate conservatives.<sup>9</sup> None of these were to add much to the Government's strength on the floor of the House. The *Sydney Morning Herald* reported of one of Berry's speeches:

... from the low tone in which the honorable member for the most part spoke, the continued laughter with which the House received his address, and the noise and disorder in the strangers' gallery, but a very small portion of what the honorable member did say was heard or understood ...<sup>10</sup>

Hastings Elwin had practised at the London Bar and had been Attorney-General of Antigua in the West Indies. He had come to NSW as Chairman of the Board of Directors of the Australian Trust Company.<sup>11</sup> Elwin's legal and business experience and debating aptitude were to prove an asset to the Government. Robert Lowe replaced Jones in November.<sup>12</sup> Lowe had arrived in the colony in 1842 and quickly established himself as an eminent barrister. His political views were basically those of a traditional British liberal although his actions were 'guided by a personal vendetta against the human race, as well as by adherence to conviction'.<sup>13</sup> Gipps had been impressed with Lowe and nominated him to the Council, hoping to use his

oratorical skills to counter the attacks of the elected members. Lowe did not disappoint the Governor in the short term but in 1844 they were to have a bitter falling out. After his break with Gipps, the able, acerbic and unpredictable Lowe was to join Wentworth and Windeyer in spearheading the opposition. Lowe resigned from the Council in November 1849 to return to England where he subsequently had an important political career, being appointed Chancellor of the Exchequer in 1868.

Twenty-four members had been returned at the first Council election in June-July 1843. The most renowned was William Charles Wentworth. By now becoming increasingly illiberal, Wentworth still retained much popularity as the man who had led the struggle for civil and constitutional rights in NSW. His most recent biographer has noted that the 'driven personality that impelled Wentworth to great things was matched by utterly obnoxious behaviour. So often his intelligence, energy and courage were offset by his intolerant, loud and self-serving ways'.<sup>14</sup> Wentworth's aggression, oratorical skill and legal and constitutional knowledge made him the undoubted leader of the opposition and the dominant figure in the Council throughout its existence. His more self-effacing brother, Major D'Arcy Wentworth, was also an elected member. Wentworth had run as a team in Sydney with William Bland, an emancipist and well-known liberal. Both had campaigned on the inadequacy of the powers granted to the new Council and been easily elected. Bland had been a surgeon in the Royal Navy until he had fatally wounded his opponent in a duel and been transported. After completing his sentence, Bland had become a successful medical practitioner in Sydney. Wentworth's chief ally was Richard Windeyer.<sup>15</sup> Like Wentworth, Windeyer practised at the Sydney Bar where he had won a considerable reputation. He was, as well, a large landowner 'with a liberal soul'.<sup>16</sup> Windeyer died in office in December 1847. Charles Cowper, who was to dominate NSW politics in the first decades after responsible government, also joined in the attacks on the Government.<sup>17</sup> A landowner with close links with the Church of England, Cowper was at this stage a moderate conservative rather than the pre-eminent liberal he was later to become. He was initially very much the tyro, his contributions in the House being unpolished and awkward.

Another important antagonist of the Government was John Dunmore Lang. He had come to Sydney in 1823 as its first Presbyterian minister. An inveterate controversialist, the combative Lang had been elected as one of the representatives for Port Phillip. He was a powerful, lively and entertaining speaker. Lang's condemnation of the 'immorality' of the emancipists had previously inclined him towards the exclusive faction. However, by the time of the first election Lang had become an advocate of self government for NSW and a staunch critic of the Colonial Office. He now regarded the landed gentry as the stooges of London.<sup>18</sup> Of the remaining members for Port Phillip, Charles Ebdon was a wealthy pastoralist, Thomas Walker was a merchant who had acquired large landholdings in the area and Alexander Thomson was a medical practitioner who had become a Port Phillip landowner. Charles Nicholson was also a doctor. A scholar and connoisseur, Nicholson had become a landed gentleman and businessman after inheriting a

fortune. He was a prominent conservative. Melbourne was represented by Henry Condell, a brewer and businessman who was its first mayor.<sup>19</sup>

The Government received little support from the elected members. A notable exception was Roger Therry who provided some much needed debating strength. He had since 1829 been Commissioner of the Court of Requests, a small debts court. Retaining the right to private practice, Therry had become one of the colony's most distinguished barristers and had acted as Attorney-General while Plunkett was overseas. A 'moderately conservative Catholic', Therry had 'favoured emancipists and was identified publicly with Bourke's liberalism'.<sup>20</sup> William Foster was also prepared to enter the fray on the Government's behalf. He had come to the colony as Solicitor-General in 1827, had been Therry's predecessor as Commissioner of the Court of Requests and had subsequently practised at the Bar.<sup>21</sup> The defeat of John Macarthur's son James had robbed the Government of a powerful ally. A leading moderate conservative, James Macarthur successfully contested the 1848 election and was a major figure in the Council for the rest of its existence.<sup>22</sup> His less talented cousin, Hannibal Hawkins Macarthur, had been elected. Alexander Macleay was another of the old exclusive faction to win a seat. Colonial Secretary from 1825 to 1837, Macleay's determined opposition to Bourke's liberal policies had led to his replacement by Thomson.<sup>23</sup>

Of the remaining elected members, William Bowman, William Bradley, John Coghill, William Lawson, Francis Lord, Terrence Aubrey Murray and William Suttor were prominent members of the landed gentry. John Panton was a successful Sydney merchant and William Dumaresq had become a large landowner after being a senior official under Governor Darling.

In sum, the Council was overwhelmingly Protestant, prosperous and conservative in its makeup and was to remain so. This was not surprising given the restricted nature of the franchise. A 'property owning electorate' had produced a 'property owning Council'.<sup>24</sup> The great majority of both elected and non-official nominee members were landed proprietors. Of the minority with commercial and professional backgrounds most had also acquired substantial landholdings.

### ***First meeting***

The new Council met for the first time on 1 August 1843. After the members present were sworn in, Thomson rose to address the House. Striking an elevated tone, he urged the new Councillors to approach every subject or measure

with a solemn and earnest determination to weigh fully and maturely the principles which should guide us in arriving at a just and right conclusion. We should as far as possible avoid all merely personal or local considerations, and apply ourselves to those great fundamental rules which are best calculated to the greatest amount of good for the community at large.

This Benthamite sentiment was followed by an orthodox conservative warning against 'over legislation':

The enterprise, the intelligence, and ingenuity of man, will be found at all times the best and surest guides in directing the channels in which his industry and capital should be employed. It has been justly observed that legislative interference in matters where it is not imperatively required has been productive of more mischief than any legislative omission to interfere ...

Thomson optimistically appealed to members for their co-operation:

I shall frequently require your assistance, and I trust I shall not appeal to you for it in vain ... By your cordial co-operation with me in working out measures of public benefit, I feel that my duties and my responsibilities will be lessened and my exertions crowned with success ...

The Colonial Secretary then reminded members that their first duty was to elect a Speaker. In this, as in other matters of procedure, he was firmly of the opinion that although not legally bound to follow the precedents of the British Parliament

in these we shall always find the safest guides, as we may rest assured that those rules which were devised by the wisdom of Parliament, and stood the test of ages, possess great claims to our support and adoption.<sup>25</sup>

The contest for the Speakership showed little evidence of the avoidance of ‘merely personal or local considerations’ that Thomson had urged on members. The Speakership was a prestigious and important office which attracted a generous annual salary of £750. A group of ten members had met beforehand to come to an understanding as to who should take the Chair. Wentworth and Macleay were both interested. They had clashed during Darling’s Governorship and had been bitter enemies ever since. It was suggested to Wentworth that his well-known partisanship made him an unsuitable Speaker. Wentworth accepted this and withdrew from the contest. He put it to Macleay that he should also withdraw for the same reason. Macleay responded that unless he was assured of the support of the great majority of members he would not nominate. Wentworth took this as a pledge to withdraw. The group then decided to approach Edward Hamilton. He had not been strongly associated with any political faction and as a lawyer and former Fellow of Trinity College, Cambridge was felt to be suitably equipped for the position. Hamilton agreed to be nominated.<sup>26</sup>

When Macleay did not withdraw, Wentworth launched a furious attack on his old adversary. He described Macleay as ‘incompetent’ and lacking appropriate qualifications for the Speakership. In addition, Wentworth drew attention to another factor:

Mr Macleay had been twice in the public service, once at home and once in the colony — had twice been superannuated, and was in receipt of higher pensions for the same than was consistent with the nature of the services [rendered].

This alone should have prevented him from putting himself forward. Wentworth considered that ‘the highest honour the colony had to bestow’ should not be given:

to this twice superannuated octogenarian ... It was absurd to talk of him coming forward for the sake of the honour of the office: his object was to gain a third salary

and a third pension. Feeling that [Macleay] was already loaded with honours, pensions, and lands, he was disgusted with this attempt to add to what he already had so largely received.<sup>27</sup>

Macleay was elected by 17 votes to 13. Those voting against were rarely to be found on the same side of the House in future divisions. As well as the Wentworth brothers, Windeyer, Lang and Bland, the 'Noes' included Thomson, Riddell, Lithgow, Therry and Elwin. The only members of the landed gentry not to support Macleay were Lawson, Blaxland and Bradley. Hampered by his 'want of distinct utterance and his deafness',<sup>28</sup> Macleay proved to be an ineffectual Speaker with little control of the House. On one occasion he plaintively remarked: 'It was useless for him to call 'order' for honourable members paid no attention to him'.<sup>29</sup> Macleay rarely intervened in proceedings and gave minimal procedural guidance. When he did it was on the level of drawing attention to the small size of the piece of paper on which a member had drafted a bill he was introducing:

He wished to take the opinion of the House as to whether it was proper or regular to present a bill to the House on such a piece of paper as that? In his opinion it was neither the one nor the other. (The House was very generally amused.)<sup>30</sup>

Macleay resigned in May 1846. He was succeeded by Nicholson, a more competent presiding officer who remained Speaker until responsible government.

The Council was more fortunate in having Hastings Elwin as Chairman of Committees. In many ways, it was a more onerous task than the Speakership. The House spent much of its time as a Committee of the Whole House. This was where the detailed consideration and amendment of bills took place and where the Estimates were examined. If a major issue had to be considered the Council would often go into Committee. Proceedings were less formal, discussion was freer and members were permitted to speak more than once. Officials were called to the bar of the House to be examined. The Chairman had to pay close attention to what was decided. In the absence of an official Hansard, his notes were sometimes needed to clarify disputed or uncertain points.<sup>31</sup> The less structured nature of debate in Committee meant that the Chairman had often to intervene to maintain order and to rule on disputed points. Elwin proved equal to these demanding responsibilities. He presided with fairness and dignity and his rulings were well considered and substantial. When the long and exacting debate on the Estimates was finally drawing to a close, Windeyer moved that the House express its thanks to Elwin for his 'great efficiency and handsome conduct' in the carrying out of his duties. The motion was seconded by Thomson and carried 'amidst loud demonstrations of approbation'.<sup>32</sup> The only problem from the Government's point of view was that Elwin's occupation of the Chair deprived it of a powerful advocate when the House was in Committee. Elwin refused to accept any payment, an example that Macleay, who was in financial difficulties, did not follow. The Speaker told the House that this was because he had been advised that 'such a proceeding would operate very injuriously on his successor'.<sup>33</sup> Elwin resigned from the Council owing to ill health in July 1844 and was succeeded by Nicholson. When Nicholson was elected

Speaker, Henry Watson Parker became Chairman. He had been Gipps' Private Secretary and was to become the third Premier of NSW in October 1856.

Gipps proposed to open the proceedings of the Council formally on 3 August. The debate about how the Governor should be received gave some interesting insights into how members perceived their new institution.<sup>34</sup> Thomson noted that objections had been made to the Governor occupying the Speaker's Chair as 'the Speaker having once been legally placed in the Chair he ought not to be removed'. His solution was to provide a special seat for the Governor. Wentworth disagreed, arguing that no matter where he sat the Governor as the King's representative automatically displaced the Speaker when he entered the House, just as the King when he entered the House of Lords became the presiding officer:

It therefore followed as a necessary consequence, that the Governor, let him occupy what position he might when he appeared in that House, would be president ... For these reasons he was of the opinion that the House could not receive the Governor ...

Therry contended that analogies with the British Parliament were not binding as the blended Council was an anomalous body:

They were placed in a new position, and must work the Act borrowing as much from analogy as they could advantageously and avoid being too nice as to analogy when they could derive no advantage from it.

His counter argument was that the 1842 Act specified that the Speaker presided in the Council and that remained the case no matter who else was present in the House. Nicholson's opposition to Wentworth's assertion was also based on the anomalous nature of the Council. He contended that it combined both elements of the UK Parliament in one House, with the official and nominated members being the equivalent of the upper house and the elected members of the lower. The Sovereign when opening the British Parliament addressed both Houses together, with the Speaker being recognised 'as the official organ of the lower house'. The Governor on this analogy could address the Council without displacing the Speaker.

This was one of the few times that Lang did not side with Wentworth. His approach was that of the man of commonsense uninterested in legal sophistry. Lang rejected even Thomson's cautious compromise and could see no problem with the Governor using the Speaker's Chair:

If the Speaker's Chair had been consecrated by some religious ceremony, expressly for the purpose of the Speaker, and to be used only by him, if it thereby acquired a charm which the collision of any other mortal with would destroy, then the Council ought to guard it. But as there was no virtue either in the wood or the cushion, there was no necessity for such extreme caution. There was no magic circle in the Chair itself — it was merely the seat of the Speaker for the time being ...

Windeyer was the only member to support Wentworth. Unlike Nicholson, the analogy he drew with the British Parliament was that the Governor



exercised the power of the House of Lords, and the power vested in the Council, for all practical purposes, was the same as the House of Commons, tempered by the functions possessed by the Governor. And who ever heard of the House of Lords or the King coming down to the House of Commons? Whenever the monarch was present no other person could be equal. The Speaker was the first person in that assembly, and was by act of parliament the only person who could preside; but how could it be argued that he could preserve his power if the Governor was present?

The Council agreed with Thomson and Gipps got his chair, 'a handsome seat' on a 'raised platform on the left of the Speaker's chair'.<sup>35</sup> Although on this occasion Wentworth had little support, the debate served as a warning that the Governor could expect no consideration or deference from him. In spite of his espousal of lofty, constitutional principles, there seems little doubt that Wentworth was motivated by a desire to snub Gipps by excluding him from the House. Relations between the two had been poisonous since 1840 when Gipps had blocked Wentworth's attempt to purchase virtually all of the South Island of New Zealand.<sup>36</sup> During the debate on the Speakership, Wentworth had indulged in some self analysis:

It had been said he was a man of vindictive character. He was a man of warm temperament; but he knew that it was not men of that temperament who were vindictive. Secret hate and vengeance were not entertained by minds of that kind. It was the cool, calculating man who lay by for an opportunity of wreaking some vengeance when an opportunity occurred.<sup>37</sup>

His behaviour in the Council was to show that he was capable of both warm attacks and cool revenge.

Sir George Gipps had been Governor of NSW since 1838.<sup>38</sup> After distinguished service in the Royal Engineers, he had been the driving force behind the Gosford inquiry into political discontent in Lower Canada. This had given him valuable background knowledge about colonial affairs. Gipps was principled, well intentioned, hard working and an excellent administrator. He was, however, lacking in personal and political skills. Compromise and conciliation were not his strength. Gipps was not well suited to dealing with a fractious, assertive legislature enjoying its first taste of authority and with an appetite for more.

In his first address to the Council, Gipps gave his view of the 'peculiar constitution' which had been given to the new legislature:

The Council, Gentlemen, is composed of three elements, or of three different classes of persons — the representatives of the people — the official servants of Her Majesty — and of gentlemen of independence — the unofficial nominees of the Crown.

Like Thomson, Gipps attempted to strike a positive note although no doubt he had his forebodings:

Let it not be said or supposed that these three classes of persons have, or ought to have, separate interests to support — still less that they have opposing interests, or any interest whatever, save that of the public good. Let there be no rivalry between them, save which shall in courtesy excel the other, and which of them devote itself most heartily to the service of their common country.<sup>39</sup>

Unfortunately for Gipps, the common interest most members did find was in attacking him and his Government.

The atmosphere was adversarial from the beginning. Almost everything the Government tried to do was met with a persistent, relentless hostility. Debate often consisted of a quartet: Thomson and Plunkett for the Government and Wentworth and Windeyer leading the opposition. While Wentworth ‘rose to frequent flights of fancy’ and ‘hurled invective upon his opponents’, Windeyer’s style was ‘more prosaic. He spoke in a tone of probing investigation, always seeming to question the Government’s motives’.<sup>40</sup> Their acuity, intellect and oratorical skill made Wentworth and Windeyer a formidable duo. Even Parkes or Reid at the height of their powers would have had difficulty in countering them. By training and inclination, Thomson was more a bureaucrat than a politician. His manner was dry, methodical, business-like and unemotional. The Colonial Secretary was almost unfailingly helpful and courteous, even in the face of antagonism. Time and again he went out of his way to accommodate members’ requests and provide them with the information they requested. When he was stung out of his usual unruffled calm Thomson was capable of hitting back hard. Plunkett was more able to respond to Wentworth and Windeyer in kind. His skill in debate was enlivened by some Irish fire and bite. Riddell, as the Treasurer and second most senior member of the Government, was occasionally forced to speak but generally preferred to let Thomson carry the burden. It was Thomson, for example, who took charge of seeing the Estimates through the House. When he was absent because of illness, Riddell adjourned the debate rather than stepping in.<sup>41</sup> The other official members were almost entirely mute.

While the terms Government and opposition were freely used, there were no party blocs in the modern sense and members prided themselves on their independence. Voting patterns were unpredictable and the outcome of divisions was uncertain, particularly as absenteeism was high. What gave the opposition common purpose was a desire for more power for the Council and antipathy to the policies of the local and UK Governments. It was a resentment capable of bringing Wentworth and Nicholson together. The Schedules to the 1842 Act which gave the Governor some £81,000 annually over which the Council had no control were a particular sore point. Lack of local control of land policy and revenue was a further source of complaint.

In divisions, the officials usually voted in unison. Split votes did occur, but this was not uncommon in the Legislative Assembly in the 19th century.<sup>42</sup> Therry, Foster, Elwin and Lowe generally voted with the Government, joined in Committee by

Macleay. The unofficial nominees sometimes joined their elected brethren in opposing the Government. Berry and Blaxland, in particular, were erratic in their support. Although not having to answer to electorates, the nominees were not completely insulated from public opinion. They were also anxious not to be seen as tools of the Government, as opposition speakers sometimes stigmatised them. Berry, for example, told the House that ‘although a Crown nominee, he was free to act in accordance with his conscience, as if he had been an elected member’.<sup>43</sup> In terms of both debating and voting strength, the Government was not in a strong position.

Although debate was robust and forthright, it was generally on a high plane. Speeches were lengthy, detailed, well-researched and well-argued. Members took their parliamentary responsibilities seriously and believed in the importance of them. They endeavoured to do their duty conscientiously as legislators and representatives of the people of the colony. The evidence bears out Lowe’s often quoted description of the Council: ‘as enlightened, and as reasonable a body, as ever met in any dependency of the Crown since the American Revolution’.<sup>44</sup> Thomson for once agreed with Lowe and in later life observed that the array of talent in the Council ‘had not been equalled by any subsequent assembly’.<sup>45</sup>

### ***Ground rules***

A basic matter that needed to be determined was when the Council should meet.<sup>46</sup> Ebdon moved that the House assemble at 2pm on Tuesday, Wednesday, Thursday and Friday. He argued that 12 noon, the hour of meeting of the old Council, was ‘decidedly too early, as it would seriously interfere with the business of the committees; and on the other hand, he was anxious to avoid night sittings which were very objectionable on many grounds’. Wentworth complained that such an early hour would prevent the attendance of members who had business to transact:

He could not help saying the House would cut an indifferent figure without the attendance and assistance of members of the Bar, who could not absent themselves from their professional duties at so early an hour. He therefore proposed that four o’clock be the hour of meeting ...

Berry was quick to respond:

If lawyers *would* come into the Council, they must abide the consequences (laughter), and they ought to be pleased at an opportunity of showing their patriotism by making the sacrifice of their time which would be necessary.

Thomson, Riddell and Lithgow all argued for 2pm. This gave Windeyer the opportunity to make a disparaging personal attack on the officials:

They appeared to forget that if they could get the day’s work done by two o’clock they must be too well paid, and must have one fourth of their salaries cut off. The supposed office hours were from ten until four, and he certainly had expected that,

for the sake of appearance, the official members would have protested that they could not possibly attend the Council until four.

Wentworth's amendment was defeated 19 votes to 11. Windeyer then moved that 3pm be the hour of meeting. The House was evenly divided on his amendment and it was passed on the Speaker's casting vote.

On 4 August, Thomson moved that a committee be established to draw up Standing Orders. Like Nicholson, he saw the Council as 'being composed partly on the principle of an upper house or House of Lords, and partly as a lower house or representative assembly'. On the whole, he believed that the practices of the House of Commons should be their guide. However, he cautioned that 'they should not follow them too servilely, but they should adopt only such rules as were applicable to their peculiar constitution'. Thomson had drawn up some guidelines for the committee with the aid of a standard work on the procedure of the Commons by Fortunatus Dwaris.<sup>47</sup> The members of the committee were Elwin, Hamilton, Foster and Cowper, with Therry as Chairman. Wentworth and Windeyer were asked to serve but declined.<sup>48</sup> After debate and amendment, the Standing Orders drawn up by the Committee were adopted on 27 October. They were approved by the Governor on 8 December. It was a detailed code of 141 rules covering such subjects as the duties of the Speaker, the conduct of business, the behaviour and privileges of members, procedures for public and private bills, and committees. In areas not covered by the Standing Orders the 'rules, usages and forms' of the UK Parliament were to apply.<sup>49</sup>

The routine of business quickly established itself and was to persist for the rest of the Council's existence. In many ways the Council was a typical 19<sup>th</sup> century legislature, not greatly dissimilar to the Legislative Assembly in its proceedings.<sup>50</sup> Petitions played an important role in the parliamentary process. They were a means by which the colonists, whether voters or not, could have direct access to the legislators. Petitions usually asked for redress of individual or community grievances or expressed public opinion on broader issues. A member presenting a petition would sometimes move for a debate or the establishment of a select committee on the issue involved. Petitions had much impact in a small community where members knew most of their constituents and a few votes could turn an election result. Thomson said of an act regulating the conduct of seamen while in port:

The measure had been introduced in consequence of the presentation of a petition numerously and respectably signed — signed by nearly all the merchants resident in the colony, and also by a great number of commanders of vessels in the port ... [The] law itself was actually framed by or for the petitioners ... and very ably framed it was ...<sup>51</sup>

Petitions often attracted a great deal of support. Lang, for example, presented a petition asking for relief for the unemployed signed by 3,153 people, 'an

astonishingly large proportion of the male workforce which numbered only about 11,000'.<sup>52</sup>

Addresses to the Governor for Returns were an important means of obtaining statistical and other factual information from the Government. In 1844, 25 Returns were tabled in the House, some lengthy and detailed.<sup>53</sup> Addresses to the Governor could also be moved requesting the adoption of policies or courses of action. There was no formal Question Time but questions could be asked of the officials. Messages from the Governor were received, usually about finance, proposed legislation or suggested amendments to bills. Notices of motion were given soon after the House met. Notice was required for almost all proposed items of business. The Council would then move on to orders of the day: motions, bills or adjourned debates.

Select committees were frequently set up, a total of 336 during the life of the Council. They were the Council's main means of informing itself about matters it had to consider. Committees inquired into a wide range of issues. In 1843, subjects investigated included the situation of distressed labourers, Crown Land sales, immigration, monetary confusion and postage.<sup>54</sup> Committees were, in effect, the 'eyes and ears' of the House. Legislative and administrative action was often based on their reports.<sup>55</sup>

Legislation proceeded according to Westminster tradition: notice of motion, first reading, second reading speech and ensuing debate, clause by clause discussion and amendment in Committee, third reading. There was usually a delay between each stage to prevent legislation being rushed through without proper consideration. Standing Orders could, however, be suspended to allow the next stage in the passage of a bill to proceed forthwith. There were no time limits on debate. 33 bills were introduced in the 1843 session, 16 by message from the Governor and four by official members (Thomson and Plunkett). A total of 25 bills were passed, although the Governor refused to assent to one and reserved two for the Royal Assent. Amendments were proposed by the Governor to six bills. Wentworth introduced six bills, four of which were passed.<sup>56</sup> The author of a detailed study of law-making in the Council has observed that in 1843 'a small number of elected members hit the ground running, took the initiative from the executive and encroached on areas which, until then had been the exclusive province of government'. This trend continued throughout the Council's existence. It was a period of 'tremendous legislative and, even, nation-building effort'.<sup>57</sup> Of the 724 bills introduced into the Council, 72% were passed, a much better record than in the 19<sup>th</sup> century Legislative Assembly where the success rate for bills was in the mid-50% range.<sup>58</sup>

The Council sat for 85 days in 1843, slightly above the average number of sitting days per year from 1843–55 of 78 days (excluding the election years of 1848 and 1851). The busiest year was 1854 when the Council sat for 94 days and the least active 1846 when there were 49 sitting days (again excluding the election years of 1848 and 1851).<sup>59</sup> The House almost invariably met in the second half of the year.

As the session wore on attendances usually began to decline as members left Sydney to return to their properties and others neglected their legislative duties for their private affairs. Therry complained of members arriving ‘at the time their counting houses closed, and departing just in time to take a fashionable dinner’ instead of devoting themselves ‘to the business of the House the whole live-long evening’.<sup>60</sup> In late September 1843, Wentworth spoke scathingly of

the approaching absence of members for the purpose of superintending the process of sheep shearing on their estates — gentlemen whose patriotism was so great that they considered the superintending of their sheep shearing as paramount to all other duties.<sup>61</sup>

The Council was often unable to form a quorum. On 24 November 1843, for example, the *Herald* reported:

Yesterday the Speaker took the chair at half-past three o’clock exactly, and as there were not half a dozen members present, he at once adjourned the House ... We would impress upon members the necessity of being punctual in their attendance; whatever hour is fixed should be rigidly observed; the chair should be taken at precisely the hour agreed upon: for the procrastinating habit of ‘waiting a few minutes’ only induces members to become gradually more and more irregular in their attendance.<sup>62</sup>

The Council was forced to adjourn due to lack of a quorum on 12 of the 18 sitting days in November 1843.<sup>63</sup>

### ***The estimates***

The major set piece battle of the 1843 session concerned the Estimates. Gipps presented the Estimates of Expenditure for 1844 to the House by message on 23 August. He noted that the funds appropriated by Schedules A (for his salary, that of the judges and for the administration of justice) and C (for public worship) were inadequate and he would have to ask the Council for supplementation. In an attempt to be conciliatory that he was later to regret, Gipps said that

consequently, in each of these cases, the Council having to make good an indispensable supplement has, for all practical purposes, as much control over the expenditure, on account of the whole of the services enumerated in these schedules, as it would have had though these schedules had not formed part of the Act.<sup>64</sup>

On 19 September the House went into Committee to consider the Estimates. Wentworth immediately opened hostilities:

He, in common with other members in that House, felt deeply aggrieved at the principles involved in the adoption by the British Parliament of the Schedules to the Act. If the [UK] Government had had confidence in the loyalty of the people of the colony, as they ought to have had, they would not have perpetrated so violent an invasion of the constitutional rights of the Council and the colony ...

As the Government had shown it had no faith in the Council, if supplementation was requested 'he thought the best course for the House to adopt would be to say, 'You have fixed a sum, take it — and do the best you can with it'. The Governor had said they had a right to 'control the appropriation of the revenue, and let them exercise it. (Hear, hear.)'. Wentworth exhorted members to go through the Estimates

officer by officer, and salary by salary, and do away with those which were unnecessary, and reduce where reduction was practicable — and then they must proceed to the incidental expenses, and retrench them ...<sup>65</sup>

Day after day, item by item the relentless inquisition continued, motivated as much by resentment as a desire for retrenchment. Positions were eliminated, votes deleted, departments abolished and salaries reduced.<sup>66</sup> No item was too insignificant for scrutiny. The salary of the Gaoler at Berrima prison, for example, was reduced by £20 and a further £59 was saved by reducing the number of Turnkeys from four to three.<sup>67</sup>

On 17 October, Thomson responded that the Council had no power over the salaries of officials who were appointed by the British Government.<sup>68</sup> Windeyer immediately moved a resolution that the Council was empowered to deal with all salaries except those expressly guaranteed by the 1842 Act and this was carried by 15 votes to seven.<sup>69</sup> Gipps was having second thoughts about the latitude he had earlier offered the Council. He had not anticipated that his conciliatory approach would be met with such implacable obstructionism. On 19 October the Governor sent a message to the House. He explained that when he had composed his earlier message

it was certainly not in my contemplation, that any desire would exist, on the part of the Council, to reduce the salaries of officers who, holding their appointments from Her Majesty, naturally consider their salaries to be guaranteed to them by Her Majesty's Government ... I now feel that I had made an omission, and I hasten to repair it.<sup>70</sup>

For Wentworth, this message was both a goad and a godsend as it allowed him to make a direct attack on Gipps. On 27 October, he moved that the House consider the Governor's message.<sup>71</sup> Wentworth completely rejected the suggestion that the House could not interfere with salaries guaranteed by the Imperial Government. He alleged that the message was, in reality, 'intimidation more than anything else, to see how far the Government could go, and to ascertain whether the Executive would not be able to ride rough shod over the representatives of the people ...' Wentworth then moved a series of resolutions repudiating all the propositions in Gipps' message which was virtually a vote of censure on the Governor. After a lengthy debate, the Council narrowly rejected Wentworth's resolutions by 14 votes to 12.

Consideration of the Estimates concluded on 19 December. After asserting its authority, the Council finally voted an extra £6,114 for Schedule A instead of the

£10,577 requested. Although supplementation of £6,022 had been requested for Schedule C no extra funds were approved.<sup>72</sup> The Appropriation Bill was passed on 21 December and a week later Gipps thankfully prorogued the Council until 1844.

### ***Conclusion***

The confrontation over the Estimates was the prototype for the political conflict which was to continue for the rest of the Council's existence. The majority of members, usually led by Wentworth, continually clashed with the Government over the restrictions imposed by Britain on the local legislature. The demand for control of all revenue by the Council became more and more insistent. This broadened into a claim for full self government. Parallels were increasingly drawn with the circumstances which forced Britain's North American colonies into armed revolt. Differences between liberals and conservatives were temporarily muted in the struggle. Wentworth in August 1852 moved that the House refuse to consider the Estimates. The motion was defeated by 28 votes to 17. However, a further motion by Wentworth that the House refuse to consider any future Estimates unless the Council's complaints were redressed was passed by one vote. It was at this stage that the British Government decided to be conciliatory and told the Council that if it drafted a suitable constitution NSW would be granted self government.<sup>73</sup>

By the time the Legislative Assembly came into existence in 1856 the citizens of NSW had seen the Legislative Council in operation for 13 years. They were fully conversant with electoral politics and parliamentary institutions. The creation of a house of review was the novelty. The old Legislative Council transformed itself relatively seamlessly into the Assembly. The practices and procedures of the new Lower House were very similar to those developed in the pre-1856 period. Physically, this continuity was symbolised by the fact that the Assembly used the old Council chamber. A new chamber was constructed for the Upper House. A major difference was that the Government was now formed by a Premier and Ministers responsible to Parliament rather than by the Governor's officials. Responsible government in this sense was new. However, responsible government in its other sense of the legislature scrutinising the executive had been in operation in the old Council. The constant, detailed, at times ruthless, examination of the actions of the Government which commenced in 1843 is a major feature of the story of the Council. ▲



## Notes

- <sup>1</sup> The Act gave the Council the power to increase its size but the ratio of nominated to elected members had to be maintained. This provision was used to increase the size of the Council in 1851 to 54 members, 36 of whom were elected. Port Phillip was separated from NSW to become the colony of Victoria in 1851.
- <sup>2</sup> See D Clune, 'The Development of Legislative Institutions in NSW 1823–1843', *Australasian Parliamentary Review*, Spring 2010, Vol. 25(2), pp. 80–90.
- <sup>3</sup> On Thomson see SG Foster, *Colonial improver: Edward Deas Thomson 1800–79*, MUP, 1978.
- <sup>4</sup> JM Ward, *James Macarthur: colonial conservative, 1798–1867*, SUP, 1981, p 196.
- <sup>5</sup> On Riddell, Gibbes, Lithgow and O'Connell see *Australian Dictionary of Biography*, vols 1 and 2, MUP, 1966 and 1967.
- <sup>6</sup> Under the 1842 Act, the Governor could 'nominate official members either by name or title, but if he chose the latter course, as he had in O'Connell's case, the occupant of the office so named retained his seat for the five year life span of the Council, or for as long as he held office'. When this difficulty was discovered Gipps recalled O'Connell's resignation. It was then realised that Plunkett's appointment had been invalid as Barney had been appointed by office. The situation was resolved by a despatch from the Colonial Office ratifying all the original official appointments including Plunkett's. R Knight, *Illiberal Liberal: Robert Lowe in NSW, 1842–50*, MUP, 1966, pp 79–80.
- <sup>7</sup> On Plunkett see JN Molony, *An Architect of Freedom: John Hubert Plunkett in NSW 1832–69*, ANU, 1973.
- <sup>8</sup> J Hirst, *Freedom on the Fatal Shore: Australia's first colony*, Black Inc, Melbourne, 2008, p 428.
- <sup>9</sup> On Blaxland, Jones and Icely see *Australian Dictionary of Biography*, vols 1 and 2, MUP, 1966 and 1967. On Hamilton see *Australian Dictionary of Biography*, vol 4, MUP, 1972. See also JM Ward, *James Macarthur: colonial conservative, 1798–1867*, SUP, 1981 on Icely and Hamilton.
- <sup>10</sup> *SMH*, 22.9.1843.
- <sup>11</sup> MMH Thompson, *The Seeds of Democracy: early elections in colonial NSW*, Federation Press, Sydney, 2006, p 109.
- <sup>12</sup> On Lowe see R Knight, *Illiberal Liberal: Robert Lowe in NSW, 1842–50*, MUP, 1966.
- <sup>13</sup> R Knight, *Illiberal Liberal: Robert Lowe in NSW, 1842–50*, MUP, 1966, p 259.
- <sup>14</sup> A Tink, *William Charles Wentworth: Australia's greatest native son*, Allen and Unwin, Sydney, 2009, p 275.
- <sup>15</sup> On Bland, and Windeyer see *Australian Dictionary of Biography*, vols 1 and 2, MUP, 1966 and 1967.
- <sup>16</sup> A Powell, *Patrician Democrat: the political life of Charles Cowper 1843–70*, MUP, 1977, p 29.
- <sup>17</sup> On Cowper see A Powell, *Patrician Democrat: the political life of Charles Cowper 1843–70*, MUP, 1977.
- <sup>18</sup> On Lang see DWA Baker, *Days of Wrath: a life of John Dunmore Lang*, MUP, 1985.
- <sup>19</sup> On these members see DWA Baker, *Days of Wrath: a life of John Dunmore Lang*, MUP, 1985, pp 193, 198 and the relevant articles in the *Australian Dictionary of Biography*.
- <sup>20</sup> JM Ward, *James Macarthur: colonial conservative, 1798–1867*, SUP, 1981, p 125. See also *Australian Dictionary of Biography*, vol 2, MUP, 1967.
- <sup>21</sup> MMH Thompson, *The Seeds of Democracy: early elections in colonial NSW*, Federation Press, Sydney, 2006, p 78.

- <sup>22</sup> On Macarthur see JM Ward, *James Macarthur: colonial conservative, 1798–1867*, SUP, 1981.
- <sup>23</sup> On Macleay see *Australian Dictionary of Biography*, vol 2, MUP, 1967 and SG Foster, *Colonial improver: Edward Deas Thomson 1800–79*, MUP, 1978.
- <sup>24</sup> ACV Melbourne, *Early Constitutional Development in Australia*, UQP, second edition, 1963, p 286. On the electoral system see also J Hirst, *Freedom on the Fatal Shore: Australia's first colony*, Black Inc, Melbourne, 2008, MMH Thompson, *The Seeds of Democracy: early elections in colonial NSW*, Federation Press, Sydney, 2006, and E Clifford, A Green and D Clune, eds, *The Electoral Atlas of NSW, 1856–2006*, NSW Department of Lands, 2006.
- <sup>25</sup> *SMH*, 2.8.1843.
- <sup>26</sup> These machinations were revealed during the debate on the election of the Speaker, *SMH*, 2.8.1843.
- <sup>27</sup> *SMH*, 2.8.1843.
- <sup>28</sup> This was Major D'Arcy Wentworth's reason for opposing Macleay, *SMH*, 2.8.1843.
- <sup>29</sup> *SMH*, 29.9.1843.
- <sup>30</sup> *SMH*, 10.11.43.
- <sup>31</sup> NSW did not have an official Hansard until 1879.
- <sup>32</sup> *SMH*, 13.10.1843.
- <sup>33</sup> *SMH*, 13.10.1843.
- <sup>34</sup> For the debate see *SMH*, 3.8.1843.
- <sup>35</sup> *SMH*, 4.8.1843.
- <sup>36</sup> A Tink, *William Charles Wentworth: Australia's greatest native son*, Allen & Unwin, Sydney, 2009, pp 154–8.
- <sup>37</sup> *SMH*, 2.8.1843.
- <sup>38</sup> On Gipps see D Clune and K Turner eds, *The Governors of NSW, 1788–2010*, Federation Press, 2009.
- <sup>39</sup> *SMH*, 4.8.1843.
- <sup>40</sup> SG Foster, *Colonial improver: Edward Deas Thomson 1800–79*, MUP, 1978, p 69.
- <sup>41</sup> *SMH*, 23.9.1843.
- <sup>42</sup> On split voting in 19<sup>th</sup> century ministries see D Clune and G Griffith, *Decision and Deliberation: the Parliament of NSW, 1856–2003*, Federation Press, 2006, p 29.
- <sup>43</sup> *SMH*, 29.9.1843.
- <sup>44</sup> R Knight, *Illiberal Liberal: Robert Lowe in NSW, 1842–50*, MUP, 1966, p 243.
- <sup>45</sup> SG Foster, *Colonial improver: Edward Deas Thomson 1800–79*, MUP, 1978, p 69.
- <sup>46</sup> For the debate see *SMH*, 10.8.1843.
- <sup>47</sup> Fortunatus Dwaris, *A General Treatise on Statutes: their rules of construction, and the proper boundaries of legislation and judicial interpretation: including a summary of the practice of Parliament, and the ancient and modern method of proceeding of passing bills of every kind: with an appendix of precedents, forms, rules, and orders*, Saunders and Benning, London, 1830–31.
- <sup>48</sup> *SMH*, 5.8.1843.
- <sup>49</sup> For the Standing Orders see *Votes and Proceedings of the NSW Legislative Council*, Session 1843.
- <sup>50</sup> On the operation of the 19<sup>th</sup> century Assembly see D Clune and G Griffith, *Decision and Deliberation: the Parliament of NSW, 1856–2003*, Federation Press, 2006, chapter one.
- <sup>51</sup> *SMH*, 7.10.1843.
- <sup>52</sup> *SMH*, 27.9.1843; DWA Baker, *Days of Wrath: a life of John Dunmore Lang*, MUP, 1985, p 207.

- <sup>53</sup> Figures from *Votes and Proceedings of the NSW Legislative Council*, Session 1844.
- <sup>54</sup> A full list of committees appointed is in the *Votes and Proceedings of the NSW Legislative Council*, Session 1843.
- <sup>55</sup> On the role of committees in the Council see KF Mills, 'Of the People, by the People, for the People: law-making in NSW, 1843–1855', unpublished PhD thesis, UNE, 2006.
- <sup>56</sup> Figures from *Votes and Proceedings of the NSW Legislative Council*, Session 1843.
- <sup>57</sup> KF Mills, 'Of the People, by the People, for the People: law-making in NSW, 1843–1855', unpublished PhD thesis, UNE, 2006, pp i, 258.
- <sup>58</sup> For a detailed analysis of the fate of bills in the Council see KF Mills, 'Of the People, by the People, for the People: law-making in NSW, 1843–1855', unpublished PhD thesis, UNE, 2006. On the 19<sup>th</sup> century Assembly's treatment of bills see D Clune and G Griffith, *Decision and Deliberation: the Parliament of NSW, 1856–2003*, Federation Press, 2006, chapter one.
- <sup>59</sup> Figures calculated from *Votes and Proceedings of the NSW Legislative Council*.
- <sup>60</sup> *SMH*, 1.9.1843.
- <sup>61</sup> *SMH*, 27.9.1843.
- <sup>62</sup> *SMH*, 24.11.1843.
- <sup>63</sup> *Votes and Proceedings of the NSW Legislative Council*, Session 1843.
- <sup>64</sup> *SMH*, 24.8.1843.
- <sup>65</sup> *SMH*, 30.9.1843.
- <sup>66</sup> For a detailed account of the cuts to the Estimates and their effect see A McMartin, *Public Servants and Patronage: the foundation and rise of the NSW Public Service, 1786–1859*, SUP, 1983, pp 231–5.
- <sup>67</sup> *SMH*, 10.10.1843.
- <sup>68</sup> Under regulations issued in 1842, 'Offices of inconsiderable rank and emolument were to be filled up either by the Governor himself or in the name of Her Majesty. All other offices were to be at the disposal of the Secretary of State'. In effect, this meant that the Governor had authority to appoint only officers with salaries under £100 per year. A McMartin, *Public Servants and Patronage: the foundation and rise of the NSW Public Service, 1786–1859*, SUP, 1983, p 246. Thomson said that the total sum of the salaries which could not be interfered with was £10,340, *SMH*, 18.10.1843.
- <sup>69</sup> *SMH*, 18.10.1843.
- <sup>70</sup> *Votes and Proceedings of the NSW Legislative Council*, Session 1843, 19.10.1843.
- <sup>71</sup> For the debate see *SMH*, 28.10.1843 and 1.11.1843.
- <sup>72</sup> *Votes and Proceedings of the NSW Legislative Council*, Session 1843, 15.12.1843; A McMartin, *Public Servants and Patronage: the foundation and rise of the NSW Public Service, 1786–1859*, SUP, 1983, pp 231–2, 235.
- <sup>73</sup> For a detailed account of these developments see ACV Melbourne, *Early Constitutional Development in Australia*, UQP, second edition, 1963.