

CHAPTER 5

MEMBERS

This chapter examines the qualifications required for election to the Legislative Council and the grounds for disqualification from election and membership of the Council. The qualification provisions ensure that potential members are capable of representing the electors of the State, while the disqualification provisions ensure that, once elected, members uphold their integrity.

The qualification requirements for election to the Council are now the same as the qualification requirements for enrolment as an elector for an electoral district in New South Wales. The disqualification provisions are far more extensive, and include disqualifications such as holding an office of profit or receiving a pension from the Crown, and holding a contract or agreement for or on account of the public service of New South Wales.

This chapter also examines a range of other issues pertaining to members: the Code of Conduct for members and investigations into corrupt conduct, the disclosure of pecuniary interests, attendance and leave of absence, dress codes, the administration of the pledge of loyalty¹ and remuneration.

QUALIFICATIONS FOR ELECTION TO THE COUNCIL

Under section 81B(1) of the *Parliamentary Electorates And Elections Act 1912* every person enrolled as an elector for a district² is qualified to be nominated as a candidate at a periodic Council election, unless disqualified under the *Constitution Act 1902* or the *Parliamentary Electorates and Elections Act*. People who are not eligible to vote are thus indirectly disqualified from membership of the Council. The requirements for enrolment as an elector are set out in sections 20 and 21 of the *Parliamentary Electorates and Elections Act*. Section 20 provides that a person is qualified for enrolment as an elector if they are at least 18 years of age,³ and either

1 Until 2006 members took an oath or affirmation of allegiance.

2 District means a district for the election of a member to serve in the Assembly.

3 The age requirement was reduced from 21 years to 18 by the *Parliamentary Electorates and Elections (Amendment) Act 1970*, which did not commence until 21 March 1973 when similar Commonwealth legislation amending the voting age was enacted.

an Australian citizen or a British subject enrolled to vote in Australia before 26 January 1984.⁴ Section 21 provides that a person is not eligible to have their name placed or retained on the electoral roll if the person, being of unsound mind, is incapable of understanding the nature and significance of enrolment and voting; is in prison, having been convicted of a crime or an offence and sentenced to imprisonment for 12 months; or is the holder of a temporary entry permit or is a prohibited immigrant under the *Migration Act 1958* (Cth).

There is no requirement in section 20 of the *Parliamentary Electorates and Elections Act* for residence in New South Wales as a qualification for enrolment. However, section 33 provides that a person qualified for enrolment and who has lived at an address in a subdivision for the past month is entitled to have their name placed on the roll. Consequently, it is possible for a candidate who is enrolled but has since moved outside the State to be elected as a member. However, it is unlikely that any party would endorse as a candidate a person who was not resident in the State.⁵

As discussed in Chapter 4 (Elections), while the provisions of section 81B(1) of the *Parliamentary Electorates and Elections Act* apply to candidates nominating for periodic Council elections, the section makes no reference to the qualification of candidates for election to fill a casual vacancy in the Council.⁶ Requirements for candidacy for election to fill a casual vacancy are prescribed by section 22D(2)-(4) of the *Constitution Act 1902*.

DISQUALIFICATIONS FROM MEMBERSHIP OF THE COUNCIL

Members may be disqualified from membership of, and from sitting in, the Council. Primarily disqualification is designed to uphold the integrity of members by ensuring that they perform their parliamentary functions in the interests of their constituents and the broader public interest. In turn, this supports the independence and integrity of Parliament.⁷

The grounds for disqualification from Parliament are set out in sections 13 to 13C of the *Constitution Act 1902* and section 81E of the *Parliamentary Electorates and Elections Act 1912*. They include:

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- 4 Under this section, citizens of countries such as the United Kingdom, Canada and New Zealand are eligible to become members of the New South Wales Parliament without holding Australian citizenship, provided they were enrolled to vote in the State or registered on the Commonwealth electoral roll before 26 January 1984.
 - 5 See Twomey A, *The Constitution of New South Wales*, The Federation Press, Sydney, 2004, p 401.
 - 6 However, in at least one case issues have arisen as to whether a person who fails to satisfy the residency requirements of the *Parliamentary Electorates and Elections Act 1912* could be elected to fill a casual vacancy. This issue arose in 2000, when a long-time Queensland resident, Mr John Bradford, was preselected to fill a casual vacancy expected to arise in the seat of the Hon Elaine Nile. Questions were raised at that time regarding Mr Bradford's enrolment as an elector in New South Wales, although subsequent investigation concluded that he was enrolled.
 - 7 Carney G, *Members of Parliament: Law and Ethics*, Prospect Media, Sydney, 2000, p 15.

- holding an office of profit or pension from the Crown (section 13B of the *Constitution Act*);
- holding a contract for or on account of the public service of New South Wales (section 13 of the *Constitution Act*);
- failure to attend the House for one whole session unless excused by the House (section 13A(1)(a) of the *Constitution Act*);
- allegiance to a foreign power (section 13A(1)(b) of the *Constitution Act*);
- bankruptcy, or taking the benefit of a law for the relief of bankrupt or insolvent debtors (section 13A(1)(c) of the *Constitution Act*);
- public default (section 13A(1)(d) of the *Constitution Act*);
- conviction of certain crimes (section 13A(1)(e) of the *Constitution Act*);
- membership of the Assembly (section 13C of the *Constitution Act*);
- membership of the Commonwealth Parliament (section 81E of the *Parliamentary Electorates and Elections Act*).

The disqualifications under sections 13 and 13B apply to both candidates for election to the Council and to sitting members. The disqualifications under section 13A apply to sitting members only. The disqualifications under section 13C and section 81E of the *Parliamentary Electorates and Elections Act* apply to candidates for election only. Each category of disqualification is considered below.

Holding an office of profit or pension from the Crown⁸

Section 13B of the *Constitution Act 1902* provides, in part, that a person who holds an office of profit under the Crown, or has a pension from the Crown, is not capable of sitting and voting as a member of either House. Furthermore, if elected, their seat as a member becomes vacant unless the House after being notified of the circumstances passes a resolution, within a prescribed period of time, indicating that it is satisfied that the member has resigned from the office or ceased to receive the pension.

This is undoubtedly the most significant of the disqualifications from election and membership of the Council and is designed to ensure that members are fit and proper to sit in the House and carry out their duties and responsibilities free from influence or undue pressure from the executive government. The reasons for disqualification from Parliament for those who hold public office have been described in the following terms:

- (1) to reduce the influence of the executive in the Parliament which otherwise would be enhanced by members holding a non-ministerial

⁸ For the history of office of profit in the British House of Commons, see the Memorandum by Sir Gilbert Campion, Clerk of the House of Commons, *Report of the Select Committee on offices of places of profit under the Crown*, House of Commons, UK, 1941, Appendix 2, pp 137-162; for background to s 13B, see Standing Committee on Privilege and Ethics, *Report on sections 13 and 13B of the Constitution Act 1902*, Report No 15, March 2002, pp 7-14.

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executive office (this may be seen as an aspect of the doctrine of separation of powers)

- (2) to avoid any conflict of interest which might arise between parliamentary duties and those of any other public office (this includes the inability to adequately perform the duties of both positions given the modern full-time role of members of Parliament)
- (3) to maintain the principle of ministerial responsibility whereby those who determine and execute government policy remain accountable to Parliament through the appropriate minister (this role may be hindered if officers attached to the minister are members of Parliament).⁹

Section 13B was inserted into the *Constitution Act* in 1978, as part of the reform of the Council, and provided common office of profit disqualification provisions for members of both Houses.¹⁰

Before 1978, the disqualifications provisions for members holding an office of profit were provided in section 19 (dealing with members of the Council) and section 34 (dealing with members of the Assembly) of the *Constitution Act 1902*.¹¹ Section 19 was invoked on two occasions.

On 6 October 1948, the Hon James Maloney resigned from the Council to avoid disqualification for accepting an office of profit.¹² The Governor had appointed Mr Maloney to the Library Board of New South Wales on 23 February 1948, for a term of four years.¹³ When Mr Maloney realised that he held an office of profit,¹⁴ he resigned from the Council and was subsequently re-elected to fill his own vacancy one month later on 19 November 1948.¹⁵ Through resignation and re-election, Mr Maloney was able to circumvent the then disqualification provisions for a sitting member accepting an office of profit, because when re-elected as a member he already held an existing office of profit.¹⁶ Mr Maloney resigned from the Library Board in December 1948.¹⁷

9 See Carney, above n 7, pp 57-58; see also Standing Committee on Privilege and Ethics, above n 8, pp 7-14; see also *Sykes v Cleary* (1992) 176 CLR 77 at 96.

10 *Constitution and Parliamentary Electorates and Elections (Amendment) Act 1978*, Sch 1(7).

11 Before 1978, s 19 was excluded from the then entrenchment provisions relating to the Council by s 7A(6). The amended s 7A(1)(c) inserted in 1978 applied the entrenchment provisions of the section to enactments respecting persons capable of being elected or sitting and voting as members of either House, unless the provision applied in the same way to both Houses. Section 7A(6) also exempted a bill with provisions regarding office of profit which applied to both Houses.

12 *LC Minutes* (19/10/1948) 6.

13 *Government Gazette*, No 20, 20 February 1948, p 419. The Report of the Library Board of New South Wales for the year ended 30 June 1948 shows that Mr Maloney attended three meetings of the Board following his appointment, *Joint Volumes of Parliamentary Papers* (1948-1949) Vol 1, p 505.

14 *Sydney Morning Herald*, 8 October 1948, p 3. Under the then s 3(18) of the *Library Act 1939*, members of the Library Board were entitled to fees for attending meetings and travelling expenses, thus creating an office of profit for Mr Maloney, as a member of the Council.

15 *LC Minutes* (30/11/1948) 30.

16 See *Report of Trustees of the Museum of Technology and Applied Sciences for years 1946 and 1947*, *Joint Volumes of Parliamentary Papers* (1947) Vol 1, p 45; (1947-1948) Vol 1, p 157.

17 *Government Gazette*, 3 December 1948, p 3244.

In June 1956, the Hon Harold Ahern resigned as an employee of the Electric Light and Power Supply Corporation Ltd, in view of his impending transfer of employment to the Electricity Commission, which would have constituted an office of profit under the Crown.¹⁸

In 1980, two years after it was inserted into the *Constitution Act 1902*, section 13B was substantially amended by the *Constitution (Amendment) Act 1980* to modify the restrictions on members of Parliament accepting offices of profit under the Crown and to rectify anomalies with the office of profit restrictions.

Before 1980 a person elected holding an office of profit under the Crown or pension from the Crown, or a sitting member accepting an office of profit or pension, resulted in automatic disqualification and loss of seat.

The most significant change made by the 1980 amendment was in the treatment of persons and members who infringed section 13B. The minister's second reading speech on the amending bill indicated that the harsh and devastating consequence of the section was not always apparent for a member acting in good faith who declined to accept payment for a remunerated office, and the intention of the amendment was to avoid cases of inadvertent disqualification.¹⁹ To avoid the harsh office of profit restrictions, successive governments when enacting multifarious statutes creating statutory boards and commissions, exempted the restrictions on accepting an office of profit under section 13B from applying to part-time offices in those bodies.²⁰ The practice of granting exemption by individual statute created an anomaly in the case of part-time positions on non-statutory bodies which needed to be unpaid if it was desired to appoint a member of Parliament.²¹

Consequently, the 1980 amendment to section 13B removed the automatic disqualification of a person elected to Parliament from holding an office of profit or pension from the Crown, or a sitting member from accepting an office of profit or pension from the Crown. However, if the House does not, within seven sitting days²² after notice is given of the circumstances that would otherwise give rise to disqualification, pass a resolution indicating that it is satisfied that the person has ceased to hold the office of profit, or the right to a pension from the Crown has ceased or is suspended while a member of the House,²³ the member is then disqualified and loses their seat.

18 *LC Minutes* (13/6/1956) 42 (personal explanation). See also *LC Debates* (13/6/1956) 460-461.

19 *LC Debates* (19/3/1980) 5439-5442.

20 See, for example, the *Sydney Cricket and Sports Ground Act 1978*, Sch 1(5); the *Sydney Opera House Trust Act 1969*, s 9(2); and the *Zoological Parks Board Act 1973*, s 9(3).

21 *LC Debates* (19/3/1980) 5439.

22 For the purposes of sub-ss (1) and (2), 'sitting days' are counted whether or not they occur during the same session of Parliament (see sub-s (4), and the definition of sitting days in the *Interpretation Act 1987*, s 18). In the case of sub-s (1), it appears that the seven sitting days are to be counted from the date the disqualification comes to the notice of the House, rather than the date of the person's election to the House.

23 *Constitution (Amendment) Act 1980*, Sch 1(2)(a) and (b).

When the amending bill was introduced, it was envisaged that each House would adopt standing rules and orders regarding the giving of notice of the holding or acceptance of a disqualifying office or pension.²⁴ While no specific rules or orders were then adopted, the new standing orders adopted in 2004 provide that a notice of motion concerning the qualification of a member is placed on the Notice Paper as business of the House (SO 39(b)). That means such notices take precedence over government and general business.

It is evident from the minister's second reading speech that the aim of the new disqualification procedure was to allow for inadvertent breaches of the office of profit provisions to be detected and rectified without the drastic consequence of loss of seat. However, there is no requirement for the House to agree to a motion affirming that the member holds the seat; rather the seat will become vacant on the expiration of seven sitting days from which the anomaly comes to the notice of the House, unless the House first passes a resolution that it is satisfied that the person or member has ceased to hold the office or the right to a pension has ceased or is suspended while a member of the House. According to Twomey:

The House may choose, on political grounds, not to pass the resolution, so that the member's seat becomes vacant. If it were intended that mere resignation of the office were enough to avoid the vacation of a seat, then this could have been provided for without the need for a resolution of the House.²⁵

What is more likely though is that the procedure was intended to make it clear that, once the House was notified of circumstances that might otherwise result in disqualification, it was up to the House to determine whether a member no longer held a public office or a pension, rather than to allow a hostile majority to vacate the seat of an otherwise validly elected member. Nonetheless, the possibility exists that the House could, on political grounds, fail to pass the resolution with the result that the seat would be vacated.

The restriction on members of Parliament accepting offices of profit under the Crown was also modified by the 1980 amendment to provide that a person is not disqualified from being elected or sitting and voting as a member if they hold or accept an office of profit under the Crown which is not remunerated, except fees for attendance at meetings or an allowance for reasonable expenses incurred, or to be incurred, in carrying out the duties of the office.²⁶ It was pointed out in the Minister's second reading speech that the *House of Commons Disqualification Act 1957* (UK) provides relief from disqualification and this principle had been adopted.²⁷

24 *LC Debates* (19/3/1980) 5441.

25 Twomey, above n 5, p 440.

26 *Constitution (Amendment) Act 1980*, Sch 1(2)(c); *LC Debates* (19/3/1980) 5440.

27 *LC Debates* (19/3/1980) 5441. The UK Act contains a detailed list of all the offices which disqualify a person from membership of the House.

The 1980 amendment also rationalised the scope of restriction on tenure of office of profit under the Crown to apply only to offices within the framework of the Crown in right of New South Wales, but prevents a member from concurrently serving in another Parliament.²⁸ Similarly, the restriction on having or accepting a pension from the Crown only applies to New South Wales. Previously section 13B applied to any office under the Crown as an office of the executive government in all jurisdictions. It was believed that this was not necessary in a federal system and that the historical aim of obviating executive government influence over Parliament only has general application in the same jurisdiction.²⁹ Curiously the wording of the restriction in section 13B refers to an office as a member of a legislature of a 'country' other than New South Wales. During the second reading debate the Hon Sir Adrian Solomons queried the use of the term 'country'.³⁰ At the third reading the Hon Paul Landa, Attorney General, explained that the term was used in an international law sense in that country is the whole of a territory subject to one body of law such as each State of Australia, and that the exclusion should not extend to membership of subsidiary political entities such as local government bodies.³¹

Section 13 was also amended in 1980 to remove doubt that a contract or agreement with the Crown under section 13(1) and (2) does not apply to disqualify a person from sitting and voting or holding office as a member of either House by reason of holding or accepting an office of profit, thus leaving it to section 13B as to the circumstances in which a disqualification for any such reason takes place.³²

While the provisions of section 13B were substantially modified in 1980, the meaning of the terms 'office', 'office of profit' and 'under the Crown' remains uncertain. Several cases have involved interpretation of these terms.³³

Generally speaking, the term 'office of profit under the Crown' would include an officer of the Crown and offices where the person is appointed and removable by the Governor or a minister of the Crown. The term would include at least all officers in the public service within the meaning of section 6 and Schedule 1 of the *Public Sector Employment and Management Act 2002*. The *Public Sector Employment Legislation Amendment Act 2006* altered the basis on which public sector staff are employed, particularly staff in various statutory corporations. As indicated in the minister's second reading speech, this was in response to the Commonwealth's Work Choices legislation.³⁴ In particular, the 2006 amending Act removed the employment functions of certain statutory corporations that employed their own staff and created a Government Service of New South Wales in which persons are

28 *Constitution (Amendment) Act 1980*, Sch 1(2)(c).

29 *LC Debates* (19/3/1980) 5440.

30 *Ibid*, 5442.

31 *LC Debates* (25/3/1980) 5703.

32 *Constitution (Amendment) Act 1980*, Sch 1(1); *LC Debates* (19/3/1980) 5441.

33 See Twomey, above n 5, pp 434-439.

34 *LC Debates* (8/3/2006) 21169-21173 per the Hon John Della Bosca.

employed in the service of the Crown.³⁵ The 'public sector service' now includes the Government Service, the Teaching Service, the New South Wales Police, the New South Wales Health Service, the service of either House of Parliament, or the President or Speaker, or the President and the Speaker jointly, and any other service of the Crown.³⁶ The Government Service now includes Public Service Departments and various statutory corporations, including certain casual and temporary staff employed by statutory corporations.³⁷

The position of 'special temporary employees', such as ministerial staff, who work for 'political office holders'³⁸ is covered by Part 2.5 of the *Public Sector Employment and Management Act 2002*. Under section 37 such staff are employed by the Director-General of the Premier's Department, and are taken to constitute a branch of the Premier's Department.

While the employment status of special temporary employees working for political office holders and employees of statutory corporations may have previously been uncertain, the 2006 amendment clarified that they are employed by the government in the service of the Crown and, like all employees falling within the definition of the 'public sector service' in section 3, would now constitute an office of profit under the Crown for the purposes of section 13B.

Employees of State Owned Corporations were not included in the 2006 amendment³⁹ and it remains unclear whether staff of a statutory state owned corporation hold an office of profit under the Crown. Although such staff are employed by the corporation⁴⁰ and not the Crown, the corporations do not represent the State unless by express agreement of the voting shareholders⁴¹ and ministers have limited power to direct such corporations.⁴²

Whether or not a particular entity established by statute is 'the Crown' must be judged by the terms of the statute and factual criteria.⁴³

Whether an office is under the Crown depends on the nature of the duties and who appoints, controls and dismisses. Where the Crown has power of appointment and dismissal the presumption is that the office is under the Crown. Where

35 *Public Sector Employment and Management Act 2002*, s 4A.

36 *Ibid*, s 3.

37 *Ibid*, s 6 and Sch 1.

38 A minister, a parliamentary secretary or the leader of the opposition in the Assembly. See the *Public Sector Employment and Management Act 2002*, s 32.

39 See *LC Debates* (8/3/2006) 21171.

40 *State Owned Corporations Act 1989*, s 20M.

41 *Ibid*, s 20F.

42 *Ibid*, s 20P.

43 In *Townsville Hospitals Board v Townsville City Council* (1982) 149 CLR 282 at 291 Gibbs CJ (with whom the other members of the Court agreed) stated that the legal authorities display 'a strong tendency to regard a statutory corporation formed to carry on public functions as distinct from the Crown unless Parliament has by express provision given it the character of a servant of the Crown'.

the Crown appoints but the duties are not connected with the public service, then the office may not be an office under the Crown.⁴⁴

More complex questions arise in the case of officers or employees of semi-government or partly privatised entities.⁴⁵

Local government councillors do not hold offices of profit under the Crown and are capable of being elected as members while continuing to hold the position of councillor. This is because councillors are elected to civic office under the *Local Government Act 1993* and are accountable to the people who elect them, and not the executive government.⁴⁶ Several members when elected to the Council have remained local government councillors for a period of time.⁴⁷ Similarly, employees of local government do not hold an office of profit under the Crown.

The office of a judge or royal commissioner is also unlikely to be ‘under the Crown’, because the office-holder is required to act independently and is not subject to any direction or supervision by the executive.⁴⁸

The Crown Solicitor has advised that it is doubtful that an office with a university would be regarded as being ‘an office of profit under the Crown’, except for the position of a member of a university Senate appointed by the minister on the nomination of the Senate.⁴⁹

The *University Legislation Amendment Act 2004* removed the requirement for each House of Parliament to appoint a member to the governing body of the various universities within the State. Under the amendment the minister may now appoint a member of Parliament as a member of the governing body but only if the governing body nominates the person for appointment.⁵⁰ However, section 13B would not operate to disqualify a member appointed by the minister to a

44 *Report from the Select Committee on offices of places of profit under the Crown*, House of Commons, UK, 1941, Appendix 1, Third Memorandum by the Attorney General, p 136.

45 Senate Standing Committee on Constitutional and Legal Affairs, *The Constitutional Qualifications of Members of Parliament*, 1981, pp 39-40; Cole K, ‘Office of Profit under the Crown and membership of the Commonwealth Parliament’, Parliamentary Library, Parliament of Australia, 30 April 1993, pp 12-15.

46 In *Sydney City Council v Reid* (1994) 34 NSWLR 506 at 521 per Meagher JA, the Sydney City Council was found by the Court of Appeal not to be ‘the Crown, or an arm of the Crown, or an emanation of the Crown, or an agent of the Crown’; see also Crown Solicitor’s Advice to the Auditor-General in *Auditor-General’s Report to Parliament 1999*, Vol 2, pp 403-407.

47 For example, the Hon Frank Calabro, the Hon Leo Connellan, the Hon Joe Thompson, the Hon Kayee Griffin and Ms Sylvia Hale.

48 Twomey, above n 5, p 437; Carney, above n 7, p 64.

49 Crown Solicitor, ‘Advice re: Inquiry concerning ss 13 and 13B of the *Constitution Act 1902*’, paras 3.3 and 3.7, reproduced in Standing Committee on Privilege and Ethics, above n 8, Appendix 4.

50 See *Charles Sturt University Act 1989*, s 9(4); *Macquarie University Act 1989*, s 9(4); *Southern Cross University Act 1993*, s 10(4); *University of New England Act 1993*, s 9(4); *University of New South Wales Act 1989*, s(3); *University of Newcastle Act 1989*, s 9(4); *University of Sydney Act 1989*, s 9(2); *University of Technology Sydney Act 1989*, s 9(4); *University of Western Sydney Act 1997*, s 12(4); and *University of Wollongong Act 1989*, s 9(4).

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governing body of a university if the member is not entitled to remuneration, except fees for attendance at meetings or an allowance for reasonable expenses,⁵¹ and especially where the payment is from the university and not the Crown. Conversely, a position with a TAFE college may amount to 'an office of profit under the Crown'.⁵²

Section 102 of the *Public Sector Employment and Management Act 2002* provides that if any person employed in any 'public sector service' nominates for election to Parliament, they must be given leave of absence until the result of the election is declared. If the person is elected they are required to resign from the public sector service.

Section 13B(3) of the *Constitution Act 1902* exempts the following office holders from the operation of section 13B(1) and (2) and they are capable of being elected and sitting in the Council:

- a person who holds or accepts the office of minister of the Crown or any office of profit under the Crown created by an Act as an office of the executive government;
- a person who holds or accepts an office in respect of which the holder is not entitled to any remuneration, except fees for attendance at meetings or an allowance for reasonable expenses incurred or to be incurred in carrying out the functions of the office;
- a person who holds or accepts an office under the Crown other than the Crown in right of New South Wales, but not as a member of another Parliament;
- a person who holds or accepts the office of Vice-President of the Executive Council;
- a person who holds or accepts the office of parliamentary secretary.

The position of President is not an office of profit under the Crown as the President is elected by the House.

Some offices are also deemed by legislation not to be an office of profit under the Crown for the purposes of section 13B.⁵³

Any member contemplating accepting a position which might be considered an office of profit must obtain their own legal advice. Occasionally the Clerk, on behalf of the President, has sought advice from the Crown Solicitor on issues concerning office of profit. In some cases positions have been regarded as an office of profit, such as President of the Ku-ring-gai Chase Trust under the *Crown Lands*

51 *Constitution Act 1902*, s 13B(3)(a)(ii).

52 See also Crown Solicitor's Advice to the Auditor-General in *Auditor-General's Report to Parliament 1999*, Vol 2, para 3.3.

53 For example, trustees of Sydney Cricket and Sports Ground Trust (*Sydney Cricket and Sports Ground Act 1978*, s 5); the Chief Cancer Officer of the Cancer Institute of New South Wales (*Cancer Institute (NSW) Act 2003*, s 10).

Consolidation Act 1913 (now repealed),⁵⁴ government-appointed trustee under the *McGarvie Smith Institute Incorporation Act 1928*, or Fellow in Anaesthesia at a public hospital.⁵⁵ Other positions have not been regarded as an office of profit, such as membership of the Board of management of the Road Safety Council of New South Wales (now disbanded).

Section 13B also applies to any person in receipt of a pension from the Crown during pleasure or for a term of years. It appears that this class of pension has long ceased to function and that the disqualification has little, if any, application today.⁵⁶

Under section 25 of the *Parliamentary Contributory Superannuation Act 1971* if a person receiving or entitled to receive a pension under the Act again becomes a member, their right to a pension is suspended while the person continues to be a member.

As for public service pensions, section 13D of the *Constitution Act 1902* provides for the abatement of the salary of any member receiving a pension or superannuation as a public servant.

Holding a contract for or on account of the public service⁵⁷

Section 13 of the *Constitution Act 1902* disqualifies from election to and membership of the Council any person who holds a contract or agreement for or on account of the public service of New South Wales. Section 13(1) and (2) provide as follows:

(1) Any person who directly, or indirectly, himself, or by any person whatsoever in trust for him or for his use or benefit or on his account, undertakes, executes, holds, or enjoys in the whole or in part any contract or agreement for or on account of the Public Service of New South Wales shall be incapable of being elected or of sitting or voting as a Member of the Legislative Council or Legislative Assembly during the time he executes, holds or enjoys any such contract or any part or share thereof or any benefit or emolument arising from the same.

(2) If any person being a Member of such Council or Assembly enters into any such contract or agreement, or, having entered into it, continues to hold it, his seat shall be declared by the said Legislative Council or Legislative Assembly, as the case may require, to be vacant, and thereupon the same shall become and be vacant accordingly.

54 Crown Solicitor's Advice, '*Constitution Act, 1902*, section 17B(3): Question whether the office of President of the Ku-ring-gai Chase Trust is an 'office of profit under the Crown'', 29 June 1954.

55 Crown Solicitor's Advice, '*Office of Profit*', 28 April 1995.

56 *LC Debates* (19/3/1980) 5441; Carney, above n 7, p 93.

57 For a historical background to s 13, see Standing Committee on Privilege and Ethics, above n 8, pp 5-6.

In simpler terms, section 13(1) provides that public contractors are incapable of being elected to or of voting or sitting in Parliament. Section 13(2) provides that, where a person is already a member of the Council and enters into a contract for or on account of the public service, the Council shall declare their seat vacant. This provision seemingly requires a declaration from the Council before the member loses their seat and, furthermore, obliges the House to make such a declaration.⁵⁸

The rationale for this disqualification is to prevent the executive government from unduly seeking to influence members of Parliament through the offer of government contracts. Moreover, it also helps maintain the integrity of contracting for the public service by ensuring that the public service is not compromised in the interests of benefiting members of Parliament.

The existence of a 'contract or agreement' is a necessary feature for section 13(1) or (2) to apply. Further, the contract or agreement in question may need to be one which is valid and enforceable at law. In addition, a contract or agreement must be 'for or on account of the public service of New South Wales'. Some contracts or agreements are expressly deemed by provisions of other statutes to be 'for or on account of the public service of New South Wales'. However, where this is not the case, there is some uncertainty as to whether 'for or on account of the public service' refers to the party with whom the contract must be made or the purpose of the contract.⁵⁹

There have been various proposals to implement schemes for the provision of motor vehicles to members which have all failed owing to the disqualification provisions in the *Constitution Act 1902* regarding contracting with the Crown.

In 1972 a government Salaries Inquiry Committee proposed to provide members with assistance in the purchase of motor vehicles similar to a scheme of assistance for public servants who use vehicles on official business. However, the Crown Solicitor advised that a member contracting to repay an advance, giving a bill of sale over a vehicle purchased with an advance, or contracting with the government to purchase a motor vehicle could be disqualified under section 13.⁶⁰

In 1989 following a direction from the Premier to the Parliamentary Remuneration Tribunal to make a special determination under section 12 of the *Parliamentary Remuneration Act 1989*, the Tribunal made a determination that would allow vehicles to be purchased by the government and leased to Parliament House and the costs of providing a vehicle for a member's use would be met out of the member's electoral allowance or salary. In an advice on proposed schemes for provision of motor vehicles to members, the Crown Solicitor advised that, while the determination was not within the powers of the Tribunal, nevertheless the

58 For a more detailed discussion, see Twomey, above n 5, pp 407-410.

59 For a more detailed discussion, see *ibid*, pp 411-415.

60 Crown Solicitor's Advice, 'Assistance to Members of Parliament in purchase of motor vehicles for use by them primarily on parliamentary duties: *Constitution Act, 1902*, as amended, sections 13 and 14', 24 July 1972.

scheme proposed by the Tribunal could amount to a contract falling within the scope of section 13. Alternative schemes proposed in the request for advice involving salary sacrifice were also considered a substantial risk of being found to amount to a contract within section 13.⁶¹

However, the Crown Solicitor has advised that section 13 has no application in relation to the provision of a motor vehicle for use by a parliamentary secretary, where there is no contract or agreement between the government and the member in relation to provision of the motor vehicle.⁶²

Section 13(4) lists six exemptions where candidates for and members of Parliament may enter into contracts or agreements. They are:

- investment in government bonds;
- contractual interests arising under a deceased estate or trust;
- compensation agreements (to be notified in the Government Gazette);
- real property contracts, including leases;⁶³
- contracts for the sale to or from the Crown of goods, merchandise or services if supplied on ordinary public terms;
- secured loans by the Crown to members on ordinary terms.

In addition to the loss of their seat under section 13, section 14(2) provides that, if any person 'presumes to sit or vote' as a member while holding 'a contract for or on account of the public service', an action may be brought in the Supreme Court for the recovery from that person of the sum of \$1000. In deciding such action, the Court would need to determine whether or not the person had in fact been disqualified when they presumed to sit or vote.

In a case in 1956, advice of the Crown Solicitor suggested that a member's ownership of a printing and publishing company, which publishes a local newspaper and which accepts government advertisements, might constitute a disqualification under section 13, while accepting advertisements from local councils would not.⁶⁴

In 2002 the Standing Committee on Parliamentary Privilege and Ethics conducted an inquiry into sections 13 and 13B of the *Constitution Act 1902*.⁶⁵ The Committee

61 Crown Solicitor's Advice, 'Provision of motor vehicles to Members; *Constitution Act 1902*, s 13, and other questions', 31 October 1990. The advice, together with an advice from Price Waterhouse, dated 7 November 1990, on the taxation implications of provisions of cars to members, was tabled by the President on 3 December 1997, in response to an order of the House for papers, *LC Minutes (3/12/1997)* 287; *LC tabled documents, 1997/762 & 763*.

62 Crown Solicitor's Advice, 'Provision of motor vehicles to parliamentary secretaries', 27 November 1997. The advice was tabled in the Council by the Leader of the Government during debate on an order for papers, *LC Minutes (3/12/1997)* 283; *LC tabled documents, 1997/759*.

63 In 1966 the Crown Solicitor advised that a lease of privately owned land by a member to the Totalizator Agency Board was exempt; Crown Solicitor's advice, 31 August 1966.

64 Crown Solicitor's Advice, 'Effect of sections 13 and 17B(3) of the *Constitution Act*', 1 May 1956.

65 Standing Committee on Parliamentary Privilege and Ethics, *Report on sections 13 and 13B of the Constitution Act 1902*, Report No 15, March 2002.

concluded that the sections are unclear in meaning, uncertain in scope and, in some cases, anomalous. In addition, the Committee concluded that key provisions of the sections were also complex and antiquated, and the meaning obscure. The Committee was of the view that this lack of uncertainty was unsatisfactory given the harshness of the penalty imposed by each section – loss of seat. Given the uncertainty and potentially disproportionate nature of the penalty, the Committee concluded that both sections are unworkable in a contemporary context and should be repealed.⁶⁶ This recommendation has not been acted on to date.

Failure to attend the House for one whole session

Section 13A(1)(a) of the *Constitution Act 1902* provides that a member's seat will become vacant if the member fails to attend for one whole session of the Council, unless excused by the House. A 'session' refers to the period between the first meeting of the House following prorogation, whether for a periodic Council election or otherwise, and the next prorogation of the House.

There is no requirement for a member to seek permission from the House for leave of absence, but to avoid the disqualification provisions under section 13A(1)(a), members may obtain leave under standing order 63.

Since 1856 there have been 15 cases of members of the Council being disqualified on the ground of failure to attend, the most recent occurring in 1925.⁶⁷ All the cases occurred during the period in which members of the Council were appointed by the Governor, rather than elected, and involved the predecessor to section 13A, section 19 now repealed, which disqualified any member who failed to attend the House for two successive sessions unless excused by the King or the Governor.

In 1865 there was an instance where the absence of three members for two sessions appears to have been dealt with leniently under the *Constitution Act 1855*. At the commencement of a new session in January 1865, the President reported to the House that three members, the Hon Alexander Macarthur, the Hon Francis Merewether and the Hon William Russell, had failed to attend the House for two successive sessions, namely 1863-1864 and 1864.⁶⁸ The matter was referred to a

⁶⁶ *Ibid*, paras 4.1 to 4.4, pp 30-31.

⁶⁷ *LC Minutes* (8/12/1858) 2 (Riddell), (11/1/1861) 7 (A'Beckett), (24/10/1865) 3 (Alexander Macarthur, Merewether & Russell), (22/8/1882) 2 (William Macarthur), (8/9/1885) 2 (Joseph), (27/2/1889) 3 (Grahame & Ogilvie); (29/4/1890) 4 (Watt); (30/8/1892) 107 (Lord), (12/5/1896) 3 (Tarrant), (10/3/1908) 2 (Wise); (24/6/1925) 3 (Mackellar). In one case, although the member failed to attend for two sessions and his seat became vacant, the member died during the recess before the vacancy was reported at the next sitting of the House, *LC Minutes* (23/10/1888) 2 (Campbell). Before 1856 there was also one case of a member being disqualified for failing to attend for two sessions, *LC Votes & Proceedings* (22/3/1848) 7 (Lang).

⁶⁸ *LC Minutes* (24/1/1865) 10. Section 5 of the *Constitution Act 1855* provided that if any member failed to attend the Council for two successive sessions without the permission of the Governor notified to the Council their seat became vacant.

select committee, which recommended that the absence of the members for two sessions be reported to the Governor.⁶⁹

The report of the committee was adopted by the House and referred to the Governor.⁷⁰

The Governor, in accordance with section 6 of the *Constitution Act 1855*⁷¹ referred the question of vacancy to the Council to hear and determine. The House once again referred the matter to a select committee.⁷²

In evidence before the committee, the Clerk of the Parliaments advised that the last occasions on which, respectively, the three members had attended in the House was 19 December 1862 (Mr Macarthur), 20 December 1862 (Mr Merewether) and 3 December 1862 (Mr Russell). The 1862 session ended on 20 December 1862, and the 1863-1864 session commenced on 23 June 1863 and ended on 22 April 1864. The 1864 session, which commenced on 18 October 1864, ended abruptly on 9 November 1864 after five sitting days, following an adverse vote in the Assembly, and a general election was held on 16 December 1864.⁷³

During his evidence to the committee the Clerk advised that the absence of the members had made the formation of a quorum more difficult and that there were times when the House, for want of a quorum, had adjourned before proceeding to business.⁷⁴ Evidence by three other witnesses indicated that the three members were in England at that time.⁷⁵

The President, the Hon Terence Murray, as chair of the committee, submitted a draft report concluding that the evidence showed that the members had failed to attend for two sessions and although no Act (bill) had been passed in the 1864 session, according to the true intent and meaning of the *Constitution Act 1855* the seats of the members had become vacant in law and should be declared vacant by the House. However, the motion for the adoption of the draft report was negated on division, three votes to two. An alternative draft report was then proposed by another member of the committee, the Hon Edward Deas Thompson, which concluded that the committee was of the opinion that the members had not within the true intent and meaning of the *Constitution Act* failed to give their

69 'Report from the Select Committee on Question of Vacancy', *LC Journals* (1865) Vol 12, p 165.

70 *LC Minutes* (7/2/1865) 19-20.

71 Section 6 of the *Constitution Act 1855* provided that any question respecting a vacancy in the Council was to be referred by the Governor to the Council to be heard and determined by the Council. An appeal from the determination was allowed to the Queen with the advice of the Privy Council.

72 *LC Minutes* (22/3/1865) 29.

73 *LC Minutes* (3/11/1865) 13.

74 'Report from the Select Committee on Question of Vacancy', above n 69, p 176; *LC Journals* (1865) Vol 12, p 169. Mr Merewether had been granted leave of absence on 23 July 1863 for the remainder of the session.

75 'Report from the Select Committee on Question of Vacancy', above n 69, p 177.

attendance, as the sittings from October to November 1864 did not constitute a session within such intent and meaning. This report was adopted on division, three votes to two, and tabled in the House.⁷⁶

In the House, Mr Deas Thompson moved that the Council, having considered the report of the Select Committee, concurred in the conclusion of the committee that the seats of the members had not become vacant. An amendment was moved by the Solicitor General, the Hon John Hargrave, to the effect that the Council was of the opinion that the seats of the members had in law become vacant. A point of order was raised during debate, questioning whether it was proper to deal with the three members in one proceeding, and that no opportunity had been afforded them of being heard. It was not upheld by the President, on the basis that the question respecting the three members had been referred in the same message from the Governor.⁷⁷

Confounding the issue at the time, in May 1865 the Hon Joseph Docker introduced the 'Session' Definition Bill, which provided that any session in which a bill has not been passed by both Houses is not a session within the meaning of the *Constitution Act 1855*.⁷⁸ During debate on the second reading of the bill a point of order arose as to whether it was in order to proceed with the bill before determining the question of the vacancy already before the House. The President ruled that it would be irregular to proceed with the bill at that time as the House had already in part debated the definition of the word 'session' and it would be anticipated and prejudged by the bill. A motion of dissent was then moved against the President's ruling and the debate was adjourned.⁷⁹ When debate on the dissent motion resumed, the Hon Sir William Manning moved an amendment to the effect that the Council reserved its consideration of the principle involved in the ruling of the President. The amendment was agreed to on the voices.⁸⁰ The second reading of the 'Session' Definition Bill was eventually negatived without division.⁸¹

Ultimately when debate was concluded on the question of the vacancy, the amendment of the Solicitor General, that the seat had become vacant, was negatived on division, 11 votes to 7, and the original motion was carried, with the result that the three members remained in the Council.⁸²

No further action was taken in the House in relation to the reserved consideration of the principle involved in the ruling of the President.

76 *Ibid*, pp 173-174; *LC Minutes* (5/4/1865) 44.

77 *LC Minutes* (3/5/1865) 72-73.

78 *LC Minutes* (18/5/1865) 86.

79 *LC Minutes* (25/5/1865) 89.

80 *LC Minutes* (31/5/1865) 97.

81 *LC Minutes* (7/6/1865) 111.

82 *LC Minutes* (26/5/1865) 94.

Allegiance to a foreign power

Under section 13A(1)(b) of the *Constitution Act 1902*, a member's seat will become vacant if the member takes any oath or makes any declaration or acknowledgment of allegiance, obedience or adherence to any foreign prince or power. Under the section, the entitlement to rights or existing allegiance to a foreign power does not disqualify a member. It is only if a member does some act while a member in acknowledgment of allegiance or to obtain such rights that the provision applies. Thus, having dual citizenship in itself does not activate the provision, but obtaining foreign citizenship while a member would cause the member's seat to be vacated.⁸³

The rationale for this disqualification is the avoidance of an actual or perceived divided loyalty or conflict of interest on behalf of a member.

There has been some doubt expressed as to whether a member with dual citizenship, who performs some act in acknowledgment of their foreign allegiance, such as applying for a foreign passport, would lose their seat under this section.⁸⁴ Section 13A(1)(b) differs from section 44(i) of the Commonwealth Constitution, which provides that a 'person' who is subject to certain grounds of disqualification, including foreign allegiance, is incapable of being chosen, or sitting, as a member.

Bankruptcy

Section 13A(1)(c) of the *Constitution Act 1902* provides that a member's seat becomes vacant if the member becomes bankrupt or takes the benefit of any law for the relief of bankrupt or insolvent debtors.

Bankruptcy as a ground of disqualification from membership dates from at least 1842,⁸⁵ when bankruptcy was considered a crime and it was assumed that bankruptcy and insolvency involved moral turpitude and rendered a person unsuitable for public office. It was also a time when property qualifications applied to the franchise. In recent years, in line with changing community attitudes, the need for such a ground of disqualification has been questioned,⁸⁶ although given the perceived or actual vulnerability of bankrupt members to financial pressure, it has also been argued that there is a case for retaining such a disqualification.⁸⁷

As with the disqualification for foreign allegiance, the disqualification only applies if a sitting member becomes bankrupt or takes the benefit of a relevant

83 *LC Debates* (26/11/1992) 9998-9999.

84 Twomey, above n 5, p 424.

85 5 & 6 Vic, c 76 (1842) (Imp).

86 Committee on the ICAC, *Inquiry into section 13A of the Constitution Act 1902*, December 1998, pp 29-30; Senate Standing Committee on Constitutional and Legal Affairs, above n 45, pp 34-37.

87 Carney, above n 7, p 55.

law. The disqualification has no application to candidates for election to Parliament. Accordingly, a candidate who is bankrupt is not disqualified from becoming a member.⁸⁸

Under the *Bankruptcy Act 1966* (Cth), a person becomes bankrupt in one of two ways. Voluntary bankruptcy occurs when the Official Receiver accepts a bankruptcy petition presented by the debtor.⁸⁹ Involuntary bankruptcy occurs when the relevant court makes a sequestration order against the debtor's estate.⁹⁰

There has been one instance of the seat of a member of the Council being vacated by reason of bankruptcy. On 11 May 1932 the President advised the House that the Hon Hugh McIntosh had become bankrupt and his seat was vacated.⁹¹ Legal proceedings indicate that an order in bankruptcy sequestering the estate of Mr McIntosh was made on 25 March 1931 in respect of two guarantees payable as an assignee from a company to secure a bank overdraft.⁹² The wording of then section 19(d) of the *Constitution Act 1902*, which is identical to the current provision, suggests that the disqualification should have been immediate and automatic on the bankruptcy sequestration order being made, since there was no provision in the section governing appeals against an order in bankruptcy. In the event it was obviously thought improper to take any action with respect to the existence of a vacancy as, curiously, the bankruptcy order against Mr McIntosh was not reported to the House until almost 14 months later, after an unsuccessful appeal to the High Court and refusal of leave to appeal to the Privy Council. Lawyers for Mr McIntosh successfully made representations to the President and Crown Solicitor in April 1931, suggesting that the matter await the outcome of an appeal and that the then section 20 of the *Constitution Act 1902* provided the machinery for determining questions arising respecting any vacancy. Although the Crown Solicitor was of the view that the wording of section 19 was plain in that the seat of a member who becomes bankrupt automatically becomes vacant, he thought that, until an order was made by the High Court discharging the sequestration order, it was best that Mr McIntosh abstain from acting as a member.⁹³ Although Mr McIntosh did not take part in any debate or division he nevertheless attended the House on 30 occasions during the appeal process.⁹⁴

Following an unsuccessful appeal to the High Court,⁹⁵ Mr McIntosh sought special leave to appeal to the Privy Council. Again, lawyers for Mr McIntosh made

88 The most notable case in New South Wales is that of Sir Henry Parkes who was twice declared bankrupt while a member of the Assembly. On each occasion he resigned his seat and was subsequently re-elected.

89 *The Laws of Australia*, Thomson Lawbook Co, 2005, Voluntary Bankruptcy 3.3 [29].

90 *Ibid*, 3.3 [35].

91 *LC Minutes* (11/5/1932) 534.

92 *McIntosh v Shashoua* (1931) 46 CLR 494.

93 Crown Solicitor's Advice, 1 May 1931.

94 *LC Minutes* (7/6/1931) 195 (first occurrence), (10/5/1932) 525 (last occurrence). His last two attendances in the House were after the Privy Council decision.

95 *McIntosh v Shashoua* (1931) 46 CLR 494.

representations regarding his position in the Council. Subsequently, the Crown Solicitor advised that he thought the matter should be brought before the Governor and the Executive Council with a view to referring the matter to the Council under section 20 of the *Constitution Act 1902*.⁹⁶ Nothing further occurred until special leave was refused to appeal to the Privy Council in May 1932.⁹⁷ Lawyers for Mr McIntosh made representations to the Governor on 9 May 1932, requesting the Governor to refer to the Council whether a resolution was necessary to declare the seat vacant, in a similar manner to the practice in the Assembly. It was also suggested that the Council might take the view that forfeiture of the seat be waived. This request may have been made in the knowledge that the session was about to come to an end for an election. On 11 May 1932 lawyers for Mr McIntosh informed the President that they had received advice that the matter was being submitted to the Premier with a view to the matter being brought before the Council. Subsequently, on the next day, which was the second last sitting day of the session, the President informed the House of the bankruptcy and vacation of the seat of Mr McIntosh.⁹⁸

Public defaulter

Section 13A(1)(d) of the *Constitution Act 1902* provides that a member's seat becomes vacant if the member 'becomes a public defaulter'. The meaning of 'public defaulter' is unclear. Advice from the Crown Solicitor in 1995 noted that extensive research had failed to yield any clear indication as to meaning of 'public defaulter'.⁹⁹ However, it has been suggested that the term relates to the non-payment of debts,¹⁰⁰ or to a person who has escaped the law, or defaulted in the payment of a tax, or defaulted on a government contract.¹⁰¹

In 1998, the Joint Committee on the Independent Commission Against Corruption recommended that this ground of disqualification from Parliament be deleted from the *Constitution Act 1902*, on the basis that '[t]he meaning of 'public defaulter' is obscure and does not appear to be the subject of any statutory or judicial definition'.¹⁰² However, no action has been taken in that regard.

Conviction of certain crimes

Section 13A(1)(e) of the *Constitution Act 1902* provides that a member's seat becomes vacant if the member is convicted of an infamous crime, or of an offence punishable by imprisonment for life or for a term of five years or more.

96 Crown Solicitor's Advice, 23 December 1932.

97 His last two attendances in the House were after the Privy Council decision.

98 *LC Correspondence*, 1931/19. It is not known how the President was informed to then declare the seat vacant.

99 Quoted in Committee on the ICAC, above n 86, para 6.8.

100 *Ibid.*

101 Carney, above n 7, p 55.

102 Committee on the ICAC, above n 86, para 6.10.

Initially, the criteria in section 13A(1)(e) applied to persons ‘attainted of treason or convicted of felony or any infamous crime’. However, the criteria was changed in 1999¹⁰³ to the current provisions after a member of the Council was charged with two offences under the *Crimes Act 1900*: dangerous driving occasioning death and dangerous driving occasioning grievous bodily harm.

As with other provisions under section 13A, section 13A(1)(e) only applies to a sitting member of Parliament. It does not prevent a person who has been convicted of such an offence from being elected to Parliament (although, as cited earlier, under section 21 of the *Parliamentary Electorates and Elections Act 1912*, a person sentenced to imprisonment for 12 months or more and in prison serving that sentence is not eligible to be elected). Once a member has been convicted of an infamous crime or an offence punishable by imprisonment for a term of five years or more, a vacancy in their seat occurs. The House can decide a disqualification issue for itself acting under its inherent powers, or, under section 175H of the *Parliamentary Electorates and Elections Act*, resolve to give a reference to the Court of Disputed Returns for determination. The role of the House or the Court of Disputed Returns is to determine that a vacancy has occurred because of the conviction. There is no requirement for the House to confirm the disqualification of a member if the Court makes a declaration of a vacancy.¹⁰⁴

There is no definition of ‘infamous crime’ in the *Constitution Act 1902*,¹⁰⁵ and the precise meaning of the expression is uncertain. However, the term derives from offences which would disqualify a person from giving evidence before a court or being a juror, such as fraud, forgery and bribery, rather than to crimes of violence.

The expression was first used in the Constitution Bill in 1855. In the early 19th century the notion of ‘infamous crime’ was a common law principle affecting the competency of certain persons to give evidence. Although such incompetence had been removed by statute in 1843, the idea had been preserved in relation to disqualification from service as a juror and it was this idea that was taken up in successive versions of the Constitution in relation to disqualification.

The leading authority on the matter is *In re Trautwein*, in which the Council referred a question to the Court of Disputed Returns as to whether, under the predecessor to section 13A(1)(e), the Hon Theodore Trautwein had been convicted of an infamous crime, and whether his seat had consequently become vacant. The Court of Disputed Returns found that the making of a false statement about a document in order to avoid tax was analogous to forgery and was therefore an ‘infamous crime’. According to Maxwell J, forgery, perjury and attempts to pervert the course of justice fall within the category of ‘infamous crime’.¹⁰⁶

103 *Crimes Legislation Amendment (Sentencing) Act 1999*, Sch 4.90.

104 Under ss 175F and 175H(2)(c) of the *Parliamentary Electorates and Elections Act 1912*, the Prothonotary of the Supreme Court is required to forward a copy of the order or declaration of the Court of Disputed Returns to the Clerk of the House.

105 A definition is provided in s 104 the *Crimes Act 1900*, but it is expressed to be for the purposes of offences referred to in ss 101-103 of that Act.

106 (1940) 40 SR (NSW) 371 at 374-377.

The meaning of ‘infamous crime’ was also considered in 1995, when a member of the Assembly was convicted of certain offences under the *Taxation Administration Act 1953* (Cth).¹⁰⁷ The Crown Solicitor and Solicitor General initially advised that the offences amounted to infamous crimes, although they later modified that view,¹⁰⁸ while Mr David Bennett QC advised that the offences did not amount to such crimes.¹⁰⁹ The question was never finally determined, as the member resigned from the Assembly. However, in a subsequent report concerning certain related matters, the Independent Commission Against Corruption expressed the view that the term ‘infamous crime’ was outmoded and uncertain in meaning, and should be removed from the Constitution.¹¹⁰

Disqualification from membership of Parliament for an offence punishable by imprisonment for life or for a term of five years or more applies regardless of whether or not the maximum offence of five years or more is actually applied by the courts. Even where the actual sentence is less than five years’ imprisonment, or none at all, the seat of the member would still become vacant.

There has been one instance of a member vacating their seat on conviction of a felony under the former section 19 of the *Constitution Act 1902*. On 13 June 1905 the President informed the House that he had received a communication from the Chief Secretary that the seat of the Hon Thomas Slattery was vacated on conviction of a felony.¹¹¹

Section 13A(1)(e) also prescribes that a member’s seat will become vacant if the member is convicted of a specified offence *and* the member is the subject of the operation of section 13A(2). A member is the subject of the operation of section 13A(2) in the following circumstances:

- if the member fails to appeal against their conviction by the time the prescribed period for lodging an appeal expires;
- if the member appeals against their conviction but the conviction is not set aside when the appeal is determined; or
- if the member appeals against their conviction but the appeal either lapses or is withdrawn.

107 The offences involved knowingly making a statement to a taxation officer which was false in a material particular (ss 8P and 8R of the *Taxation Administration Act 1953* (Cth)); and failing to keep full accounts of a business with the intention of deceiving the Commissioner of Taxation (ss 8T and 8P of the *Taxation Administration Act 1953* (Cth)). See ICAC, *Report on the investigation into circumstances surrounding the payment of a parliamentary pension to Mr PM Smiles: second report*, April 1996, p 2.

108 ICAC, *Investigation into the circumstances surrounding the payment of a parliamentary pension to Mr PM Smiles*, February 1995, pp 8-9.

109 ICAC, above n 107, p 5.

110 *Ibid.*

111 *LC Minutes* (13/6/1905) 4. The letter from the Chief Secretary included a certificate of the Prothonotary of the Supreme Court indicating that Mr Slattery was convicted on 3 April 1905 for stealing £6958.18s and was sentenced to three years and six months with hard labour in Darlinghurst goal, *LC Correspondence*, 1905/149.

It follows that a member's seat will not become vacant under section 13A(1)(e) if their conviction *is* set aside on appeal, or if the member resigns before the appeal period expires or before an appeal is determined, lapses or is withdrawn.

One consequence of the enactment of section 13A(2) is that, following a member's conviction, there will be a delay before it is known whether or not the member's seat will become vacant, until either the prescribed period for lodging an appeal has expired, or any appeal process has concluded. In the intervening period, however, the House retains a discretion in appropriate cases to expel the member from the House, where such action is reasonably necessary for the exercise of its functions. Section 13A(3) specifically provides: 'Nothing in this section affects any power that a House has to expel a Member of the House'. Other options potentially available to the House are to suspend the member or to grant the member leave of absence until the outcome of an appeal is known.¹¹²

In the case of the Hon Theodore Trautwein, discussed above, the matter was referred to the Court of Disputed Returns on 23 May 1940, and the Court made its finding in relation to the conviction on 19 June 1940. Mr Trautwein did not attend the House during this time, although once the Court had determined that the member had been convicted of an infamous crime, his seat was declared vacant from 16 April 1940, the date of his conviction.

Membership of the Legislative Assembly

Section 13C of the *Constitution Act 1902* provides that a member of either House of Parliament is not capable of being elected or of sitting or voting as a member of the other House.

The rationale for this disqualification lies in the impossibility of adequately performing the roles of a member of both Houses, and the conflict of interest likely to arise between the responsibilities of each role. The parameters of the phrase 'being elected' are not defined, but it would be prudent for a member to resign as a member of one House before nominating as a candidate for election to the other.

Under section 14(1) of the Act, if any person who is 'incapable to sit or vote' under the Act is nevertheless elected or returned, the House (to which election is sought) must declare their election void.

Membership of the Commonwealth Parliament

Section 81E of the *Parliamentary Electorates and Elections Act 1912* provides:

A member of the Parliament of the Commonwealth shall be incapable of being nominated as a candidate for, or elected as a member of, the Council.

¹¹² LC Debates (7/6/2000) 6689.

Section 79(7) of the Act imposes an equivalent disqualification in respect of election to the Legislative Assembly.

The rationale for the disqualification is similar to the rationale for section 13C of the *Constitution Act 1902*, that is the avoidance of any conflicts of interest arising from the performance of the dual roles as a member of two Houses of Parliament, and the impossibility of adequately performing both roles.¹¹³

DETERMINATION OF DISQUALIFICATIONS

In 1928 the Parliament transferred the power to determine the validity of any 'election or return' to the Court of Disputed Returns under section 155 of the *Parliamentary Electorates and Elections Act 1912*.

In addition to the power to determine election petitions, any 'question respecting the qualification of a Member' or 'a vacancy' in the House may be referred by resolution of the Council to the Court of Disputed Returns under sections 175B and 175H of the Act.

Where any question is referred, the President transmits to the Court a statement of the question on which the determination of the Court is desired, together with any relevant papers relating to the question in the possession of the Council.¹¹⁴ The Court may allow any person who, in its opinion, is interested in the determination of the question referred to be heard before it, or may direct notice of the reference to be served on any person. Any person allowed to be heard, or on whom notice has been served, is deemed a party to the reference.¹¹⁵

As with the exercise of the Court's jurisdiction concerning disputed elections and returns, there is no appeal from the Court's decision.¹¹⁶

There has been only one case in which the Council has referred a question to the Court of Disputed Returns, that of the Hon Theodore Trautwein cited earlier. On 23 May 1940, the last sitting day of the session, the House asked the Court of Disputed Returns to determine whether the Hon Theodore Trautwein had been convicted of an 'infamous crime' and whether the member's seat had become vacant. Mr Trautwein had been convicted and sentenced to one-year hard labour on 16 April 1940 for making a false statement about a document in order to avoid tax, and an appeal against the conviction was dismissed on 20 May 1940.¹¹⁷ The Court of Disputed Returns made its finding in relation to the conviction on 19 June 1940, during the prorogation of the House.

113 Carney, above n 7, p 28.

114 *Parliamentary Electorates and Elections Act 1912*, ss 175C and 175H.

115 *Ibid*, ss 175D and 175H.

116 *Ibid*, ss 169, 175G and 175H.

117 *LC Minutes (23/5/1940)* 383-384.

On 24 September 1940, the first sitting day of the next session, the judgment of the Court was reported to the House.¹¹⁸ After examining the history of the expression ‘infamous crime’ and reported cases, the Court found that Mr Trautwein, in making untrue representations, both orally and in writing, with some names forged, to avoid tax and bankruptcy proceedings by the Federal and State Commissioners of Taxation, being analogous to forgery, is designated an ‘infamous crime’ within the meaning of the common law doctrine as ‘contrary to the faith, credit and trust of mankind’, and that the member’s seat had become vacant.¹¹⁹ Following receipt of the determination of the Court, the President informed the House that the Governor had been notified that the member’s seat had become vacant on 16 April 1940, the date of the member’s conviction.¹²⁰

THE EFFECT OF DISQUALIFICATION UNDER SECTION 13A ON SUPERANNUATION BENEFITS

Where the seat of a member becomes vacant by the operation of section 13A of the *Constitution Act 1902*, a member is not entitled to a pension under the *Parliamentary Contributory Superannuation Act 1971*, but is entitled to a refund of their contributions.¹²¹ This Act was amended by the *Parliamentary Contributory Superannuation Amendment (Criminal Charges and Convictions) Act 2006* to provide disqualification from receiving a pension if a member ceases to be a member while proceedings for a ‘serious offence’¹²² are pending and is later convicted. In addition, a former member’s pension is suspended while any ‘serious offence’ proceedings are pending. If the proceedings do not lead to a conviction the suspension is lifted and entitlement to a pension is reinstated.¹²³

Superannuation benefits available to members are discussed later in this chapter.

CONDUCT OF MEMBERS

The House has a common law power to discipline members adjudged guilty of misconduct or conduct unworthy of the House. This power was confirmed by the decision of the New South Wales Court of Appeal in *Armstrong v Budd*.¹²⁴

However, since 1998, the conduct of members has also been regulated by a Code of Conduct for members of both Houses. The code was first adopted by the

118 *LC Minutes* (24/9/1940) 7-11.

119 *LC Minutes* (24/9/1940) 10.

120 *LC Minutes* (24/9/1940) 11.

121 *Parliamentary Contributory Superannuation Act 1971*, s 19(8).

122 *Ibid.* Section 19AA(10) defines serious offence as (a) an offence committed in New South Wales that is punishable by imprisonment for life or for a term of five years or more or an offence committed elsewhere than in New South Wales that, if committed in New South Wales, would be an offence so punishable, or (b) an infamous crime.

123 *Ibid.*, s 19AA.

124 (1969) 71 SR (NSW) 386.

Council on 1 July 1998.¹²⁵ On 26 May 1999 the code was re-adopted by the Council, by a resolution expressed to have ‘continuing effect unless and until amended or rescinded by further resolution of the House’.¹²⁶

On 27 June 2007, a revised code was adopted by the Council, again by resolution expressed to have ‘continuing effect unless and until amended or rescinded by further resolution of the House’.¹²⁷

Enforcement of the Code of Conduct is the responsibility of the individual Houses. However, as discussed below, the Independent Commission Against Corruption (ICAC) has jurisdiction to make findings of ‘corrupt conduct’ against a member, including that a member has committed a ‘substantial breach’ of the code.

The following section examines the definition of ‘corrupt conduct’ under the *Independent Commission Against Corruption Act 1988* and provides a background to the adoption of the Code of Conduct. It also examines the conduct of investigations by the ICAC into corrupt conduct and the role of the Ethics Adviser.

Corrupt conduct

In 1988 the Greiner Government established a new institution, the ICAC, to target corruption in New South Wales. The ICAC was established under the *Independent Commission Against Corruption Act 1988* with the coercive powers of a royal commission. The establishment of the ICAC followed a series of widely publicised events involving the conduct of senior public officials, including the imprisonment of a Cabinet minister and a former chief magistrate, and an inquiry which had led to the discharge of a Deputy Commissioner of Police.

Sections 7-9 of the Act define ‘corrupt conduct’. Section 7 provides that ‘corrupt conduct’ is any conduct which falls within the description of corrupt conduct contained in section 8, but which is not excluded by section 9. Section 8(1) of the Act, as amended by the *Independent Commission Against Corruption Amendment Act 1994*, defines corrupt conduct as:

- (a) any conduct of any person (whether or not a public official) that adversely affects, or that could adversely affect, either directly or indirectly, the honest or impartial exercise of official functions by any public official, any group or body of public officials or any public authority, or
- (b) any conduct of a public official that constitutes or involves the dishonest or partial exercise of any of his or her official functions, or
- (c) any conduct of a public official or former public official that constitutes or involves a breach of public trust, or

125 *LC Minutes* (1/7/1998) 629-630. The code was first adopted by the Assembly on 5 May 1998, see *LA Votes and Proceedings* (5/5/1998) 544-548.

126 *LC Minutes* (26/5/1999) 91-92. The effect of that provision was that the Code of Conduct operated continuously in the Council, without the need for re-adoption in each new Parliament.

127 *LC Minutes* (27/6/2007) 148-152.

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- (d) any conduct of a public official or former public official that involves the misuse of information or material that he or she has acquired in the course of his or her official functions, whether or not for his or her benefit or for the benefit of any other person.

Under section 8(2), corrupt conduct also includes conduct of any person that adversely affects, or could adversely affect, the exercise of official functions by any public official and which could involve bribery, blackmail, illegal drug dealings and an assortment of other criminal offences.

Section 9(1), as amended in 1994, provides that conduct which falls within section 8 does not amount to corrupt conduct unless it could also constitute or involve:

- (a) a criminal offence, or
- (b) a disciplinary offence, or
- (c) reasonable grounds for dismissing, dispensing with the services of or otherwise terminating the services of a public official, or
- (d) in the case of conduct of a minister of the Crown or a member of a House of Parliament – a substantial breach of an applicable code of conduct.

Of particular note is section 9(1)(d), which provides that conduct of a member of Parliament which falls within section 8 of the Act will amount to 'corrupt conduct' if it could also constitute or involve 'a substantial breach of an applicable code of conduct'. The term 'substantial breach' used in section 9(1)(d) was considered in a report by the ICAC in September 2003 to the Speaker of the Assembly:

The ICAC's assessment of what constitutes a 'substantial' breach of the Code will depend on the facts and circumstances of each particular case. The word 'substantial' is given its natural and ordinary meaning. The Shorter Oxford English Dictionary defines 'substantial' inter alia 'as being of ample or considerable amount, quantity or dimensions; having weight or force or effect, not of imaginary, unreal or apparent only'. Similarly the Butterworths Australian Legal Dictionary defines the term as 'being real or of substance, as distinct from ephemeral or nominal; in a relative sense, considerable.'

The ICAC is of the view that the meaning should also be considered in the overall context in which the term is used. The Preamble to the Code refers to the responsibility of MPs to perform their duties with honesty and integrity, respecting the law and the institution of Parliament. What constitutes a 'substantial' breach will also be influenced by which clause of the Code a Member is alleged to have breached. For example a single instance of a breach of clause 2 (which deals with bribery) may amount to a 'substantial' breach, whereas a single instance of a breach of clause 4 (dealing with the use of public resources) may not be regarded as a 'substantial' breach. Other factors to consider may include the amount of money or value of gifts involved, whether the conduct could also amount to a criminal offence, the nature and extent of a failure to declare a conflicting interest and the assessment of that conduct by other Members.¹²⁸

128 ICAC, *Regulation of secondary employment for Members of the NSW Legislative Assembly: Report to the Speaker of the Legislative Assembly*, September 2003, p 25.

The expression ‘applicable code of conduct’ used in section 9(1)(d) is defined as ‘a code of conduct adopted for the purposes of this section by resolution of the House concerned’ (section 9(3)).

The provisions of section 9(1)(c) contemplate that the service of members can be terminated. In a formal sense, the services of members can only be terminated in one of two ways: by disqualification under the provisions of the *Constitution Act 1902* or by exercise by the relevant House of its discretionary powers. However, the current position is that ‘reasonable grounds for ... terminating the service of a public official’ can be applied to members of Parliament, and that the ICAC can make a statement in its reports to Parliament to the effect that Parliament should consider terminating the service of one of its members.

Under section 9(4) and (5) of the *Independent Commission Against Corruption Act 1988*, ‘corrupt conduct’ also includes conduct of a minister or member which would cause a reasonable person to believe that it would bring the integrity of the office or the Parliament into serious disrepute, and constitutes a ‘breach of the law’ apart from the Act. In this context, a ‘breach of the law’ is construed as meaning a breach of a civil, and not a criminal, law.¹²⁹

The Code of Conduct

The ‘Greiner–Metherell Affair’

The impetus for the adoption of a Code of Conduct for Members arose out of an episode that has become known as the ‘Greiner–Metherell Affair’. The Hon Nick Greiner was Premier of a minority government in 1991 and 1992, while the Hon Dr Terry Metherell was a former minister in the Greiner Government. A few months before the events in question, Dr Metherell had resigned as a member of the Liberal Party, although he continued as the member for Davidson, a safe Liberal seat. Dr Metherell became one of five independent members who held the balance of power in the Assembly.¹³⁰ On 10 April 1992, Dr Metherell resigned from the Assembly and was appointed to a senior position within the environment portfolio in the New South Wales public service.

Dr Metherell’s resignation from Parliament and appointment to the public service were the subject of widespread public controversy. Allegations were made that the Premier and the then Minister for the Environment, the Hon Tim Moore, had arranged the public service position for Dr Metherell for political motives. It was also claimed that Dr Metherell’s appointment was a case of ‘jobs for the boys’, as he was a friend of the Minister, and a past Cabinet colleague of both the Minister and the Premier.

¹²⁹ ICAC, *Report on investigation into conduct of the Hon J Richard Face*, June 2004, p 45.

¹³⁰ The other independent members in the House at the time were the Hon Tony Windsor (who generally voted with the Government), and three non-aligned members, the Hon Clover Moore, the Hon John Hatton and the Hon Dr Peter Macdonald.

The Parliament referred the circumstances relating to Dr Metherell's resignation from the Assembly and subsequent appointment to the public service to the ICAC for investigation. One of the principal matters which the ICAC was required to determine was whether any 'corrupt conduct' had occurred within the meaning of the *Independent Commission Against Corruption Act 1988*. It is significant to note that as originally enacted in 1988, section 9 of the Act did not include section 9(1)(d).

The ICAC's findings on the matters were contained in its *Report on investigation into the Metherell resignation and appointment*, dated June 1992. In its report, the ICAC determined that the Premier and the Minister for the Environment had engaged in corrupt conduct as defined in the *Independent Commission Against Corruption Act 1988* on the ground that the relevant conduct:

- involved the partial exercise of official functions by public officials, and a breach of public trust, within the meaning of section 8(1)(a)-(c); and
- could constitute reasonable grounds for dismissal within the terms of section 9(1)(c).

Following the release of the ICAC's report, both the Premier and the Minister brought proceedings in the Supreme Court of New South Wales challenging the validity of the ICAC's determinations. Both sets of proceedings were removed to the Court of Appeal for determination because of the public importance of the issues involved.¹³¹

The Court of Appeal held that the finding of 'corrupt conduct' was void and wrong in law, as the ICAC had not applied the required objective standards when determining that the relevant conduct could constitute or involve reasonable grounds for dismissal within the terms of section 9(1)(c). In reaching this view, the Court specified that reasonable grounds for dismissing within section 9(1)(c) means reasonable legal grounds for successful action for dismissal, even though, in the case of a Premier and/or a minister, such dismissals will only occur in a very narrow range of circumstances.

The Court of Appeal's decision was seen as demonstrating that, apart from criminal offences within section 9(1)(a), the grounds for a finding of corrupt conduct within section 9(1) could have very little practical operation in relation to ministers or members of Parliament. As a result, concerns were expressed that the *Independent Commission Against Corruption Act 1988* operated in a more restrictive manner for ministers and other members of Parliament than for other categories of public officials.¹³²

131 *Greiner v ICAC* (1992) 28 NSWLR 125. In the event, the four Independent MPs on whom the Greiner minority government relied made it clear that they would no longer support the government if the Premier continued in office. Accordingly, the Premier resigned.

132 *LC Debates* (27/10/1994) 4772.

The ICAC Amendment Act 1994

To overcome the limitation on the ICAC's jurisdiction which the Court of Appeal decision had brought to light, the *Independent Commission Against Corruption Act 1988* was amended by the *Independent Commission Against Corruption (Amendment) Act 1994*.

The principal amendment brought about by the 1994 Act was to expand the definition of corrupt conduct in relation to ministers and members by inserting an additional ground of 'corrupt conduct' within section 9(1). The new ground was contained in a new paragraph (d):

- (d) in the case of conduct by a minister of the Crown or a member of a House of Parliament – a substantial breach of an applicable code of conduct.

The term 'applicable code of conduct' was defined, in the case of a member of either House, as a code of conduct 'adopted for the purposes of this section by resolution of the House concerned'.¹³³

The 1994 amendments also inserted a new Part 7A dealing with parliamentary ethical standards, which provided for the establishment of an ethics committee by each House. The ethics committees were given the following functions: preparing draft codes of conduct for the members of the House and draft amendments to codes of conduct already adopted;¹³⁴ reviewing the code of conduct every two years (since amended to four years);¹³⁵ undertaking 'educative work relating to ethical standards applying to members';¹³⁶ and giving advice in relation to such ethical standards in response to requests for advice from the House, though not in relation to actual or alleged conduct of any particular person.¹³⁷

Initially, the Independent Commission Against Corruption (Amendment) Bill proposed a joint ethics committee to perform these functions, which was to consist of the members of the Joint Committee on the ICAC plus five community members. However, the Council rejected this proposed structure. During the second reading debate in the House, it was argued that it would not be appropriate to give jurisdiction over the conduct of Council members to a committee, such as the Committee on the ICAC, which has a majority of Assembly members. It was also argued that the appointment of community representatives to such a committee was not only inconsistent with the Council's role as a sovereign and independent House, but was unnecessary given the provisions regarding community con-

133 *Independent Commission Against Corruption Act 1988*, s 9(3)(b). The definition in respect of ministers of the Crown is 'a Ministerial code of conduct prescribed or adopted for the purposes of this section by the regulations' (s 9(3)(a)).

134 *Ibid*, s 72C(1)(a).

135 *Ibid*, s 72C(6). This section was amended from two to four years in 2003 by the *Independent Commission Against Corruption Amendment (Ethics Committee) Act 2003*.

136 *Ibid*, s 72C(1)(b).

137 *Ibid*, s 72C(1)(c).

sultation contained in section 72C(2)-(4) of the *Independent Commission Against Corruption Act 1988*.¹³⁸ Finally, it was considered that as the non-parliamentary members were not to be elected, and accordingly would not be bound by the standing orders of the House, they would not be accountable in the way that elected members of Parliament are accountable.¹³⁹

Under the amending Act as finally agreed, while the committees of each House were to have the same functions, they were differently constituted. First, the Assembly Standing Ethics Committee was directly established by a provision of the Act, while a committee of the Council was to be 'designated' as the relevant committee, by resolution of the House. Secondly, the Assembly committee included three 'community members', whereas the requirement for such members on the Council committee had been rejected by the Council.

Under the provision of the new Part 7A of the *Independent Commission Against Corruption Act 1988*, the Standing Committee on Parliamentary Privilege and Ethics, as reconstituted from the former Standing Committee upon Parliamentary Privilege, was designated on 24 May 1995 as the Council's ethics committee for the purposes of the Act.¹⁴⁰

Development of the Code of Conduct

In 1995 and 1996, the Standing Committee on Parliamentary Privilege and Ethics conducted an inquiry to develop a draft Code of Conduct for Members of the Council under the provisions of the *Independent Commission Against Corruption Act 1988*. During the inquiry, the Committee sought to reach agreement with its counterpart committee in the Assembly on a single code of conduct for all members of Parliament. However, these attempts proved unsuccessful and a separate code of conduct was ultimately developed by each of the committees.¹⁴¹

In its report to the House in October 1996, the Council committee recommended that a 'free conference of managers' appointed by both Houses be held, to consider the draft codes developed by the two committees and to recommend a single code for all members.¹⁴² However, no action was taken to implement this recommendation.

In 1998, no progress having been made by either House towards adoption of a code of conduct, the government released a draft code, intended to apply to the members of both Houses. In support of this code, Premier Carr argued that the

138 *LC Debates* (27/10/1994) 4779-4784, (1/12/1994) 6071 and 6084.

139 *LC Debates* (27/10/1994) 4780.

140 *LC Minutes* (24/5/1995) 42.

141 Standing Committee on Parliamentary Privilege, *Report on inquiry into the establishment of a draft code of conduct for Members*, Report No 3, October 1996. Legislative Assembly Standing Ethics Committee, *Report on a Draft Code of Conduct for Members of the Legislative Assembly*, Report No 1, October 1997.

142 Standing Committee on Parliamentary Privilege, above n 141, p 60.

draft codes developed by the Council and Assembly committees were ‘too wide and too uncertain’ in scope to constitute effective grounds for findings of ‘corrupt conduct’ under the *Independent Commission Against Corruption Act 1988* and that, in view of the legal implications of the code, the code should be confined to ‘matters of corruption’ which should be handled with clarity and precision.¹⁴³

The government’s draft code was referred by each House to their respective ethics committees. Both committees subsequently reported in favour of adopting the draft code.¹⁴⁴

Adoption of the Code of Conduct

In 1998 the draft Code of Conduct proposed by the government was adopted by both Houses for the purposes of section 9 of the *Independent Commission Against Corruption Act 1988*.¹⁴⁵ It was re-adopted by the Council on 26 May 1999 with ‘continuing effect’ and remained in force until 27 June 2007, when the House adopted a revised code.¹⁴⁶

The 2007 Code of Conduct consists of a preamble and seven clauses. The individual clauses deal with: conflicts of interest, bribery, gifts, use of public resources, use of confidential information, duties as a member of Parliament and secondary employment or engagements. One of the most important provisions in practice is clause 4, which requires members to ‘apply the public resources to which they are granted access according to any guidelines or rules about the use of those resources’. The full text of the code is included in Appendix 10.

The 2007 code differs from the 1999 code in a number of significant respects. The preamble to the 2007 Code of Conduct includes an acknowledgement that the principal responsibility of members is to the people of New South Wales. The 2007 Code of Conduct also significantly expands the definition of bribery to extend to a member’s family, business associates and other persons from whom the member might expect to receive a financial benefit. The revised code also includes a new section on secondary employment or engagements.

Investigations into corrupt conduct by the Independent Commission Against Corruption

Section 13 of the *Independent Commission Against Corruption Act 1988* describes one of the principal functions of the ICAC as conducting investigations into corrupt conduct. It provides in part:

143 *LA Debates* (2/4/1998) 3649.

144 Standing Committee upon Parliamentary Privilege, *Second report on Code of Conduct*, Report No 5, June 1998, p 20. Other recommendations included that the code proposed by the Committee in 1996 be adopted as a general guide to members in carrying out their duties as elected representatives. See also Legislative Assembly Standing Ethics Committee, *Report on a Draft Code of Conduct for Members of the Legislative Assembly*, Report No 2, April 1998.

145 *LC Minutes* (1/7/1998) 629-630; *LA Votes and Proceedings* (5/5/1998) 544-548.

146 *LC Minutes* (26/5/1999) 91-92, (27/6/2007) 148-152.

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- (1) The principal functions of the Commission are as follows:
- (a) to investigate any allegation or complaint that, or any circumstances which in the Commission's opinion imply that:
 - (i) corrupt conduct, or
 - (ii) conduct liable to allow, encourage or cause the occurrence of corrupt conduct, or
 - (iii) conduct connected with corrupt conduct, may have occurred, may be occurring or may be about to occur,
 - (b) to investigate any matter referred to the Commission by both Houses of Parliament,
 - (c) to communicate to appropriate authorities the results of its investigations,
 - (d) to examine the laws governing, and the practices and procedures of, public authorities and public officials, in order to facilitate the discovery of corrupt conduct and to secure the revision of methods of work or procedures which, in the opinion of the Commission, may be conducive to corrupt conduct, ...

The ICAC may investigate allegations of corruption (section 13(1)), including matters referred to it by the Parliament (section 13(1)(b)), and may make findings and form opinions on the basis of the results of its investigations (section 13(3)(a)). However, section 13(3A) provides that the ICAC may only make a finding that a person has engaged in corrupt conduct if it is satisfied that a person has engaged in or is engaging in conduct that constitutes or involves conduct of the kind described in section 9(1)(a), (b), (c), or (d).

In conducting investigations, the ICAC has wide statutory powers to obtain information. For example, under section 21 of the *Independent Commission Against Corruption Act 1988*, the ICAC has power, by notice in writing, to require a 'statement of information' from a public authority or public official. Under section 22, it has similar power to require the production of documents or other things. It is an offence to fail to comply with a written notice issued by the ICAC (sections 82 and 83). Under section 23, the ICAC has power to enter and inspect premises used or occupied by a public authority or public official, and to take copies of any document found at the premises. No prior notice or warrant is required. In addition to these provisions, the ICAC also has power to obtain information by summons (requiring a person to give evidence and/or produce documents or things), arrest warrant (for failure to obey a summons), search warrant, listening device warrant, telephone intercept warrant, controlled operations, and the use of assumed identities.

While the ICAC has wide investigatory powers, it should be noted that under section 122 parliamentary privilege is expressly preserved in relation to the freedom of speech and debates and proceedings in Parliament. As discussed in Chapter 3 (Parliamentary Privilege), in 2003 the ICAC executed a search warrant at the Parliament House office of the Hon Peter Breen during which material protected by virtue of parliamentary privilege was wrongly seized.

Where the ICAC finds that a member of Parliament has engaged in ‘corrupt conduct’, it may report that finding to the Parliament. No penalties are attached to such a finding, and the finding has no effect on a member’s legal rights and obligations. However, findings invariably have a significant impact on reputation. Further, the finding may lead to the House itself, in the exercise of its inherent power, taking action against the member concerned (for example, by expelling the member concerned for conduct unworthy of a member). If the ICAC finds that the relevant conduct could also amount to a criminal offence, it may recommend obtaining the advice of the Director of Public Prosecutions with respect to a prosecution.¹⁴⁷

There is only one case in which the ICAC has made a finding of corrupt conduct against a member of the Council, that of the Hon Malcolm Jones in 2003.¹⁴⁸ Following the release of the ICAC report in which the finding of corrupt conduct was made, Mr Jones was given an opportunity on 3 September 2003 to address the House, which he did. The next day, the Leader of the Government in the House gave notice of a motion for Mr Jones’ expulsion, but shortly before the House met to consider the expulsion motion Mr Jones resigned to the Governor.¹⁴⁹

The Ethics Adviser

Following the adoption by both Houses of a code of conduct for members in mid 1998, the Council agreed on 24 September 1998 to the appointment of a Parliamentary Ethics Adviser.¹⁵⁰ The position is part-time, and is appointed by the President and Speaker on a renewable contract with the joint Clerks.¹⁵¹ The function of the Parliamentary Ethics Adviser is to advise any member of Parliament, when asked to do so by that member, on ethical issues concerning the exercise of his or her role as a member of Parliament (including the use of entitlements and potential conflicts of interest). The role excludes the giving of legal advice, and the officer is required to keep records of advice given and the factual information upon which it is based. Advice is kept confidential unless the member who requested the advice gives permission for it to be made public. The House can call for the production of records of the Parliamentary Ethics Adviser, but only if the member to which the records relate has sought to rely on the advice or has given permission for the records to be produced to the House.

Under the resolution establishing the position, the Parliamentary Ethics Adviser is required to meet annually with the Privileges Committee, as the dedicated Ethics Committee, and to report to the Parliament each year on the number of ethical matters raised, the number of members who sought advice, the amount of time

147 *Independent Commission Against Corruption Act 1988*, s 74A(2).

148 See ICAC, *Report on an investigation into the conduct of the Hon Malcolm Jones MLC*, July 2003.

149 *LC Minutes* (3/9/2003) 265-266, (16/9/2003) 283; *LC Notice Paper* (16/9/2003) 420.

150 *LC Minutes* (24/9/1998) 728.

151 *LC Minutes* (28/6/2007) 208-210.

spent in the course of duties and the number of times advice was given. The Ethics Adviser may also report to the Parliament from time to time on any problems arising from the determinations of the Parliamentary Remuneration Tribunal that have given rise to requests for ethics advice and proposals to address these problems.¹⁵²

The advice provided by the Ethics Adviser is based on the determinations of the Parliamentary Remuneration Tribunal and the Code of Conduct adopted by each House.

In 2007, the functions of the Ethics Advisers were expanded to include the provision of advice, on request, to ministers and former ministers, on post-separation employment.¹⁵³

PECUNIARY INTERESTS

The disclosure of pecuniary interests by a member is designed to prevent any potential conflict of interest developing between a member's public and private interests.

The Register of Pecuniary Interests

On 13 April 1981, Premier Wran introduced the Constitution (Disclosures by Members) Bill 1981 in the Assembly to insert section 14A into the *Constitution Act 1902* dealing with pecuniary interests. In his second reading speech on the bill, the Premier observed:

The establishment of a scheme whereby Members of Parliament can be seen to be above reproach not only enhances the prestige of our parliamentary system but also protects the Members themselves against scurrilous attacks which in the past they have found difficult to rebut.¹⁵⁴

The bill passed both Houses on 12 May 1981, and was approved at a referendum on 19 September 1981. The bill was subsequently reserved for Her Majesty's assent, notification of which was published in the Government Gazette of 29 January 1982.

Section 14A(1) provides that the Governor may, subject to certain qualifications, make regulations with respect to the disclosure by members of either House of their pecuniary interests. These interests include:

- real or personal property;
- income;
- gifts;

152 *LC Minutes* (24/9/1998) 728, (28/6/2007) 208-210.

153 *LC Minutes* (28/6/2007) 208-210.

154 *LA Debates* (13/4/1981) 5710.

- financial or other contributions to any travel;
- shareholdings or other beneficial interests in corporations;
- partnerships;
- trusts;
- positions (whether remunerated or not) held in, or membership of, corporations, trade unions, professional associations or other organisations or associations;
- occupations, trades, professions or vocations;
- debts;
- payments of money or transfers of property to relatives or other persons by or under arrangements made by members; and
- any other direct or indirect benefits, advantages or liabilities, whether pecuniary or not, of a kind specified in the regulations.

In 1983, the *Constitution (Disclosures by Members) Regulation 1983* was made pursuant to section 14A(1). The regulation, as amended,¹⁵⁵ provides for various types of disclosures or returns of pecuniary interests – primary returns, ordinary returns, supplementary ordinary returns and discretionary returns. New members must lodge a primary return with the Clerk within three months of the date on which they take the pledge of loyalty under section 12 of the *Constitution Act 1902*.¹⁵⁶ Before 1 October each year, members are required to lodge an ordinary return for the 12 months ending 30 June in that year, except for new members whose primary return date was between 1 May and 30 June that year.¹⁵⁷ Members must also lodge a supplementary ordinary return before 31 March for the period 1 July to 31 December for the previous year.¹⁵⁸ The regulation also provides for members to lodge a discretionary return with the Clerk at any time.¹⁵⁹

Members must lodge a return even if they do not have any interests to disclose.¹⁶⁰

The Clerk is required to compile and maintain the ‘Register of Disclosures by Members of the Legislative Council’.¹⁶¹ The register is open to public inspection at the office of the Clerk between the hours of 10.00 am and 4.00 pm on any day except Saturday, Sunday or a day which is a public holiday throughout New South Wales. Members of the Council may inspect the register on any day that the Council is sitting, outside of the days that the register is open to public inspection.¹⁶²

155 The regulation has been amended by the *Corporations (Consequential Amendments) Act 2001 No 34*, the *Financial Services Reform (Consequential Amendments) Act 2002 No 26* and most recently by the *Constitution (Disclosures by Members) Amendment Regulation 2007*.

156 *Constitution (Disclosures by Members) Regulation 1983*, cl 4.

157 *Ibid*, cl 6.

158 *Ibid*, cl 6A. This provision commences in March 2008.

159 *Ibid*, cl 6B.

160 *Ibid*, cl 22.

161 *Ibid*, cl 17.

162 *Ibid*, cl 20.

Within 21 sitting days after the last day for the lodgement of primary returns, and within 21 sitting days after the last day for the lodgement of ordinary returns, the Clerk is required to furnish to the President a copy of the register for tabling in the House.¹⁶³

The following is a list of the pecuniary interests that must be disclosed by members under Part 3 of the *Constitution (Disclosures by Members) Regulation 1983*:

- *Real property.*¹⁶⁴ Members are required to list all property in which they have an interest – financial or otherwise. In addition to listing the address or particulars of title of the property, they must indicate the nature of their ‘interest’, that is, whether they are sole owner, or hold the property jointly or in common with others. Members are not required to indicate the monetary value of the property, or indicate the name/s of any other parties with whom the property is held, either jointly or in common. Further, members are not required to disclose property where the member’s interest is limited to acting as executor or administrator of the estate of a deceased person (unless they are a beneficiary), or where the member is a trustee of a property.
- *Sources of income.*¹⁶⁵ Income does not include a member’s salary, salary of office, or any of the benefits/allowances determined by the Parliamentary Remuneration Tribunal. Members who derive income from sources other than the Parliament must disclose the source of the income. Under amendments to the regulation in 2007, such other sources of income could include income from being an employee of another person, from being the holder of another office and income from a partnership, trust, contract, agreement or arrangement.
- *Gifts.*¹⁶⁶ Gifts includes any disposition of property to a member, whether in money or in some other form, where the value exceeds \$500. Gifts under \$500 do not need to be disclosed. However, if a member receives more than one gift from the same source, it is necessary to aggregate the value of each gift to determine whether in total they exceed the \$500 limit. For example, a member does not need to disclose the receipt of the gift of a book valued at \$50. However, if the member in the course of one year receives from the same source 12 books as gifts, each valued at \$50 (\$600 in total value), then each book would need to be disclosed, since the \$500 limit has been exceeded. It is not necessary to disclose the actual value of a gift, although by its disclosure there is a tacit recognition that it exceeds the \$500 limit.

163 *Ibid*, cl 21.

164 *Ibid*, cl 8.

165 *Ibid*, cl 9.

166 *Ibid*, cl 10.

- *Contributions to travel.*¹⁶⁷ Members must disclose any financial or other contributions to travel, whether within Australia or in overseas countries, including contributions to accommodation incidental to a journey. However, there are a number of exceptions. Where the contribution is below \$250, it is not necessary to disclose the contribution. Members are not required to disclose contributions to travel where the contribution was made from public funds, such as use of members' travel entitlements, gold passes or travel in a government vehicle, nor if a relative of the member made the contribution. Further, it is not required to disclose contributions to travel which arise in the ordinary course of employment of a member outside of their duties as a member. Political contributions to travel are also not required to be disclosed in the Register if they are required to be disclosed under Part VI of the *Election Funding Act 1981*. Members are not required to disclose contributions made by their political party for travel undertaken for the purpose of that party.
- *Interests and positions in corporations.*¹⁶⁸ Interests in corporations that should be disclosed in most circumstances relate to stocks, shares, debentures or the like. Members are also required to disclose any positions held in a corporation, even if the position is honorary. However, this does not include mere membership of a corporation, nor does it include interests or positions held in a corporation if the purpose of the corporation is to provide recreation or amusement, or to promote commerce, industry, art, science, religion or charity. The same applies to a corporation which is required to apply its profits or other income in promoting its objects, or which is prohibited from paying any dividend to its members. Corporations include corporations outside New South Wales.
- *Positions in trade unions and professional or business associations.*¹⁶⁹ The term 'position' implies more than just membership and includes honorary positions which attract no remuneration. Professional and business associations include organisations, whether incorporated or unincorporated, which have as one of their objects or activities the promotion of the economic interests of its members. For example, the Australian Medical Association and the Law Society are professional associations for the purpose of this section. It is not necessary for members to disclose membership of a union, professional or business association.
- *Debts.*¹⁷⁰ Members must disclose all debts over \$500, whether or not the debt is discharged by the ordinary return date. The same rule of aggregation applies to debts as applies to gifts. It is not necessary for members to disclose debts to relatives, nor where the member is liable to pay the

167 *Ibid*, cl 11.

168 *Ibid*, cl 12.

169 *Ibid*, cl 13.

170 *Ibid*, cl 14.

debt to a bank, building society, credit society or other person whose ordinary business includes the lending of money and the loan was made in the ordinary course of business. Consequently, members do not need to disclose details of mortgages or personal loans with banks, building societies or credit unions. It is also not necessary to disclose debts arising from employment in an occupation which is not related to the member's parliamentary duties.

- *Dispositions of property.*¹⁷¹ Members must disclose details of any property which they disposed of during the 12-month period ending on 30 June each year, but only if there is any right for them to continue to use or benefit from the property, or if there is a right for them to reacquire the property at some later time. This includes both real estate as well as any other type of property.
- *Provision of client services.*¹⁷² Members must disclose any engagement to provide a service, whether under an employment contract, as an officer of a corporation or by any other contract or agreement for monetary consideration, where the service involves the use of the member's parliamentary position.

Section 4 of the explanatory notes accompanying the *Constitution (Disclosures by Members) Regulation 1983* provides additional details on the pecuniary interests that must be disclosed. While the regulation specifies interests or matters which must be disclosed, there is nothing preventing a member disclosing interests or any other benefits, advantages or liabilities which are not required to be disclosed under the regulation.

Contravention of the pecuniary interest regulation

Section 14A(2) of the *Constitution Act 1902* provides that if a member of either House wilfully contravenes any regulation made under section 14A(1) of the *Constitution Act 1902*, including the *Constitution (Disclosures by Members) Regulation 1983*, the House may declare the member's seat vacant. Section 14A(3) sets out certain requirements which apply to such declarations.

There has been no case in which a member's seat has been declared vacant under these provisions. However, on 25 September 2002 the House requested the Standing Committee on Parliamentary Privilege and Ethics to investigate and report on whether the Hon Eddie Obeid, Minister for Mineral Resources and Minister for Fisheries, had 'wilfully contravened' clause 12 of the *Constitution (Disclosures by Members) Regulation* by failing to disclose interests and positions in 29 corporations and if so, what, if any, sanctions should be enforced.¹⁷³ The Committee found that the member had made errors in his pecuniary interest returns, but that the

171 *Ibid*, cl 15.

172 *Ibid*, cl 15A.

173 *LC Minutes* (25/9/2002) 383-386, 387-391.

errors were not ‘wilful contraventions’ of the regulation, and that no sanction could be recommended.¹⁷⁴ During the debate on the Committee’s report in the House, Mr Obeid apologised to the House for the errors in his returns.¹⁷⁵

Voting and participating in debate in the House

Standing order 113(2) provides that a member may not vote in any division on a question in which the member has a direct pecuniary interest, unless it is in common with the general public or it is on a matter of State policy. If a member does vote, the vote of that member is to be disallowed. Importantly, standing order 113(2) applies only to the participation of a member in a vote on a question in which the member has a direct pecuniary interest. It does not prevent a member from participating in a debate on the question.

There are examples where members have declared a direct pecuniary interest in a question under discussion and not voted. In 1856 on a motion for committal of the Bonded Warehouses Duty Bill, three members retired beyond the Bar of the House when the President put the question. The President ruled that the members must vote. However, when the members returned and each declared a direct pecuniary interest, the House agreed to a motion, on division, that the three members abstain from voting.¹⁷⁶ In 1860, during a division in committee of the whole on an amendment to the Newcastle Wallsend Coal Company’s Railway Bill, a member stated that he had a direct personal interest as shareholder in the company. The Chair of Committees ordered that the doors be unlocked and the member withdrew.¹⁷⁷ In 1862, when the vote of the Hon Dr James Mitchell was challenged and he admitted having a direct pecuniary interest in the Life Assurance Encouragement Bill, the President ruled that the member could speak but not vote on the bill. However, another member stated his intention of voting to extend to other companies the privileges of the company of which he was proprietor. The President then ruled that this member could vote.¹⁷⁸ Subsequently, the ruling of the President regarding Dr Mitchell was referred to the standing orders committee.¹⁷⁹ The report of the committee, in referring to the practice followed in the House of Lords and the House of Commons, considered that Dr Mitchell was entitled to vote. The committee recommended that a rule be adopted to govern questions involving a direct pecuniary interest.¹⁸⁰ Subsequently, in 1863 the House

174 *LC Minutes* (31/10/2002) 453; see also Standing Committee on Parliamentary Privilege and Ethics, *Report on inquiry into the Pecuniary Interests Register*, Report No 20, October 2002, p 51.

175 *LC Minutes* (12/11/2002) 464-465, 466-468; *LC Debates* (12/11/2002) 6438.

176 *LC Minutes* (30/1/1857) 58.

177 *LC Minutes* (17/5/1860) 127.

178 *LC Minutes* (17/12/1862) 178.

179 *LC Minutes* (18/12/1862) 183.

180 ‘Report from the Standing Orders Committee on Question of Privilege – President’s ruling relating to the challenge of Mr Mitchell’s vote on the Life Assurance Encouragement Bill’, *LC Journals* (1862) Vol 9, p 223.

adopted a new standing order which provided that when the vote of a member is challenged on the ground of personal interest the rules and practices of the House of Commons be applied.¹⁸¹

In both the House of Commons and the House of Lords, members are required to declare 'any relevant pecuniary interest or benefit of whatever nature, whether direct or indirect, that he may have had, may have or may be expecting to have'. Members are also encouraged to declare non-registrable interests which might be thought to influence them. Such interests have been held to include pecuniary interests. It is the responsibility of members, having regard to the rules of the House, to judge whether a pecuniary interest is sufficiently relevant to require declaration.¹⁸² This position rests on the resolution of the House of Commons of 22 May 1974:

That in any debate or proceeding of the House or its Committees or transactions or communications which a Member may have with other Members or with Ministers or servants of the Crown, he shall disclose any relevant pecuniary interest or benefit of whatever nature, whether direct or indirect, that he may have had, may have or may be expecting to have.¹⁸³

This resolution effectively transformed the previous custom for ad hoc disclosure of pecuniary interests to the House of Commons into a rule of the House, to which the penal sanctions of contempt of the House attached.¹⁸⁴

The Senate moved a special order in 1994 to require senators to declare relevant pecuniary interests and for a record of those interests to be kept.¹⁸⁵ Originally, the order also required senators to declare relevant interests during proceedings in the Senate. This requirement was abolished in 2003, although senators may still do so.¹⁸⁶

While the Council standing orders do not prescribe a wider duty of disclosure beyond the exclusion of members from voting on a question in which they have a direct pecuniary interest, clause 1 of the Code of Conduct requires members to declare any conflict of interest whenever it arises in the execution of their office, including in Parliament.

181 *LC Minutes* (19/8/1863) 37; see also 'Report from Standing Orders Committee on vote of members personally interested in questions before the House', *LC Journals* (1863-1864) Vol 10, pp 227-231, new standing order approved by Governor, pp 231-233. The practice in the House of Commons was that members were allowed to vote on questions of public policy.

182 McKay W (ed), *Erskine May's Treatise on The Law, Privileges, Proceedings and Usage of Parliament*, 23rd edn, LexisNexis, UK, 2004, pp 341-342.

183 CJ (1974) 144.

184 Carney, above n 7, p 342.

185 See Resolution on Registration and Declaration of Senators' Interests, 3 March 1994.

186 Evans H (ed), *Odgers' Australian Senate Practice*, 11th edn, Department of the Senate, Canberra, 2004, p 136.

Voting and participating in committees

Standing order 210(10) provides that no member may take part in a committee inquiry where the member has a pecuniary interest in the inquiry of the committee.

On 28 June 2007, following legal advice concerning members' pecuniary interests in committee inquiries, the House adopted a sessional order amending standing order 210(10) to provide that no member may take part in a committee inquiry where the member has a direct pecuniary interest in the inquiry of the committee, unless it is in common with the general public, or a class of persons within the general public, or it is on a matter of State policy.

The issue of pecuniary interests and membership of committees is discussed further in Chapter 19 (Committees).

ATTENDANCE AND LEAVE OF ABSENCE

Attendance

There is no specific rule or order of the House which requires a member to attend,¹⁸⁷ although there have been cases in which the House has ordered its members to attend for a particular purpose.¹⁸⁸ The only requirement regarding attendance is that referred to in section 13A(1)(a) of the *Constitution Act 1902*, which provides that a member's seat becomes vacant if the member fails to attend the House for one whole session unless excused by permission of the House.

From 1856 until the adoption of new standing orders in 1895, members could be fined for contempt for not attending in compliance with an order for a 'call of the House', without leave of the House or reasonable excuse.¹⁸⁹ On several occasions during this period there was a call of the House when members were summoned to attend the House during the second reading debate on bills. The last two

187 This contrasts with Legislative Assembly standing order 27: Every Member is bound to attend the service of the House and any Committee to which they are appointed unless granted leave of absence by the House.

188 See, for example, the order of the House that the Treasurer and Leader of the Government in the House, the Hon Michael Egan, be suspended for the remainder of the sitting and attend at the Bar of the House on the next sitting day to explain his failure to comply with previous Orders of the House for the tabling of certain documents, *LC Minutes (2/5/1996)* 113-118. The House also considered a motion noting the failure of the Government to proclaim the commencement of a part of the *Motor Accidents Compensation Act 1999* and that, in the event of the failure of the Hon John Della Bosca, Special Minister of State and Assistant Treasurer, to immediately recommend commencement to the Governor and table a copy of the proclamation in the House, the Minister attend at his place at the table of the House and explain his defiance of the will of the Parliament; however, debate on the motion was adjourned on division and interrupted by prorogation, *LC Minutes (16/11/1999)* 219-220.

189 Standing orders 167 and 169.

occurred in 1891 and 1895.¹⁹⁰ It is not known how members' attendance was accounted for on these occasions and there appear to be no instances where a member was fined for non-attendance. There was another attempt to summon members to the House in 1902 during the second reading debate on the Constitution Act Amendment Bill. However, it was pointed out during debate on the motion that there was no longer a standing order that could compel members to attend and the practice had become obsolete. The motion was subsequently withdrawn.¹⁹¹

Nevertheless, a list of absent members is included in the minutes of the House's proceedings for each sitting day, and a record of the number of days on which each member has attended is published in the Journals of the House.¹⁹² In practical terms, the political parties ensure that their own members are present for important divisions, or arrange for absent members to be 'paired'. Further, depending on the circumstances of the case, the House may take action against a member for non-attendance. For example, in 2004 a censure motion was moved against a member 'for being absent from Parliament for the purpose of trying to secure his preferred result in a local council election' overseas, although the motion was defeated on division.¹⁹³

The attendance of members at committee meetings is addressed in Chapter 19 (Committees).

Leave of absence

Subject to the requirements of section 13A(1)(a) of the *Constitution Act 1902*, it is not mandatory for a member to seek leave of absence from the House, although it is quite common for leave to be sought for extended absences. The seeking of leave of absence is governed by standing order 63, which provides that the House may by motion on notice give leave of absence to a member.

A notice of motion for leave of absence takes precedence as business of the House. Such motions may be debated, but are often dealt with as formal business. Leave of absence has been granted to members for various causes, including illness,¹⁹⁴ maternity leave¹⁹⁵ and military service.¹⁹⁶ In one case in the 19th century, leave of

190 On resumption of and during adjourned second reading debate on the Electoral Reform Bill, *LC Minutes* (23/12/1891) 182; second reading debate on the Constitution Amendment Bill and the Land and Income Tax Assessment Bill, *LC Minutes* (4/9/1895) 22.

191 *LC Minutes* (25/9/1902) 139; *LC Debates* 3003-3006.

192 From 1856 until 2002 the Minutes of Proceedings recorded the members present each day on the first page. From 2003 the final entry in the Minutes lists only those members absent, *LC Minutes* (30/4/2003) 28, 51; *LC Debates* (30/4/2003) 54.

193 *LC Minutes* (3/6/2004) 846-849.

194 See, for example, the leave granted to the Hon Elaine Nile, *LC Minutes* (18/11/1999) 244.

195 See, for example, the leave granted to the Hon Carmel Tebbutt, *LC Minutes* (23/11/2000) 742.

196 See, for example, the leave granted to the Hon Dr Brian Pezzutti, *LC Minutes* (10/11/1999) 197, (28/3/2001) 902.

absence was sought and granted before the relevant member had taken the oath of allegiance, although the view was expressed during debate in the House that leave was unnecessary in those circumstances.¹⁹⁷

SWEARING IN OF MEMBERS

The procedures for swearing in new members of the Council are governed by the *Constitution Act 1902* and the standing orders.

Section 12 of the *Constitution Act 1902*, as amended by the *Constitution Amendment (Pledge of Loyalty) Act 2006*, provides that no member of the Council or Assembly may sit or vote in the Parliament until they have taken the pledge of loyalty before the Governor, or some person authorised by the Governor under section 12 of the *Constitution Act*.¹⁹⁸ A member is no longer required to swear allegiance to Her Majesty Queen Elizabeth II, or her heirs and successors, before sitting or voting in the Council or Assembly.¹⁹⁹

Section 12 also provides the form that the pledge must take: 'Under God, I pledge my loyalty to Australia and to the people of New South Wales'. A member may omit the words 'Under God' when taking the pledge of loyalty.²⁰⁰

Under section 22E²⁰¹ of the *Constitution Act*, members elected to fill casual vacancies in the Council are not permitted to take the pledge of loyalty prescribed by section 12 until the expiration of two days after their election. During this time, if they cease to be a member of the same party as that of the member whose seat has been vacated, they are deemed not to have been elected, and the seat again becomes vacant. This allows the party concerned time to expel any member who may have been elected by a hostile majority in the Parliament.

Standing order 10 provides that a new member may take and sign the 'oath or affirmation' and sign the roll of the House at any time during the sitting of the House when no business is then under consideration.²⁰² On the first day of the meeting of a session of Parliament to be opened by commissioners, the swearing

197 *LC Minutes (7/2/1865)* 19; *Sydney Morning Herald*, 8 February 1865, p 5.

198 The first member to take the pledge of loyalty was the Hon Robert Brown, *LC Minutes (9/5/2006)* 2003.

199 Before 2006, members of both Houses were required to swear an oath or affirmation of allegiance to the Monarch and were required, in the event of the death or abdication of the Monarch, to again subscribe the oath or affirmation to the new Monarch before they could sit and vote in Parliament again.

200 Before the enactment of the *Constitution Amendment (Pledge of Loyalty) Act 2006*, the *Oaths Act 1900* provided the form of the oath of allegiance or affirmation used to swear in members.

201 Section 22E is entrenched under s 7A of the *Constitution Act 1902* and may not be expressly or impliedly repealed or amended except by approval of the electors at a referendum. Therefore, references to swearing of an oath or affirmation remain in this section.

202 See also standing order 61(2): 'A member must sign the roll when the member takes the oath or affirmation of allegiance required by law'.

in of new members takes place at the conclusion of the joint sitting to open the Parliament (SO 6). At that time, the Clerk of the Parliaments announces the names of the members of the Council elected at that election, and the names of the commissioner or commissioners appointed by the Governor for swearing members.

In the case of the filling of a casual vacancy, the swearing in of the new member usually occurs immediately after prayers, although it can occur at any time during the sitting provided that business is not interrupted.

REMUNERATION AND ENTITLEMENTS

Remuneration

The system of remuneration of members of Parliament has developed over time, through numerous legislative changes and inquiries.²⁰³

From the advent of responsible government in 1856, the Premier, ministers, President, Speaker and Chair of Committees in both Houses received an annual allowance in the annual appropriations.²⁰⁴ Other members did not receive an allowance but were provided with free transport on State rail and trams, and free stationery and postage.

In the late 1880s, there were four unsuccessful attempts to pass bills providing for an annual allowance for members of the Assembly (but not the Council). The first attempt in July 1887, the Parliamentary Representatives Allowance Bill, sought to authorise payment of an annual allowance to members of the Assembly as reimbursement for expenses incurred in the discharge of their parliamentary duties. This bill and two similar bills in 1887 and 1888 failed to pass the Council, when the second reading was negatived on division.²⁰⁵ A fourth bill, the Parliamentary Representatives Allowance Bill 1889, which was to apply from the commencement of the session on 27 February 1889, was amended in the Council to apply from the next Parliament. The bill was laid aside in the Assembly when the Speaker drew attention to the nature of the Council's amendment, claiming that the Council's action in amending a money bill affected the rights of the Assembly.²⁰⁶

203 For the history of payment of members, see 'Payment of members in New South Wales, Pros and Cons from 1912', Reference Monograph No 4, New South Wales Parliamentary Library, 1966; see also Parliamentary Remuneration Tribunal, 'Initial determination of additional entitlements for members of the Parliament of New South Wales by the Parliamentary Remuneration Tribunal, pursuant to the *Parliamentary Remuneration Act 1989* (as amended) and the *Parliamentary Remuneration Further Amendment Act 1998*', May 1999.

204 From 1902, ss 27, 29 and Sch 2 of the *Constitution Act 1902*, as originally enacted, provided for allowances for ministers.

205 *LC Minutes* (12/7/1887) 149, 9 votes to 30; (17/7/1888) 272, negative on voices; (5/12/1888) 40, 3 votes to 30.

206 *LA Debates* (25/7/1889) 3433-3445.

An annual allowance for Assembly members was finally instituted in 1889 following the passage of the Parliamentary Representatives Allowance Bill 1889 (No 2). After being initially dropped from the business paper in the Council through lack of a quorum, the bill was later restored and narrowly passed its second and third readings on division. The bill was returned to the Assembly with an amendment that payments commence on passing of the bill.²⁰⁷

The *Parliamentary Representatives Allowance Act 1889* provided for Assembly members to receive an allowance of £300 per annum for parliamentary duties, commencing on the date of assent, 21 September 1889.

The allowance for Assembly members stayed at £300 per annum until 1912. The Parliamentary Representative Allowance Bill 1912 initially sought to increase the amount of the allowance set in 1889 to £500, to apply retrospectively from 1 January 1912, but this bill was defeated in the Council when the second reading was negatived on division.²⁰⁸ The bill was again introduced in the next session, with the increase to take effect from assent. The second reading in the Council was agreed to on the casting vote of the President and the bill passed without amendment.

During the Great Depression in the 1920s and 1930s the allowance of Assembly members was both reduced and restored on various occasions.

Members of the Council did not receive an allowance until 1948 following the passage of the *Constitution Amendment (Legislative Council Members Allowances Act) 1948*. The allowance was initially set at £300.

From the commencement of the payment of allowances to members, in 1889 in the Assembly and 1948 in the Council, up until 1975, members were required to vote for increases in their allowances and salary, through bills passed from time to time.²⁰⁹ In some cases increases followed independent inquiries appointed by the government of the day. Between 1920 and 1971 there were four government-initiated inquiries into the payment of members of Parliament – a Royal Commission by Mr Justice Edmunds of the Court of Industrial Arbitration in 1920;²¹⁰ an inquiry by Mr ES Wolfenden, consulting actuary and chartered accountant, in

207 *LC Minutes* (18/9/1889) 230.

208 *LC Minutes* (27/3/1912) 146.

209 The *Parliamentary Allowances and Salaries (Amendment) Act 1975* was the last in which members determined their own salaries and allowances. The Act also provided for payment of an accommodation allowance from 1 July 1975 for ministers and members of the Assembly resident in non-metropolitan electorates. This was due to the commencement of a new building for Parliament House and country members could no longer stay in accommodation at Parliament House.

210 See the 'Report of Royal Commission of inquiry (Mr Justice Edmunds) into the question of increasing the salaries or allowances to ministers and members of the Legislative Assembly of NSW', *Joint Volumes of Parliamentary Papers* (1920), second session, Vol 2, p 135; see also the *Parliamentary Representatives Allowances and Ministers' Salaries (Amendment) Act 1920*.

1956;²¹¹ an inquiry by the Hon BH Matthews, a retired Judge of the Supreme Court of Queensland, in 1966;²¹² and a Committee of Inquiry, chaired by Sir John Goodsell, CMG, a former chairman of the public service board, in 1971.²¹³

It was not until 1975 that the remuneration of members was removed from direct parliamentary vote and placed at arms length from the political process. The *Parliamentary Remuneration Tribunal Act 1975* provided for the establishment of an independent Parliamentary Remuneration Tribunal, comprising a judge or retired judge, appointed by the Chief Justice, to determine the salary, allowances, fees and other emoluments and allowances to be paid to ministers, office holders and members of both Houses. The Tribunal was required to make an annual determination before 30 November in each year, which took effect from 1 January in the next year.²¹⁴

In 1985, following the transition of the Council to a House fully elected by popular vote at the 1984 periodic election, a determination of the Tribunal provided for salary parity of Council members with members of the Assembly to take effect from 19 April 1985. This was on the basis that members were expected to devote themselves full-time to their parliamentary duties.²¹⁵

In 1989, the *Parliamentary Remuneration Tribunal Act 1975* was replaced by the *Parliamentary Remuneration Act 1989*. This Act, as amended, is the basis for the current system for the determination of members' salaries, allowances and additional entitlements.

211 See the 'Report by Mr ES Wolfenden, FCA (Aust) AIA (London), Chartered Accountant and Consulting Actuary, upon Appropriate Salaries and Allowances for Members of Parliament, Ministers of the Crown and Holders of Parliamentary Offices in New South Wales'; *Joint Volumes of Parliamentary Papers* (1956-1957) Vol 4, p 1293; see also the *Parliamentary Salaries and Allowances Act 1956*.

212 See the 'Report by the Honourable BH Matthews on the Emoluments and Other Benefits of the Parliament of New South Wales', *Joint Volumes of Parliamentary Papers* (1965-1966) Vol 5, p 1081; see also the *Parliamentary Allowances and Salaries (Amendment) Act 1966*, in which for the first time the basic payment to members was described as a salary.

213 See the 'Report by the Committee of Inquiry to Review the Emoluments of Statutory and Other Senior Office Holders and the Emoluments and Allowances and the Facilities and Other Benefits of Members of the Legislature of New South Wales' (Goodsell Inquiry), *Joint Volumes of Parliamentary Papers* (1971) Vol 4, p 1507; see also the *Parliamentary Salaries and Allowances Act 1971*; see also the *Parliamentary Contributory Superannuation Act 1971*.

214 See the 'Report and Determination of the Parliamentary Remuneration Tribunal under section 5 of the Parliamentary Remuneration Tribunal Act 1975', *Joint Volumes of Parliamentary Papers* (1975-1976) Vol 4, p 931. The first determination of the new Tribunal took effect from 1 January 1976 and provided for salaries and an expense allowance for ministers, office holders and members in both Houses, electoral allowances for members of the Assembly, special expenses allowance for ministers and country members of the Assembly, committee allowances for members of both Houses and travelling allowances for the Premier and ministers.

215 See the 'Report and Determination of the Parliamentary Remuneration Tribunal under section 5B of the Parliamentary Remuneration Tribunal Act 1975', 31 May 1985, *Joint Volumes of Parliamentary Papers* (1984-85-86) Vol 15, p 304.

Under section 2A of the *Parliamentary Remuneration Act 1989* members are provided with a basic salary as personal income for the performance of their parliamentary duties. In turn, section 4 of the Act provides that the basic salary for all members is fixed at the salary payable under the law of the Commonwealth to a member of the House of Representatives who is not entitled to any additional salary, less \$500. Further, under section 6, recognised office holders in Schedule 1 to the Act are also provided with an additional salary and an expense allowance as a specified percentage of the basic salary of a member.

Entitlements

Before 1975, the Premier of the day could approve at his discretion from time to time entitlements for members such as postage, telephone expenses, travelling allowance, air transport, secretarial assistance and allowances for attendance at meetings of committees. On occasion, the Premier did so on the advice of independent inquiries.

However, following the passage of the *Parliamentary Remuneration Tribunal Act 1975*, responsibility for some of these allowances was removed to the independent Parliamentary Remuneration Tribunal. The Tribunal was required to make an annual determination of the additional allowances payable to members and recognised office holders in relation to electoral allowances, travelling allowances and expenses, and committee allowances.²¹⁶ The Tribunal could also make recommendations to the Premier on the provision of services, equipment or facilities for members, but only on such matters referred to the Tribunal by the Premier.²¹⁷ However, these recommendations could be accepted, rejected or implemented in part by the Premier.

This system of administering members' entitlements under the 1975 scheme was both complex and confusing. The report of the Independent Commission Against Corruption in April 1998 on *Investigation into Parliamentary and Electorate Travel: First Report*, together with comments of the Parliamentary Remuneration Tribunal, in its report of May 1998,²¹⁸ expressing concern at the 'Byzantine complexity' of the existing rules at the time, highlighted the need for a review of the system. The Tribunal considered that the existing scheme:

is all too apt to give rise to misconceived claims; to conceptual confusion; to practical misunderstandings; and to suspicions in the public mind that there is insufficient transparency and accountability in the handling of large sums of what are, when all is said and done, public monies.²¹⁹

²¹⁶ *Parliamentary Remuneration Act 1975*, s 6.

²¹⁷ See the 'Report and recommendations of the Parliamentary Remuneration Tribunal under section 6 of the Parliamentary Remuneration Tribunal Act 1975', November 1975, *Joint Volumes of Parliamentary Papers (1975-1976)* Vol 4, p 967.

²¹⁸ See the *Report and Determination of the Parliamentary Remuneration Tribunal pursuant to section 5A (3)*, 18 May 1989, para 13.

²¹⁹ *Ibid.*

A change to the system was also important following the adoption by both Houses of the Code of Conduct for Members in July 1998 which gave the Independent Commission Against Corruption jurisdiction to consider such matters as whether a member had applied public resources according to any guidelines or rules about the use of those resources.

From 1989, when the *Parliamentary Remuneration Tribunal Act 1975* was replaced by the *Parliamentary Remuneration Act 1989*, the Premier no longer had a role in approving additional entitlements recommended by the Tribunal, as applied under the 1975 scheme. Under section 9 of the *Parliamentary Remuneration Act 1989*, it is now the function of the Parliamentary Remuneration Tribunal to make determinations of additional entitlements that are to be available to members or recognised office holder.²²⁰

Section 2A of the *Parliamentary Remuneration Act 1989*, as amended by the *Parliamentary Remuneration Amendment Act 1998*, provides that:

- recognised office holders are provided with additional salaries as personal income for the performance of their parliamentary duties;
- recognised office holders are provided with statutory expense allowances for facilitating the efficient performance of their parliamentary duties;
- members and recognised office holders may be provided with additional allowances and other entitlements for the purpose of facilitating the efficient performance of their parliamentary duties.

Parliamentary duties are in turn defined in section 3 as:

[T]he duties that attach to the office of a member or recognised office holder, and includes the duties that a member or recognised office holder is ordinarily expected to undertake, including participation in the activities of recognised political parties, and includes any duties prescribed as being within this definition, but does not include any duties prescribed as being outside this definition.

Section 10 requires the Tribunal to make determinations on additional entitlements for the purpose of facilitating the efficient performance of the parliamentary duties of members or recognised office holders, including participation in the activities of recognised political parties. Determinations on additional entitlements can provide for:

- the payment of additional allowances, fees and other emoluments, including, for example, electoral allowances, travel allowances, travel expenses and committee allowances; and

²²⁰ An initial determination on additional entitlements was to be made before 1 December 1998, with effect from 1 January 1999. See the *Parliamentary Remuneration Amendment Act 1998*, s 4.

- the provision of services, facilities and equipment, including, for example, electorate services, electorate staff, electorate offices, office equipment, travel and communication equipment.

In performing its functions the Tribunal may make inquiries, receive submissions, and may invite submissions from members and other persons.²²¹ Under section 12A of the Act, inserted in 2001 by the *Parliamentary Remuneration Amendment Act 2001*, in making a determination, the Tribunal is required to have regard to the financial implications of the determination for the State. The Tribunal is also required to invite the Secretary of the Treasury to make submissions on the financial implications of any determination and to take any submission into account before making the determination. A copy of any submission made by the Secretary of the Treasury is included as an annexure to the determination.

The Tribunal is required to make an annual determination of additional entitlements on or before 1 June each year which take effect from 1 July.²²²

The nature of the determinations of additional entitlements provided to members, conditions of use and substantiation required are set out in each annual determination of the Tribunal. The determinations are published in the Government Gazette and tabled in both Houses.²²³ Determinations of the Tribunal since 1997 are available on the Tribunal's website <www.remtribunals.nsw.gov.au>.

The President or the Speaker may request the Tribunal to give a ruling on the interpretation or application of a determination.²²⁴

The *Parliamentary Remuneration Act 1989* does not prevent members or office holders from being provided with certain other entitlements, such as offices and facilities at Parliament House for members, offices or facilities elsewhere for ministers, and travel by ministers.²²⁵

Members of the Council are provided with a detailed 'Members' Guide' on the use of entitlements. Members also receive a range of administrative and support services within Parliament House to assist them in the performance of their parliamentary duties. The services provided to members are determined by the President and sometimes, jointly, with the Speaker. Members are provided with office accommodation within the parliamentary building, including furniture and office equipment. The use of these facilities does not extend to direct electioneering or political campaigning, nor to conducting a business from within Parliament House. Members are provided with staff, who are employed by the President, according to the determinations of the Tribunal.

221 *Parliamentary Remuneration Act 1989*, s 14.

222 *Ibid*, s 11.

223 *Ibid*, s 13.

224 *Ibid*, s 17A.

225 *Ibid*, s 15A.

SUPERANNUATION

Members of the Assembly were first provided with a pension by the *Legislative Assembly Members Pension Act 1946*, which required members to contribute £78 per annum. After serving 15 years in Parliament, or the term of three Parliaments, members were entitled to a pension of £6 per week. The *Legislative Assembly Members Superannuation (Amendment) Act 1967* extended superannuation entitlements to ministers in the Council.

Following recommendations of the Goodsell inquiry in 1971, the *Parliamentary Contributory Superannuation Act 1971* established a new contributory superannuation scheme for members of both Houses, in substitution of the 1946 scheme.

In 2005, a further new scheme was introduced for members elected at or after the 23 March 2007 general election. These are discussed below.

Members elected before 23 March 2007

Under the *Parliamentary Contributory Superannuation Act 1971*, members elected before 23 March 2007 are required to contribute to a defined benefit superannuation scheme 12.5 per cent of their basic salary, including any additional salary in the case of a recognised officer holder, but excluding any allowance for electoral or other purposes.²²⁶ After serving seven years, a member is entitled to a pension of 48.8 per cent of the current basic salary of a member, increasing by 0.2 per cent per month to a maximum of 80 per cent after 20 years service. Recognised office holders are entitled to a higher pension based on any additional salary received.²²⁷

Since the enactment of the *Parliamentary Contributory Superannuation Amendment Act 1999*, a former member is not entitled to a pension until age 55²²⁸ and may convert their pension to a lump sum.²²⁹ A member who has served for less than seven years is entitled to a refund of contributions plus a supplementary benefit.²³⁰

A member may cease to contribute after the age of 65 years if they have completed 20 years of service.²³¹ On the death of a member or former member, the spouse or de facto partner is entitled to a pension at three quarters of the pension payable to the member or former member.²³² Benefits may also be available to a member on the grounds of ill health or incapacity.²³³

²²⁶ *Parliamentary Contributory Superannuation Act 1971*, ss 3 and 18.

²²⁷ *Ibid*, s 19.

²²⁸ *Ibid*, s 19B.

²²⁹ *Ibid*, s 20.

²³⁰ *Ibid*, s 22A.

²³¹ *Ibid*, s 18B.

²³² *Ibid*, s 23.

²³³ *Ibid*, s 19E.

Members elected on or after 23 March 2007

The *Parliamentary Superannuation Legislation Amendment Act 2005* closed the Parliamentary Contributory Superannuation Scheme to new members from the March 2007 general election.²³⁴ Members elected at or after the 23 March 2007 general election receive an accumulation-style superannuation benefit in line with entitlements of public sector employees under the First State Superannuation Scheme.

Under Part 3A of the amended *Parliamentary Remuneration Act 1989*, new members contribute 9 per cent of their basic salary and additional salary, if any, to the First State Superannuation Fund or another complying superannuation fund, complying approved deposit fund or retirement savings account nominated by the member. Members can make additional superannuation contributions by way of salary sacrifice.²³⁵

Members in New South Wales who are elected to the Commonwealth Parliament are no longer able to transfer benefits to the former Commonwealth Parliamentary defined benefit superannuation scheme, as a result of the closure of that scheme following the October 2004 federal election. Similarly, members of the Commonwealth Parliament who transfer to the New South Wales Parliament after March 2007 are covered by the new accumulation superannuation scheme for members.

THE TITLE 'HONOURABLE'

By convention, members of the Council are referred to as 'Honourable'. The right to use the title was conferred by the Queen in 1856.²³⁶ The title has also been conferred on the Speaker of the Assembly, ministers and judges.

In recent years, a number of cross-bench and Labor members have requested that the title not be used with reference to them.²³⁷ Other members of the House have generally respected that preference, referring to the members concerned as 'Mr' or 'Ms'.²³⁸ The relevant cross-bench members have also adopted the practice of referring to other non-cross-bench members as 'Mr' or 'Ms', which has led to a number of points of order being taken. It has been ruled that a member cannot be compelled to refer to another member as 'the Honourable',²³⁹ and that the use of 'Ms' is not disorderly.²⁴⁰

234 *Ibid*, s 4A.

235 *Ibid*, ss 14C to 14F.

236 *New South Wales Parliamentary Handbook*, 19th edn, 1972, p 24; see also 'Despatches in reference to Colonial title of 'Honourable'', No 128, H Labouchere to Governor Denison, 3 November 1856.

237 The first such member was Ms Lee Rhiannon, who referred to the issue in her inaugural speech, *LC Debates* (26/5/1999) 447-448.

238 However, see *LC Debates* (10/11/1999) 2564.

239 *LC Debates* (13/11/2002) 6567.

240 *LC Debates* (1/3/2001) 12153.

MEMBERS

Former members of the Council are entitled to apply for lifetime retention of the title 'Honourable' on retirement or resignation after continuous service of not less than 10 years.²⁴¹ Applications must be made in writing to the Premier within six months of leaving office and retention of the title is notified in the Government Gazette. Ministers and Presiding Officers are entitled to apply for lifetime retention of the title on leaving office after three years' service.

241 In 1991 the Queen delegated to State Governors the power to approve the retention of the title: letter from Sir Robin Janvrin, Buckingham Palace, to His Excellency, the Governor, 25 July 1991; see Twomey, above n 5, p 153.