

## Chapter 1 Sources of Information

The Legislative Assembly derives its powers from the provisions of the *Constitution Act 1902*, its Standing Orders, sundry State, Commonwealth and Imperial statutes, convention, custom and decisions of Speakers.

### 1.1 Constitution Act 1902

The New South Wales *Constitution Act 1902* does not contain a definition of "Parliament" nor "Legislative Assembly". It does however, in s. 3, offer a definition of "The Legislature" which is: "...His Majesty the King with the advice and consent of the Legislative Council and Legislative Assembly."

The Legislature, by virtue of s. 5 of the same Act, is charged with power subject to the *Commonwealth of Australia Constitution Act* (which gives the Commonwealth specific law making powers and provides that, in a case of a conflict, a Commonwealth Act will be paramount) "...to make laws for the peace, welfare and good government of New South Wales in all cases whatsoever..." with the proviso that "...all Bills for appropriating any part of the public revenue, or for imposing any new rate, tax or impost, shall originate in the Legislative Assembly".

The Constitution Act also contains other important provisions affecting the operation of the Parliament:

- Section 5A deals with the situation where there is a disagreement between the two Houses in relation to any bill appropriating revenue or moneys for the ordinary annual services of the Government (i.e. the budget). Disagreement arises if the Council rejects or fails to pass such a bill within one month or returns it to the Assembly suggesting an amendment to which the Assembly does not agree.
- Section 5B provides a procedure for the resolution of disagreements over bills other than for appropriation bills. For further information on this procedure see section 10.3.3.2 of Part One.
- Sections 7A and 7B contain "manner and form" prescriptions in regard to a number of important matters in respect of the Legislative Assembly and Legislative Council. Section 7A provides that a bill which proposes to abolish or dissolve the Council, alter its powers, repeal or amend certain sections of the Constitution Act dealing with Council elections, members' term of service, filling of vacancies and other matters, must be given approval by a referendum (held not sooner than two months after its passage) before being presented to the Governor for assent. Provisions touching on those persons capable of being elected and sitting and voting as members of either House and the circumstances in which a seat becomes vacant must also be dealt with in accordance with s. 7A.
- Section 7B provides for a referendum to be held in relation to provisions of bills which repeal or amend the Constitution Act in respect of compulsory voting, single member electorates, distribution of electoral districts and

number of voters in districts, the conduct of elections, and the provisions in Part 9 relating to the judiciary.

Special provisions relating to the Assembly (Part 3, Division 3) contain provisions on:

- convocation of an Assembly by the Governor;
- four year maximum duration of an Assembly;
- number of members 93;
- single member electorates;
- distribution of electoral districts;
- number of voters in a district;
- conduct of Legislative Assembly elections (also Seventh Schedule);
- proceeding to business although up to 5 writs of election are not returned;
- recognition of the Office of Speaker, election of Speaker by secret ballot and casting vote;
- absence of Speaker from the State;
- quorum (20 in addition to the [member presiding](#)); and
- resignation of seats by members.

Other important provisions are:

- Section 10: Powers of the Governor in respect to the prorogation of the Council and Assembly between sessions and the dissolution of the Assembly. The Council is a continuing House and is not dissolved.
- Section 11: At least one session of Parliament must be held in each year.
- Sections 13, 13A, 13B: Disqualification of members (see Appendix F).
- Section 14A: Disclosure of pecuniary and other interests by members.
- Section 15: Powers of the Houses to prepare and adopt Standing Rules and Orders.

## 1.2 Other legislation

There are many other Acts which have an impact on the Legislative Assembly and its members, such as the *Independent Commission Against Corruption Act 1988*, the *Legislation Review Act 1987*, the *Parliamentary Electorates and Elections Act 1912*, the [Election Funding, Expenditure and Disclosures Act 1981](#), the *Defamation Act 2005*, any Parliamentary Committees Enabling Act, the *Parliamentary Evidence Act 1901*, the *Jury Act 1977*, the *Ombudsman Act 1974*, the *Parliamentary Remuneration Act 1989*, the *Public Finance and Audit Act 1983*, the *Interpretation Act 1987*, the *Annual Reports (Statutory Bodies) Act 1984*, the *Annual Reports (Departments) Act 1985*, the *Parliamentary Precincts Act 1997*, the *Subordinate Legislation Act 1989*, and various Acts establishing statutory oversight committees and for universities.

## 1.3 Standing orders and sessional orders<sup>1</sup>

A "standing order" has been defined in Abraham and Hawtrey's Parliamentary Dictionary (UK) as "an order made by either House of Parliament for the government

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<sup>1</sup> See also Chapter 28 of Part One.

or regulation of its proceedings and declared by that House to be a standing order. Orders of this description do not expire with the session in which they are made, but remain in force until they are revoked or repealed by the House by which they are made."<sup>2</sup> Section 15 of the Constitution Act requires that standing orders be approved by the Governor and once approved become "binding and of force".

The courts have ruled that, whilst standing orders that have been approved by the Governor are "binding and of force" under the *Constitution Act 1902*, they are not part of the general law. For instance, in *Namoi Shire Council v Attorney General for New South Wales* there was an attempt to have an Act declared invalid on the basis that its passage through the Legislative Assembly contravened certain standing orders of the House which had been adopted and approved under section 15 of the *Constitution Act 1902*.

Justice McLelland, in this case, noted that the defendant was relying on the circumstance that, due to section 15(2) of the *Constitution Act 1902*, standing orders are given statutory force. However, he was of the view that this was not determinative of the issue but provided the foundation for "whether, on the true construction of the Constitution Act, compliance with standing orders made under s. 15 is a condition of the validity of a law otherwise validly enacted thereunder."<sup>3</sup> Justice McLelland was of the view that it was not and concluded:

*...it would take a clear expression of legislative intention to impose a condition upon the effective exercise of the legislative power thus conferred, additional to the occurrence of the advice and consent of each of the Legislative Council and the Legislative Assembly and the Royal Assent; and s. 15 certainly contains no such expression of intention. Moreover, the fact that the determination of the substantive content of the standing orders is, by s. 15, delegated to the respective Houses of the legislature (albeit requiring approval by the Governor), is itself a strong indication against compliance therewith being a condition of the effective exercise of legislative power, the more so when one considers the great variety of subject matter, including relatively insignificant procedural directions, with which such standing orders might, and do, deal.<sup>4</sup>*

Justice McLelland was also of the view that "...the very nature and function of standing orders of a legislative House indicates that they should be considered as directory, rather than mandatory."<sup>5</sup>

The power of the Houses of Parliament in New South Wales to make standing orders derives from an inherent right to control their own proceedings due to the principle of necessity. The Constitution Act merely authorises this inherent right by statute.<sup>6</sup>

The current standing orders of the Assembly were adopted by the House on 21 November 2006, replacing the standing orders adopted in 1994 (as amended and reprinted). The standing orders have been subsequently amended in July 2009 and November 2010.

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<sup>2</sup> Abraham, L. A., and S. C. Hawtrey, *A Parliamentary Dictionary*, 1956, p. 191.

<sup>3</sup> *Namoi Shire Council v Attorney General for New South Wales* (1980) 2 NSWLR 639 at 644.

<sup>4</sup> *Ibid.*

<sup>5</sup> *Ibid.* See also *Clayton v Heffron* (1960) 105 CLR 214 at 240 where Dixon CJ, McTiernan, Taylor and Windeyer JJ express the view that section 15 of the *Constitution Act 1902* does not make standing orders part of the general law.

<sup>6</sup> See comments made by Gerard Carney in *Members of Parliament: Law and Ethics*, 2000, pp. 180-1. This inherent right is given more consideration in section 2.2 of Part Two.

Before the Assembly agrees to new or amended standing orders they are normally considered by the Standing Orders and Procedure Committee, which comprises, in the main, the principal office holders in the House and is, by convention, chaired by the Speaker. However, there is no requirement for amendments to the standing orders to be considered by the Committee.<sup>7</sup>

While there are 370 standing orders they do not cover all aspects of procedure in the House. Many matters are governed by practice and precedent. For example, standard of dress within the Chamber, matters relating to the use of props in the Chamber and sub judice issues.

The standing orders are not immutable. They can be suspended or varied by sessional orders. Sessional orders are used to vary or suspend the operation of the standing orders or to trial new procedures not provided for in the standing orders.<sup>8</sup>

Any wilful or persistent refusal to conform to the standing orders by a member constitutes disorder and may be dealt with by the House as contempt and suspension may result.

#### **1.4 Speakers' rulings**

Rulings are given by the Speaker and other occupants of the Chair from time to time as procedural issues need clarifying or in response to points of order raised by members during the conduct of the business of the House. These rulings apply the standing and sessional orders to new cases. Where the standing and sessional orders do not provide for a particular situation, or an interpretation is needed, the Speaker may also be required to give a ruling. Rulings of the Speaker and other occupants of the Chair form precedents for future practice in respect of a particular matter. This practice strengthens the traditions of the House without compromising the flexibility which the Speaker needs to exercise impartial control of proceedings.

The more important rulings of the Speakers of the Legislative Assembly are collected together and published on a regular basis.

#### **1.5 Other reference material:**

The list of publications below is not definitive but highlights significant publications on parliamentary practice, procedure and law.

##### ***1.5.1 Parliamentary Practice and Procedure***

Sir William McKay KCB (ed) – *Erskine May's Treatise on The Law, Privileges, Proceedings and Usage of Parliament*, 23rd edition, 2004

The United Kingdom House of Commons practice is found in the latest edition of *May's Parliamentary Practice*. With nearly 150 years of history and the enactment of the "Australia Acts" effecting the severing of Australia's remaining constitutional links

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<sup>7</sup> Section 15 of the Constitution Act enables the House to make and amend standing orders and does not prescribe the manner other than by vote of the House and approval by the Governor. PD 11/11/2010, p. 27754.

<sup>8</sup> Prior to the adoption of the new standing orders in November 2006 a number of sessional orders were in place that varied the existing rules of the House including the rules relating to petitions, General Notices and the Routine of Business. The majority of those sessional orders have been included in the new standing orders.

with Great Britain (except the Sovereign) there is no longer a need for the Assembly to follow the practice of the House of Commons.<sup>9</sup> This is not to say that *May* is outmoded, as it remains the classic reference work on Westminster parliamentary practice, and is frequently quoted as an authority on parliamentary principles and traditions.

I. C. Harris (ed) - *House of Representatives Practice*, 5th edition, 2005

First published in 1981 and currently in its fifth edition (2005) this work is an important reference book for lower House procedure. It is available from the Federal Parliament's website at [www.aph.gov.au](http://www.aph.gov.au)

H. Evans (ed) - *Odgers' Australian Senate Practice*, 11th edition, 2004

First published in 1953 and currently in its eleventh edition (2004) this work documents Senate operations. It is available from the Federal Parliament's website at [www.aph.gov.au](http://www.aph.gov.au)

D. McGee - *Parliamentary Practice in New Zealand*, 3rd edition, 2005

First published in 1985 and now in its third edition (2005), McGee comprehensively covers the field as far as New Zealand is concerned. The latest edition has been amended to reflect the changes to the standing orders made in 1996 and subsequent amendments due to the introduction of a Mixed Member Proportional voting system (MMP).

B. Okely - *A Guide to Parliamentary Procedure* (1989)

Outlines procedure in the Legislative Assembly of Western Australia.

R. Blackburn and A. Kennon – *Griffith & Ryle on Parliament: Functions, Practice and Procedures*

Published in 2003, the book is the second edition of the work first published by Griffith and Ryle in 1989 on the Parliament of the United Kingdom. It explains the basic rules and procedures of Parliament, and also considers how they operate in practice and are utilised politically.

### **1.5.2 Parliamentary Law**

G. Carney – *Members of Parliament: Law and Ethics*

Published in 2000, it covers parliamentary law and custom, such as the qualification and disqualification of members of Parliament and parliamentary privilege. It also covers ethical obligations of members such as those in relation to the disclosure of pecuniary interests and codes of conduct.

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<sup>9</sup> Prior to the adoption of the current standing orders in 2006 provision was made for the current practice of the House of Commons to be adopted in situations where there were no standing or sessional orders or other orders or practice of the House governing the procedure.

#### E. Campbell – *Parliamentary Privilege*

Published in 2003, the book concentrates on Australian law concerning the privileges of Australian legislatures and their members. Particular attention is given to issues and problems that have arisen in recent years such as the implied freedom of political communication in the Australian Constitution and Citizens' Right of Reply.

#### D. Clark – *Principles of Australian Public Law*

Published in 2003, the book concentrates on constitutional law issues, with particular emphasis on the constitutions of the Australian States. It covers dismissals and dissolutions of governments, electoral law, parliamentary privilege, executive power and the limitations of state legislative power.

#### A. Twomey – *The Constitution of New South Wales*

Published in 2004, the book provides detailed information on the Constitution of New South Wales. It addresses such matters as 'manner and form' provisions, limitations on state legislative power and the status and power of the States within a Federal Commonwealth. It also considers parliamentary procedure and privilege including resolving deadlocks between the Houses, the power of the Houses in respect of money bills and the power to assent to laws. The book covers other aspects related to constitutional law such as electoral law and the disqualification and expulsion of members of Parliament. The theory is given practical meaning by including parliamentary precedents, the practice of the Executive and the conduct of inter-governmental relations.

#### **1.5.3 Historical information**

#### K. Turner - *House of Review?*

Professor Ken Turner formerly of Sydney University<sup>10</sup> has compiled an historical and political study of the Legislative Council from 1934 to 1968.

#### G. N. Hawker - *The Parliament of New South Wales 1956–1965*

Dr Hawker's book was written in 1971 at the suggestion of the then Speaker and was financed by a Government grant as an historical work.

M. Hogan & D. Clune (Editors) – *The People's Choice: Electoral Politics in 20th Century New South Wales* (Volume one: 1901 to 1927, Volume Two: 1930 to 1965, Volume Three: 1968 to 1999)

Published in 2001, the series looks at the history of electoral politics in twentieth century New South Wales. It analyses in detail the 34 elections held between 1901 and 1999 including the campaigns, the issues, the personalities and the results.

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<sup>10</sup> Professor Turner whilst officially retired remains an Honorary Research Associate in the Discipline of Government and International Relations at Sydney University.

D. Clune and G. Griffith – *Decisions and Deliberation: The Parliament of New South Wales, 1856-2003*

Published in 2006, the book provides a thorough account of the history of the Parliament of New South Wales since responsible government in 1856 and the political context in which it has operated. It includes statistics on bills, such as private members' bills passed, and procedures used such as the guillotine or gag.

D. Clune & K. Turner (Editors) – *The Premiers of New South Wales, 1856-2005*

Published in 2006 in two volumes, the set contains the biographies of all Colonial and State Premiers from 1856. Volume 1 covers the period from responsible government (1856) to Federation (1901) and Volume 2 covers the Premiers from Federation to 2005. The biographies have been written by academics, writers and politicians, both current and former.

Other historical publications have been produced as part of the sesquicentenary of responsible government in New South Wales. These include:

Michael Hogan, *Local Labor: A History of the Labor Party in Glebe, 1891-2003*, Federation Press, 2004

Michael Hogan (Ed), *A Lifetime in Conservative Politics: political memoirs of Sir Joseph Carruthers*, University of New South Wales press, 2005

Michael Hogan (Ed), *The First New South Wales Labor Government 1910-1916; Two Memoirs: William Holman and John Osbourne*, University of New South Wales Press, 2005

J. M. Bennett, *Sir James Martin: Premier and Chief Justice of New South Wales*, Federation Press, 2005

J. M. Bennett, *Colonial Law Lords: the judiciary and the beginning of responsible government in New South Wales*, Federation Press, 2006

Paul Davey, *The Nationals: the Progressive, Country and national Party in New South Wales 1919 to 2006*, Federation Press, 2006

Clive Beauchamp, *Parliament, Politics and Public Works: a history of the New South Wales Public Works Committee 1888-1930*, NSW Parliamentary Library, 2006

Stephen Chase, *You didn't get it from me: a reporter's account of political life in New South Wales from 1988-2001*, ABC Books, 2006

Jim Hagan (Ed), *People and Politics in Regional New South Wales, 1856-2006*, 2 volumes, Federation Press, 2006

Kevin Rozzoli, *Gavel to gavel: an insider's view of Parliament*, University of New South Wales Press, 2006

Marian Simms, *From Hustings to Harbour Views: electoral institutions in New South Wales 1856-2006*, University of New South Wales Press, 2006

Deborah Brennan and Louise Chappell (Eds), *"No fit place for women"? Women in New South Wales Politics 1856-2006*, University of New South Wales Press, 2006

Rodney Smith, *Against the Machines: minor parties and independents in New South Wales 1910-2006*, Federation Press, 2006

Max Thompson, *The Seeds of Democracy: early elections in colonial New South Wales*, Federation Press, 2006

#### **1.5.4 Journals**

##### *The Table*

This is the Journal of the Society of Clerks-at-the-Table in Commonwealth Parliaments which is published annually. It contains articles, details of the officers of Commonwealth Parliaments, book reviews and results of surveys conducted on particular topics.

*Australasian Parliamentary Review* (published from 2001) previously titled *Legislative Studies*

The Journal of the Australasian Study of Parliament Group, published twice yearly.

##### *The Parliamentarian*

This is the journal of the Commonwealth Parliamentary Association (CPA). It is published quarterly and contains information on CPA conferences, articles on issues affecting countries throughout the Commonwealth and reports from the various jurisdictions in relation to significant procedures/precedents. It is distributed to all members of Parliament in New South Wales who are members of the CPA.

##### *Parliament Matters*

This is the newsletter of the Australia and New Zealand Association of Clerks-at-the-Table (ANZACATT), published twice yearly. It provides information about events, procedural highlights, new administrative policies, committee inquiries and other areas of interest from the Parliaments across Australia and New Zealand. It is available online at

<http://www.anzacatt.org.au/prod/anzacatt/anzacatt.nsf/key/library.html>

##### *Canadian Parliamentary Review*

This is the journal of the Association of Canadian Clerks-at-the-Table. It is published quarterly and contains articles on parliamentary practice and procedure, both current and of a historical nature. Many articles are written by members of Parliament

providing a member's perspective on parliamentary issues. It also includes book reviews and legislative reports from the Canadian jurisdictions outlining important precedents, Speakers' rulings that have been made and legislation that has been passed during the quarter. It is available online at <http://www.parl.gc.ca/infoparl/>

#### ***1.5.5 NSW Parliamentary Library Research Publications***

The Research Section of the Parliamentary Library produces research papers on a large range of topics related to the Parliament and politics in New South Wales, including papers on parliamentary privilege, electoral matters and topical issues related to legislation and policy initiatives.

The research papers are available online at:

<http://www.parliament.nsw.gov.au/prod/parlment/publications.nsf/V3ListRPSubject>