



LEGISLATIVE ASSEMBLY

STANDING ETHICS COMMITTEE

Report on s13B of the Constitution Act 1902

September, 2002

LEGISLATIVE ASSEMBLY STANDING ETHICS COMMITTEE

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Mr Rod Caldwell

Dr Fran Flavel

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Terms of Reference:

The Standing Ethics Committee was established to prepare a draft code of conduct for Members of the Legislative Assembly, and to review any code introduced. The Committee is to carry out the educative work in relation to ethical standards applying to Members of the Legislative Assembly as well as providing advice on the standards.

Part 7A, Division 2 of the Independent Commission Against Corruption Act 1988 is the statutory provision establishing the committee.

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Chairman's Foreword

All members of Parliament are aware of the hard won independence of the early Westminster Parliament from the influence of the Crown. However, it is mainly due to recent court cases disqualifying federal Members of Parliament from taking their seats, that most become aware of certain provisions in our State and Australian Constitutions that operate to disqualify candidates or members who hold "offices of profit under the Crown". Provisions such as 13B of the New South Wales Constitution have also raised uncertainty and potential hazards that impede Members participating in advisory or consultative activities which could be considered as a legitimate part and parcel of their representative role.

The constitutional disqualification provisions are derived from the time when Parliament was establishing its independence of the Crown, when it was thought there might be a real likelihood of sapping the freedom and independence of members admitted to profitable contracts or provisions. The independence of Parliament from the Crown is still a tenet of our Westminster-derived system, but this Committee found that it is highly undesirable that constitutional provisions that have such a severe consequence as a member being required to vacate their seat should include such large areas of potential uncertainty. Legal advice received by the Committee confirms that the exact meaning and scope of terms in s13B such as "office of profit", "crown" and "pension from the Crown" defy precise definition. The listed exceptions to the application of s13B, while giving some guidance as to scope, compound the difficulties of interpretation.

This Committee undertook its inquiry into s13B of the Constitution by sitting jointly with the Legislative Council Standing Committee on Parliamentary Privilege and Ethics which had commenced its inquiry in 1997. The Legislative Council Standing Committee had a broader remit, inquiring into s13 and s13B of the Constitution Act, but the overall principles underlying s13 are relevant to our Committee's inquiry. Rather than producing a joint report, the Legislative Council Standing Committee tabled its report in March 2002 ("Report on sections 13 and 13B of the Constitution Act 1902": Report No 15 of the Standing Committee on Parliamentary Privilege and Ethics; Parliamentary Paper No 22). Our Committees are unanimous in their findings about the undesirability of sections 13 and 13B as currently drafted, but ultimately differ in terms of remedying the mischief, with our Committee recommending redrafting and the Legislative Council Committee recommending repeal. Nevertheless, the two Committees concur in finding that the need for protection of the Parliament's independence from subversion by the executive government remains valid today.

This report refers to sections of the Legislative Council Report which present summaries of provisions in other Parliaments, and discussion of accountability mechanisms.

I thank all Members of our Committee for their contributions to this important inquiry and commend our Report to the House.

JOHN PRICE MP
Chairman.

CONTENTS:

- 1. Section 13B, NSW Constitution**
- 2. Reference of inquiry to the Legislative Assembly Standing Ethics Committee**
- 3. Legislative Assembly Committee to inquire jointly with the Legislative Council Committee**
- 4. Historical background to sections 13 and 13B**
- 5. Section 13 and 13B – Issues**
- 6. Section 13B – Problems and overview**
- 7. Office of Profit disqualification provisions in other parliaments**
- 8. Findings and recommendations of the Legislative Assembly Standing Ethics Committee**
- 9. Related issues**
- 10. Recommendations**

Appendix: NSW Constitution Act 1902, sections 13 and 13B

Section 13B, NSW Constitution

Section 13B of the NSW Constitution Act 1902 disqualifies for membership of Parliament a person who holds any "office of profit under the Crown" or "pension from the Crown" "during pleasure or for a term of years". The disqualification has been amended over the years to provide for exceptions. The full text of the section is reprinted as Appendix 1 to this report.

Section 13B is only one of a number of disqualification provisions in the Constitution. Sections 13 and 13A provide for disqualifying members of Parliament on a range of grounds including "felony or any infamous crime" (s13A(e)), "allegiance to a foreign prince" (s13A(b)) and bankruptcy, insolvency or being a "public defaulter" (s13A(d)). The archaic wording of the sections derives from their historic basis in the early adoption by the NSW of the British electoral law of the early 19th century.

The need to review these disqualification provisions has previously been raised with the Parliament, and the Committee on the ICAC reported in December 1998 on its "Inquiry into section 13A, Constitution Act 1902". That report recommended deletion of a number of disqualification provisions, and modernising others so that the law was clearer in its terms and would not serve to disqualify Members where it may reasonably be considered that the Member might maintain the confidence of the community. The report has not to date been implemented by Government and no proposal for amending legislation has been introduced.

The 1988 Report notes that the purpose of disqualification provisions is to ensure that electorates may maintain confidence in their candidates and that the Parliament is protected from disrepute by providing base standards of what is necessary for an elected representative. As disqualification provisions nullify a decision of the electorate, they should only apply in cases so extreme that disqualification from parliament is necessary for community confidence in parliament to be maintained. Section 13B provides a set of minimum standards according to the rule of law rather than political judgement or expediency.

Section 13B is discussed in further detail below.

Reference of inquiry to the Legislative Assembly Standing Ethics Committee

On 10 October 2000 the Speaker of the Legislative Assembly, the Hon John Murray MP wrote to the Chairman of the Committee requesting that the Committee consider inquiring into the obstacles associated with the continuation of the provisions of the Constitution Act relating to office of profit.

The President of the Legislative Council had raised the issue with the Speaker as the Legislative Council Standing Committee on Privilege and Ethics had commenced an inquiry on this topic in 1997, which was re-referred to the 52nd Parliament when it commenced in 1999.

It is usual for any proposals for amendment of sections of the Constitution Act which pertain to powers, privileges or role of either House of Parliament or its Members to be referred to the Parliament for consideration and comment. Thus the Presiding Officers thought that the subject of disqualification of Members on the grounds of holding an "office of profit" under the Crown would be an appropriate topic for inquiry by committees of both Houses, with a view to them reaching agreement on recommendations for amendment of the Constitution Act.

Legislative Assembly Committee to inquire jointly with the Legislative Council Committee

The Legislative Council received a reference from their House on 24 June 1997 to look at the suitability and contemporary relevance of the present provisions under the Constitution Act 1902 relating to members of Parliament (i) having contracts or agreements with the Public Service; or (ii) holding offices of profit under the Crown. The Legislative Council Committee was asked to report on proposals for reform of s13 (Disqualifications) and s13B (Office of profit or pension from Crown).

The Legislative Council Standing Committee on Parliamentary Privilege and Ethics and the Legislative Assembly Standing Ethics Committee agreed to meet jointly to discuss the office of profit inquiry, and to hold any hearings jointly. The Council Committee made available to the Legislative Assembly all documents and submissions received in the course of its inquiry.

The two Committees met jointly on Thursday 5 April 2001. The members were briefed on the submissions received by the Council committee and discussed key issues. The Legislative Council committee then met separately to discuss options and as a consequence the Chair of the Legislative Council Committee advised the Chair of the Legislative Assembly Committee that her Committee had decided to recommend that sections 13 and 13B be repealed in entirety. The Legislative Assembly Committee resolved to await the final report of the Council Committee and make recommendations in response to the Council Committee's report.

This report therefore is in response to the Report of the Legislative Council Standing Committee on Parliamentary Privilege and Ethics on sections 13 and 13B of the Constitution Act 1902 (Report 15 dated March 2002), and should be read in conjunction with cited chapters and paragraphs of that report.

Historical background to sections 13 and 13B

While the Legislative Assembly Committee's inquiry is only into s13B of the Constitution Act, both s13 and s13B involve criteria for disqualification of Members, so the Assembly and Council Committees were able to sit jointly to consider the background and purpose of the two sections of the Constitution.

The history and legislative purpose of the sections under review are set out in detail in Chapter 2 of the Legislative Council Standing Committee report. Our Committee has adopted this Chapter as an accurate summary of the sections, and notes that there are other contemporary provisions relevant to s13B such as the Constitution (Public Service) Amendment Act 1916 (NSW) which provides that public servants (on leave) can stand as candidates for election as a Member, and then resign from their public service office upon being declared elected.

Section 13 and 13B - Issues

Chapter 3 of the Legislative Council Standing Committee report sets out the problems currently identified with sections 13 and 13B and discusses the range of views reflected in submissions to the inquiry. In particular Chapter 3 lists a range of accountability mechanisms which exist apart from sections 13 and 13B, such as the Independent Commission Against Corruption, the compulsory registration of pecuniary interests, media scrutiny and the judgment of the electors at the polling booth. The Council Committee concluded that these more modern accountability mechanisms provided sufficient accountability and opportunity for exposing serious corruption, which mechanisms did not exist when the disqualification provisions were originally introduced. The Council accordingly recommended that, given the availability of these alternative mechanisms, and the uncertainty surrounding the meaning and scope of sections 13 and 13B, those sections should be repealed.

The Legislative Assembly Committee has no major disagreement with this rationale, but takes the alternative view that the purposes underlying s13B are valuable and should not be repealed, but rather redrafted to be clear, precise and unambiguous in its terms.

Given the difference in opinion between the Legislative Assembly and Legislative Council Committees, and the fact that the Legislative Assembly Committee inquiry is only into s13B, not section 13, this section of our report will refer to and reprint only relevant sections of the Council report.

Section 13B – Problems and overview

The purpose of the current restrictions imposed by section 13B of the Constitution Act is to ensure that Members of Parliament are not placed in situations of conflict of interest or subjected to inappropriate influences in the performance of their legislative duties. The restrictions are also intended to ensure that the executive government cannot purchase the allegiance of a Member by awarding that member a government position.

The Legislative Council Committee noted that “these provisions came about very early in the development of the modern parliament, and in some measure reflect the exigencies of the times from which they arose”. Our Committee agrees with this finding, but does not consider that the potential risk of governments using their executive power to subvert the independence of Members of Parliament has completely disappeared.

The Legislative Assembly Committee is of the view that certain positions within government are incompatible with membership of parliament. This covers not only the physical incompatibility of fulfilling both the duties of the office and the duties of a member of Parliament but also the need to prevent certain offices, such as judicial offices and offices held by senior public servants, being held by persons who are, as members of Parliament, engaged in political controversy. The House of Representatives Standing Committee on Legal and Constitutional Affairs which reported in 1997 on the operation of the disqualification provisions contained in the Australian Constitution noted that “some offices are considered to be so sensitive that if the holders of such offices become embroiled in political controversy the offices themselves may be damaged” (“Aspects of section 44 of the Australian Constitution” 1997:54).

Our system of government is premised on a fundamental principle that parliament can hold the executive to account and therefore it is necessary to ensure that enough members of parliament are free from the influence of the Crown to achieve this. There is also a need to maintain the principle of ministerial responsibility by ensuring that officers who make decisions on matters of public policy, and for whom ministers are ultimately responsible, are not themselves members of parliament.

While the intent of the section is understood, the way it is expressed raises problems for members. The law should be clear, comprehensive and serve as a guide to affected parties.

However, the text of s13 is archaic and vague. The exact meaning and scope of the words “office of profit”, “Crown”, and “pension from the Crown” under the NSW Constitution defy precise definition, although the exceptions listed within the section give some guidance as to their scope (for example, section 13B is limited to an office of profit under the Crown in right of the State of NSW). In 1988 the Australian Constitutional Commission recommended that the expression be removed from the Commonwealth Constitution and be replaced by provisions specifying the classes of public officers and employees who should be disqualified.

Section 13 is also inflexible in its application and harsh in its consequences, forcing a Member who breaches its terms to vacate his or her seat.

The provision raises immense difficulties for Members who are invited to serve on ad-hoc review committees or part-time boards, where their experience is relevant and could be of

service to their electorate. While there is currently an exemption under s13B(3)(a)(ii) for positions which are not remunerated apart from fees payable in respect of attendance and/or an expense allowances, this provision is insufficiently clear. For example under the Local Government Act a council pays each councillor an annual fee, which does not depend on meeting attendance. The query arises as to whether these fees constitute an expense allowance or payment for attendance.

Certain public offices are currently deemed by legislation not be offices of profit under the Crown. These include such offices as members of the Sydney Cricket Ground and Sports Ground Trust, a member of the Motor Vehicle Repair Industry Council other than the office of Chairperson, appointed member of the NSW Cancer Council, member of the Sydney Opera House Trust, member of a committee established by a development corporation under the Growth Centres (Development Corporations) Act 1974 (NSW) and member of the Community Justice Centres Council. There is thus an anomaly in that Members may be appointed to certain committees which are set-up under statute, but they could not be appointed to a committee looking at a similar subject matter, or performing a similar function, if that committee is not established by legislation. This inconsistency should be addressed.

Office of Profit disqualification provisions in other parliaments:

Appendix 3 of the Legislative Council report sets out in detail the disqualification provisions applying in other Australian Parliaments and New Zealand in relation to government contractors and office of profit. The report also refers to the large number of inquiries on this subject that have been held over time as various states have had cause to review the archaic terminology inherited through our colonial history.

It is pertinent to note that the originating source of the legislation, the House of Commons, saw fit to reform their legislation in 1957 and reenact it in 1975 in the House of Commons Disqualification Act. The reformed provisions in the House of Commons Disqualification Act 1975 provide that a person shall not be disqualified for membership of the House of Commons by reason of holding an office of profit under the Crown (or any other office) except as specified. The Act specifies that persons will be disqualified who are employed full or part-time in the Civil Service, the regular armed forces (which are defined), the police force; or who hold particular offices such as judicial offices, Ambassador, or positions on specified public bodies, boards, councils and tribunals.

Rather than reprinting in full the whole of Appendix 3 (Disqualification provisions in other Parliaments) to the Legislative Council Standing Committee, this report will refer to examples and precedents from Appendix 3 that are relevant to our Committee's findings and recommendations.

Findings and Recommendations of the Legislative Assembly Standing Ethics Committee:

The Legislative Assembly Standing Ethics Committee does not agree with the recommendation of the Legislative Council Standing Committee on Ethics and Parliamentary Privilege that sections 13 and 13B should be abolished.

Our Committee is of the view that the sections are currently unhelpful and overly complex and should be entirely redrafted. However, the Committee accepts that the purposes underlying s13B are valuable and should not be ignored or removed from the Constitution.

The term "office of profit" should be dispensed with. The intention of section 13B, and the principles it currently reflects, should be retained and consolidated. For example, the office of Minister of the Crown, as presently provided for in the Constitution, should not change.

The Committee noted the current legislation in Western Australia which was introduced in 1982, following recommendations of a Parliamentary Joint Select Committee of the Legislative Council and Legislative Assembly on Offices of Profit of Members of Parliament and Members Contracts with the Crown. That Committee, and the earlier report of the Western Australian Law Reform Committee in 1971, had recommended that, as in the UK House of Commons, the particular disqualifying offices or classes of office should be specified as it is not possible to set out general criteria with sufficient precision.

The Western Australian Constitution Acts Amendment Act 1899 states that no person is disqualified from membership of the Legislature by reason of holding an office of profit under the Crown, except as provided by the Act. All disqualifying offices or classes of office are listed in the Act and schedules.

The Western Australian legislation distinguishes committees or boards formed by or from groups within the community for an industrial, commercial, charitable or recreational purpose, and where the members shall have been elected or appointed by an association or members of the community and to which the committee is responsible. Members appointed to or members of these types of organisations are exempt from the "office of profit" disqualification provisions.

Our Committee was advised by Sir Donald Limon, Clerk of the House of Commons, that prior to 1975 amendments to the House of Commons Disqualification Act 1957 referred to above, the law on the subject of office of profit was, like the similar NSW law, exceedingly complicated. The 1975 amendments to the Act, and the Orders in Council made under the Act, specify the particular offices which disqualify. Since the passing of the Act there have been very few difficulties and there has been no pressure for further review.

Our committee is recommending that the exceptions currently listed in s13 should continue to apply, eg where legislation establishing a board, commission, or statutory authority expressly states that appointment to a position on such bodies is not a "listed office" for the purpose of s13 of the Constitution.

Another type of exemption which should continue to apply is the current exemption under s13B(3)(a)(ii) for offices where the only remuneration is fees for attending meetings and reasonable expenses. It is noted that in the Queensland Legislative Assembly Act 1867, the legislation applying to "office or place of profit under the Crown" exempts appointment to an

office of profit where a member is not entitled to or does not receive any fee or reward, or "irrevocably waives" any entitlement to fee or reward from the office. "Fee or reward" is also defined to not include reimbursement of "reasonable expenses", including accommodation, meals, domestic air travel, taxi fares, public transport charges or motor vehicle hire".

The Committee is also of the view that the office of local government councillor should not be a disqualifying office. Councils are not funded solely by Government, are not subject to Ministerial direction, and are subject to very little control by executive government. Councillors as democratically elected representatives, would not appear to be in a position to exert the type of control or influence which the office of profit disqualification is aimed at preventing.

Some other jurisdictions have also recommended exempting university staff involved in specialised teaching, marking or post-graduate supervision.

Professor Enid Campbell has advised the Committees that there is no constitutional impediment to the extension of the disqualification in NSW to offices of profit under the Crown to other State Governments or the Commonwealth. Professor Campbell further notes that the Constitutional Commission proposed a disqualification in these terms.

Related Issues:

There are differences between the Commonwealth and NSW Constitutions with regard to public servants wishing to stand as candidates for election. In the course of this inquiry it has become apparent that most people are not aware of these different laws.

The NSW Constitution was subject to major amendment in 1978 when the provisions for election of the Legislative Council were reformed. The provisions of the Act relating to disqualification from elections were re-enacted in new sections 13A, 13B and 13C of the Constitution. The Constitution (Public Service) Amendment Act 1916 (NSW) provides that section 13B does not extend to any person who holds any office of profit in the public service of NSW. This includes officers and temporary employees of a teaching service. However, any officer in the public service who is elected as a Member must resign his or her office in the public service on being declared elected.

The Commonwealth Constitution does not have a comparable provision. In the Commonwealth jurisdiction there have been a number of court cases in recent years seeking to have elections of certain candidates declared null and void on the basis that they are disqualified by virtue of them holding an office of profit under the Crown. Under section 44(iv) of the Commonwealth Constitution Mr Phil Cleary was disqualified from being elected due to his employment with the Victorian Department of Education as a teacher, even though he was on leave without pay at the time of nomination and polling and had resigned from his teaching position before the declaration of the poll. The Court found that as a permanent officer in the teaching service, it was irrelevant that he was on leave without pay, as the word "chosen" in section 44(iv) related to the whole process of being elected, commencing from and including the day of nomination. In 1996 Ms Jacqui Kelly was also found to have been incapable of being "chosen" as a member due to her being an officer of the RAAF at the time of her nomination as a candidate. Miss Kelly had transferred from her position in the Royal Australian Air Force to the RAAF Reserve, but the Court of Disputed

Returns ruled that she had not been duly elected and her election was absolutely void. At the by-election which followed Miss Kelly was elected.

There is anecdotal evidence that there is some confusion in the electorate and among some candidates about the exact application of the various provisions state and federal, and the complicated wording of the sections has given rise to litigation.

Accordingly, the Committee **recommends** that the State Electoral Office should provide candidates with clearer information on the Constitutional provisions which could result in disqualification. The Office could work with the Parliament to develop plain english guides in pamphlet form and on-line, and to develop links between relevant sites on the internet.

RECOMMENDATIONS

The committee recommends THAT:

Recommendation 1.

Section 13B should:

- (a) only apply to cases where a Member clearly would forfeit the electorate's confidence;
- (b) be clear, precise and unambiguous in its terms.

Recommendation 2.

The term "office of profit" should be dispensed with, although the intention of section 13B should be retained and consolidated. For example, the office of Minister of the Crown, as presently provided for in the Constitution, should not change.

Recommendation 3.

Instead of using the broad term "office of profit", the Committee recommends that New South Wales should follow Western Australia and the United Kingdom by listing the disqualifying offices by name.

The state offices that would result in disqualification from standing for election as a Member of Parliament, or sitting or voting as a Member should include:

- Judicial or arbitral offices
- Offices statutorily required to report directly to the Parliament (Auditor General, Ombudsman, Commissioner for Children and Young People, Commissioner of the ICAC, Health Care Complaints Commissioner etc)
- Offices prescribed by statute as being the Chief Executive or Head of Department and being directly responsible for policy advice to Government, and all offices of equivalent status and responsibility in State Owned Enterprises.
- Clerk of the Parliament and Clerk of the Legislative Assembly
- positions employed under the Public Sector Management Act, or employees of a state owned corporation or the legislature (although candidates for election would be able to take leave as under the current law)
- Office of the Commissioner of Police
- Boards of statutory authorities – Offices on certain bodies with executive, administrative or policy making responsibilities to Government and where the appointments are made by the Minister or on the advice of the Minister, may have the potential to raise conflicts of interest. These boards, commissions, statutory authorities or committees should be listed in a schedule.
- any other offices gazetted to be included in the schedule listing disqualified offices.

Recommendation 4:

The exceptions currently listed in s13 should continue to apply. For example, a Member should be able to be appointed to positions "under the Crown" where they are not entitled to

remuneration, except either fees payable to him or her as a member of that body, in respect to attendance at meetings of that body, and/or an allowance for reasonable expenses incurred in carrying out the duties of that office.

Recommendation 5:

The office of local government councillor should not be a disqualifying office.

Recommendation 6:

That any draft legislation prepared to amend s13B1 be referred to this Committee and the Legislative Council Standing Committee on Parliamentary Privilege and Ethics for consideration and comment.

Recommendation 7:

The State Electoral Office should provide candidates with clearer information on the Constitutional provisions which could result in disqualification and work with the Parliament to develop plain english guides in pamphlet form and on-line.



New South Wales Consolidated Acts

CONSTITUTION ACT 1902 - SECT 13B

13B Office of profit or pension from Crown

(1) A person:

(a) holding an office of profit under the Crown, or

(b) having a pension from the Crown during pleasure or for a term of years,

shall not, if he is elected as a Member of either House of Parliament, be capable of sitting and voting as a Member of the House to which he is elected, and his seat as a Member shall become vacant, after the expiration of the period commencing with his election and ending on the expiration of 7 sitting days of that House after notice of his holding that office or having that pension has been given to that House in accordance with its Standing Rules and Orders, unless that House has previously passed a resolution indicating that it is satisfied that that person has ceased to hold that office or, as the case may be, that the right of that person to that pension has ceased or is suspended while he is a Member of that House.

(2) If a Member of either House of Parliament accepts any office of profit under the Crown or pension from the Crown during pleasure or for a term of years, his seat as a Member of that House shall become vacant upon the expiration of the period commencing with his acceptance of the office or the pension and ending on the expiration of 7 sitting days of that House after notice of his accepting that office or pension has been given to that House in accordance with its Standing Rules and Orders, unless that House has previously passed a resolution indicating that it is satisfied that that Member has ceased to hold that office or, as the case may be, that the right of that Member to that pension has ceased or is suspended while he is a Member of that House.

(3) Notwithstanding subsection (1) or (2):

(a) a person:

(i) 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,

(ii) who holds or accepts an office of profit under the Crown in respect of which he is not entitled to any remuneration, except either fees payable to him, as a member of a body, in respect of his attendance at meetings of that body or an allowance for reasonable expenses incurred or to be incurred in carrying out the duties of the office, or both those fees and such an allowance,

(iii) who holds or accepts an office of profit under the Crown, other than the Crown in right of the State of New South Wales, but not being an office as a member of any legislature of a country other than New South Wales, or

(iv) who has or accepts a pension, referred to in subsection (1) (b) or (2), from the Crown, other than the Crown in right of the State of New South Wales,

shall be capable of being elected and of sitting and voting as a Member of either House of Parliament,

(b) a person who holds or accepts the office of Vice-President of the

Executive Council shall be capable of being elected and of sitting and voting as a Member of either House of Parliament, and

- (c) a person who holds or accepts the office of Parliamentary Secretary shall be capable of being elected and of sitting and voting as a Member of either House of Parliament.

(4) For the purposes of subsections (1) and (2), sitting days shall be counted, whether or not they occur during the same session of Parliament.

[\[Index\]](#) [\[Table\]](#) [\[Search\]](#) [\[Search this Act\]](#) [\[Notes\]](#) [\[Noteup\]](#) [\[Previous\]](#) [\[Next\]](#) [\[Download\]](#) [\[Help\]](#)