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Members

THE MEMBER'S ROLE

This chapter is confined, in the main, to the role of the private Member,[1] who may be defined generally as a Member who does not hold any of the following positions: Prime Minister, Speaker, Minister, Parliamentary Secretary, Leader of the Opposition, Deputy Leader of the Opposition, or leader of a recognised party.[2] The commonly used term backbencher, which is sometimes used as a synonym of the term private Member, strictly refers to a Member who sits on a back bench as opposed to those Members who sit on the front benches which are reserved for Ministers and members of the opposition executive.

The private Member has a number of distinct and sometimes competing roles. His or her responsibilities and loyalties lie with:

- the House of Representatives but with an overriding duty to the national interest;
- constituents—he or she has a primary duty to represent their interests; and
- his or her political party.

These roles are discussed briefly below.

Parliamentary

The national Parliament is the forum for debating legislation and discussing and publicising matters of national and international importance. The role played by the Member in the House is the one with which the general observer is most familiar. In the Chamber (or in the additional forum provided by the Federation Chamber) Members participate in public debate of legislation and government policy. They also have opportunities to elicit information from the Government, and to raise matters of their own concern for discussion. It is this role which probably attracts the most publicity but, at the same time, it is the one which is probably least demanding of a Member's time.

Since the late 1960s the House of Representatives has sought to strengthen its ability to scrutinise the actions and policies of government, mainly through the creation of committees.[3] This has placed considerable demands on the time of the private Member, as committee meetings are held during both sitting and non-sitting periods and committees may hold hearings in many places throughout Australia. In order to make a substantive contribution to the work of a committee, a Member needs to invest a considerable amount of time in becoming familiar with the subject-matter of the inquiry. Committees are given wide powers of investigation and study, and their reports testify to the thoroughness of their work. They are valuable vehicles for acquiring and disseminating information and supplement the normal parliamentary role of a private Member considerably.

1 *See* Ch. on 'House, Government and Opposition' for discussion of the Ministry and office holders.
2 The definition of a private Member for the purpose of private Members' business is wider than this—*see* Ch. on 'Non-government business'.
3 *See also* Ch. on 'Parliamentary committees'.

The volume of legislation and the increasing breadth and complexity of government activity in recent times have required the typical private Member to narrow his or her range of interest and activity, and to specialise in areas which are of particular concern.

Constituency

The electoral divisions in Australia vary in population around an average of about 150 000 people and vary greatly in other respects,[4] ranging from inner-city electorates of a few square kilometres to electorates that are larger in area than many countries.

Members provide a direct link between their constituents and the federal administration. Constituents constantly seek the assistance of their local Member in securing the redress of grievances or help with various problems they may encounter. Many of the complaints or calls for assistance fall within the areas of social welfare, immigration and taxation. A Member will also deal with problems ranging from family law, postal and telephone services, employment, housing and health to education—even the task of just filling out forms. Many Commonwealth and State functions overlap and when this occurs, cross-referrals of problems are made between Federal and State Members, regardless of political affiliations.

A Member has influence and standing outside Parliament and typically has a wide range of contacts with government bodies, political parties, and the community as a whole. Personal intervention by a Member traditionally commands priority attention by departments. In many cases the Member or the Member's assistants will contact the department or authority concerned. In other cases, the Member may approach the Minister direct. If the Member feels the case requires public ventilation, he or she may bring the matter before the House—for instance, by addressing a question to the responsible Minister, by raising it during a grievance debate or by speaking on it during an adjournment debate. It is more common, however, for the concerns or grievances of citizens to be dealt with by means of representations to departments and authorities, or Ministers, and for them to be raised in the House only if such representations fail. A Member may also make representations to the Government on behalf of his or her electorate as a whole on matters which are peculiar to the electorate.

Party

Most Members of the House of Representatives are elected as members of one of the political parties represented in the House.[5] If a Member is elected with the support of a political party, it is not unreasonable for the party to expect that the Member will demonstrate loyalty and support in his or her actions in the House. Most decisions of the House are determined on party lines and, thus, a Member's vote will usually be in accord with the policies of his or her party.

One exception to this rule arises in the relatively rare case of a 'free vote'. A free vote may occur when a party has no particular policy on a matter or when a party feels that Members should be permitted to exercise their responsibilities in accordance with their

4 For sociodemographic analysis of electorates *see* P. Nelson, 'Electoral division rankings: 2006 Census (2009 electoral boundaries)', *Parliamentary Library research paper*, no. 18, 2009–10.

5 In recent Parliaments there have been up to five independents elected. For an analysis of party affiliations of Members since 1901 *see* Appendix 10. *See also* 'Political parties' in Ch. on 'House, Government and Opposition'.

consciences. A free vote may also be extended to matters affecting the functioning of the House, such as changes to the standing orders.[6]

While Members rarely challenge the policies of their parties effectively on the floor of the House because of the strong tradition of party loyalty that exists in Australia, policy can be influenced and changed both in the party room and through the system of party committees. All parties hold meetings, usually weekly when the Parliament is sitting, at which proposals are put before the parliamentary parties and attitudes are determined.

Both the Australian Labor Party and the Liberal Party/Nationals make extensive use of backbench party committees, each committee specialising in a particular area of government. These committees scrutinise legislative proposals and government policy, and may help develop party policy. They can enable private government Members to have detailed discussions with senior departmental officials and may provide a platform for hearing the attitudes of community groups and organisations on particular matters.

THE MEMBER AND THE HOUSE IN THE DEMOCRATIC PROCESS

Members of the House hold office only with the support of the electorate and must retain its confidence at the next election to remain in office. As a result the influence which citizens exert on individual Members and their parties is a fundamental strength of the democratic system.

Members are influenced by what they perceive to be public opinion, by other parliamentarians and by the people they meet in performing their parliamentary and electorate duties. They are also informed and influenced by specific representations made to them by way of requests by groups and individuals for support of particular causes, expressed points of view or expressions of interest in some government activity, or requests for assistance in dealings with government departments and instrumentalities.

Representations may be made by individuals acting on their own account or as part of an organised campaign. Major campaigns, for example, have been launched on such issues as abortion law reform and family law legislation. These campaigns may be supplemented by other measures, such as telephone campaigns and by the sending of delegations to speak to Members personally.

Representations may also be made to Members, especially Ministers, by professional lobbyists and highly organised pressure groups, such as industry associations and trade unions, which may have significant staff and financial resources.

Accessibility of Members to citizens in the electorate is important for the proper operation of the democratic process. Members are conscious of the importance of being accessible to their constituents and of identifying and promoting the interests of their electorates. This has been summarised as follows:

> They accept that generally the seats of all MPs will depend on the overall performance of the party, but they believe that they themselves are in a slightly better position because of the work they do in their electorates. Most of them certainly behave as if they were firmly convinced that their future was dependent on the contribution they make to the condition of their electorates and its residents, rather than anything they might do in the parliament.[7]

In short, the democratic system makes Members responsible and responsive to the constituents they represent and to the Australian electorate generally. This is not to ignore

6 *See* 'Free votes' in Ch. on 'Order of business and the sitting day'.
7 David Solomon, *Inside the Australian Parliament*, George Allen & Unwin, Sydney, 1978, p. 126.

the fine balance which must at times be struck between leading and responding to the people. Edmund Burke's view of this still carries weight:

> Your representative owes you, not his industry only; but his judgement, and he betrays, instead of serving you, if he sacrifices it to your opinion.[8]

In turn, it may be considered that the House must be responsive to the views of its Members and, through them, to the electorate at large, if it is to be effective as a democratic institution.

QUALIFICATIONS AND DISQUALIFICATIONS

Constitutional provisions

A person is incapable of being chosen or of sitting as a Member of the House of Representatives if the person:

- is a subject or citizen of a foreign power or is under an acknowledgment of allegiance, obedience or adherence to a foreign power;
- is attainted (convicted) of treason;
- has been convicted and is under sentence or subject to be sentenced for an offence punishable by imprisonment for one year or longer under a State or Commonwealth law;
- is an undischarged bankrupt or insolvent;
- holds any office of profit under the Crown or any pension payable during the pleasure of the Crown out of any Commonwealth revenues (but this does not apply to:
  - Commonwealth Ministers
  - State Ministers
  - officers or members of the Queen's Armed Forces in receipt of pay, half-pay or pension
  - officers or members of the Armed Forces of the Commonwealth in receipt of pay but whose services are not wholly employed by the Commonwealth); or
- has any direct or indirect pecuniary interest in any agreement with the Commonwealth Public Service in any way other than as a member in common with other members of an incorporated company consisting of more than 25 persons.[9]

(Office holders of the Parliament, such as the Speaker and President, do not hold offices under the Crown.)

A Member of the House of Representatives also becomes disqualified if he or she:

- takes the benefit, whether by assignment, composition, or otherwise, of any law relating to bankrupt or insolvent debtors; or
- directly or indirectly takes or agrees to take any fee or honorarium for services rendered to the Commonwealth, or for services rendered in the Parliament to any person or State.[10]

8 'Speech to the electors of Bristol, 1774', quoted in Michael Rush, *Parliament and the public*, Longman, London, 1976, p. 55.

9 Constitution, s. 44. In 1997 the House of Representatives Standing Committee on Legal and Constitutional Affairs recommended changes to the provisions of this section: *Aspects of section 44 of the Australian Constitution,* PP 85 (1997).

10 Constitution, s. 45.

A Member of either the House of Representatives or the Senate is incapable of being chosen or of sitting as a Member of the other House.[11] Thus, a Member of either House must resign if he or she wishes to stand as a candidate for election to the other House.

Electoral Act provisions

In order to be eligible to become a Member of the House of Representatives a person must:

- have reached the age of 18 years;
- be an Australian citizen; and
- be an elector, or qualified to become an elector, who is entitled to vote in a House of Representatives election.[12]

A person is incapable of being chosen or of sitting as a Member if he or she has been convicted of bribery, undue influence or interference with political liberty, or has been found by the Court of Disputed Returns to have committed or attempted to commit bribery or undue influence when a candidate, disqualification being for two years from the date of the conviction or finding.[13]

A person is disqualified by virtue of not being eligible as an elector, in accordance with section 163 of the Commonwealth Electoral Act, if the person is of unsound mind.[14]

No person who nominates as a Member of the House of Representatives can be at the hour of nomination a member of a State Parliament, the Northern Territory Legislative Assembly or the Australian Capital Territory Legislative Assembly.[15]

Challenges to membership

The House may, by resolution, refer any question concerning the qualifications of a Member to the Court of Disputed Returns.[16] There have been two instances of the House referring a matter to the Court,[17] although other motions to do so have been debated and negatived.[18] The ability of the House to refer such a matter to the Court of Disputed Returns does not mean that the House cannot itself act, and it has done so.[19]

A person's qualifications to serve as a Member may also be challenged by way of a petition to the Court of Disputed Returns challenging the validity of his or her election on the grounds of eligibility (such petitions may also relate to alleged irregularities in connection with elections—*see* Chapter on 'Elections and the electoral system', *and see* Appendix 13 for a full listing).

Section 44(i) of the Constitution

The 1992 petition in relation to the election of Mr Cleary (*see 44(iv) below*) also alleged that other candidates at the by-election were ineligible for election on the ground that, although naturalised Australian citizens, they were each, by virtue of their holding

11 Constitution, s. 43.

12 *Commonwealth Electoral Act 1918*, s. 163. The Parliament has laid down these qualifications in place of those prescribed in s. 34 of the Constitution. There is thus no upper age limit. The oldest Member when first elected was Sir Edward Braddon in 1901, aged 71 years. The youngest to be elected were W. Roy in 2010, aged 20, and E.W. Corboy in 1918, aged 22 (by-election). Until 1973 the minimum qualification age was 21.

13 *Commonwealth Electoral Act 1918*, s. 386.

14 *Commonwealth Electoral Act 1918*, s. 93.

15 *Commonwealth Electoral Act 1918*, s. 164.

16 *Commonwealth Electoral Act 1918*, s. 376; *and see* Ch. on 'Elections and the electoral system'.

17 To end 2017: cases of Mr Joyce, *see* p. 138, and Mr Feeney, *see* p. 139.

18 Cases of Mr Entsch, *see* p. 142, and Mr Baume, *see* p. 143.

19 Case of Mr Entsch, *see* p. 142.

dual nationality, a subject or a citizen or entitled to the rights or privileges of a subject or citizen of a foreign power. As the election was declared void the necessity for the Court to rule on the status of these other candidates did not arise, but the matter was addressed in the Court's reasons for judgment. The justices agreed that dual citizenship in itself would not be a disqualification under section 44(i) provided that a person had taken 'reasonable steps' to renounce his or her foreign nationality. The majority of justices found that the candidates concerned in this case had not taken such reasonable steps, as they had omitted to take action open to them to seek release from or discharge of their original citizenships.[20]

In 1998 the election of Mrs Heather Hill as a Senator for Queensland was challenged by petitions to the Court of Disputed Returns. Mrs Hill had been born in the United Kingdom but had become an Australian citizen before nomination. She renounced her British citizenship after the election. The Court ruled that Mrs Hill was at the date of her nomination a subject or citizen of a foreign power within the meaning of s. 44(i) and had not been duly elected.[21]

In July 2017 Mr Scott Ludlam (W.A.) and Ms Larissa Waters (Qld) resigned as Senators, having discovered that they were disqualified on grounds of dual nationality. The Senate referred these cases and that of Senator Matthew Canavan (Qld) to the Court of Disputed Returns, and later also referred the cases of Senator Malcolm Roberts (Qld), Senator Fiona Nash (Qld) and Senator Xenophon (S.A).[22] During these events the House referred the case of the Member for New England, the Hon. Barnaby Joyce MP (Leader of the National Party and Deputy Prime Minister), to the Court of Disputed Returns when Mr Joyce announced he had been advised that, although born in Australia, he was considered by New Zealand law to be a New Zealand national by descent.[23] The Court heard these seven references together. Matters raised in submissions included the possibly different status in relation to s. 44(i) of foreign citizenship by birth and foreign citizenship by descent and the operation of s. 44(i) when a person is unaware of their foreign citizenship.

In its reasons for judgement the Court noted that s. 44(i) draws no distinction between foreign citizenship by place of birth, by descent or by naturalisation. The Court summarised the proper construction of s. 44(i) as follows:

> Section 44(i) operates to render "incapable of being chosen or of sitting" persons who have the status of subject or citizen of a foreign power. Whether a person has the status of foreign subject or citizen is determined by the law of the foreign power in question. Proof of a candidate's knowledge of his or her foreign citizenship status (or of facts that might put a candidate on inquiry as to the possibility that he or she is a foreign citizen) is not necessary to bring about the disqualifying operation of s 44(i).
>
> A person who, at the time that he or she nominates for election, retains the status of subject or citizen of a foreign power will be disqualified by reason of s 44(i), except where the operation of the foreign law is contrary to the constitutional imperative that an Australian citizen not be irremediably prevented by foreign law from participation in representative government. Where it can be demonstrated that the person has taken all steps that are reasonably required by the foreign law to renounce his or her citizenship and within his or her power, the constitutional imperative is engaged.[24]

In regard to the seven cases, the Court ruled that:

20 *Sykes v. Cleary* (1992) 109 ALR 577.

21 *Sue v. Hill* (1999) 163 ALR 648. The reasons for judgment stated that the United Kingdom has been a foreign power for the purposes of s. 44(i) since, at the latest, the passage of the *Australia Act 1986*.

22 J 2016–18/1599 (8.8.2017), 1630 (9.8.2017), 1788, 1789 (4.9.2017).

23 VP 2016–18/958 (14.8.2017). This was the first time the House had referred a question on the qualifications of a Member to the Court.

24 *Re Canavan* [2017] HCA 45.

- the Court could not be satisfied, on the evidence before it, that Senator Canavan had been an Italian citizen at the date of nomination;
- Senator Xenophon's status at the date of nomination as a British Overseas Citizen (which did not bestow the rights or privileges of a citizen) did not make him a subject or citizen of the United Kingdom for the purposes of s. 44(i);
- in the other five cases, the persons involved had held foreign citizenship at the date of nomination[25] and had been incapable of being chosen or sitting as a Senator or Member by reason of s. 44(i), and the places for which they had been returned were therefore vacant;
- the vacant Senate places were to be filled by special counts[26] of the 2016 ballot papers, and a by-election was to be held for the division of New England.[27]

After the Court's decision an additional three Senators and a Member resigned, having found that they that they were also disqualified on grounds of dual nationality.[28]

CITIZENSHIP REGISTER

Following the above cases, Members were required by a resolution of the House to provide a statement to the Registrar of Members' Interests in relation to their Australian citizenship and any possible citizenship of another country. Information to be supplied included the birth and citizenship details of the Member, their citizenship at the date of nomination for the 45th Parliament, and steps taken to renounce any other citizenship. Birth details of parents, grandparents and spouse were also required.[29]

SUBSEQUENT REFERRALS

After the Citizenship Register was made public two further cases were referred to the Court of Disputed Returns, both involving renunciation of UK citizenship by descent. In the case of the Member for Batman, Mr D. Feeney, no evidence of renunciation of UK citizenship was available to be produced, and he resigned before the court considered his position. Later the court ruled his seat to be vacant by reason of s. 44(1).[30] In the case of Senator K. Gallagher, the Senator had taken action to renounce her UK citizenship before nomination but, because of the time taken to process the matter in the UK, the renunciation had not become effective until after election. The Court ruled that Senator Gallagher was incapable of being chosen or of sitting as a Senator by reason of s. 44(i) of the Constitution when she nominated for election, and there was a vacancy in the Senate for the place for which she was returned.[31] The Court held that the exception provided by the constitutional imperative referred to in *Re Canavan* (*see* extract at page 138) did not apply to Senator Gallagher's situation under British law.[32]

25 Waters, Canada; Ludlam, Joyce, New Zealand; Roberts, Nash, United Kingdom. All had renounced their foreign citizenship prior to court proceedings.

26 That is, with the votes cast for the disqualified candidate being given to the candidate next in the order of the voter's preference.

27 Having renounced his other citizenship Mr Joyce stood again and was elected.

28 Each held British citizenship by descent: Senator S. Parry (Tas.) (President of the Senate); Senator J. Lambie (Tas.); Senator S. Kakoschke-Moore (S.A.); Member for Bennelong, Mr J. Alexander. Mr Alexander was elected at the ensuing by-election.

29 VP 2016–18/1235 (4.12.2017). A similar resolution was agreed to by the Senate, J 2016–18/2179–80 (13.11.2017).

30 Referred by House, VP 2016–18/1274–5 (6.12.2017); Mr Feeney's personal explanation, H.R. Deb. (5.12.2017) 12731; he resigned on 1.2.2018; High Court order dated 23.2.2018, VP 2016–18/1398–9 (26.2.2018).

31 Referred by Senate, J 2016–18/2471–2 (6.12.2017). *Re Gallagher* [2018] HCA 17. Following the ruling on 9 May 2018 four Members in comparable circumstances, having held dual British citizenship at the date of their nomination, resigned their seats: Member for Braddon, Ms J. Keay; Member for Fremantle, Mr J. Wilson; Member for Longman, Ms S. Lamb; Member for Mayo, Ms R. Sharkie.

32 The Court held that the constitutional imperative is engaged when *both* of two circumstances are present. First, the foreign law must operate irremediably to prevent an Australian citizen from participation in representative government. Secondly, that person must have taken all steps reasonably required by the foreign law and within his or her power to free himself or herself of the foreign nationality.

Section 44(ii) of the Constitution

In 2016 the Senate referred the qualification of Mr Rodney Culleton as a Senator for Western Australia to the Court of Disputed Returns. Prior to his nomination for election Mr Culleton had been convicted in his absence in the Local Court of New South Wales for the offence of larceny, making him liable to be sentenced for a maximum term of two years. The court later granted an annulment of the conviction.

The Court of Disputed Returns ruled on 3 February 2017 that, at the date of the 2016 election, Mr Culleton was a person who had been convicted and was subject to be sentenced for an offence punishable by imprisonment for one year or longer, and that the subsequent annulment of the conviction had no effect on that state of affairs. It followed that Mr Culleton was incapable of being chosen as a Senator, and that there was a vacancy in the Senate for the place for which he had been returned.[33]

Section 44(iv) of the Constitution

On 3 September 1975 the Queensland Parliament chose Mr Albert Field to fill a casual vacancy caused by the death of a Senator. A motion was moved in the Senate to have his eligibility referred to the Standing Committee of Disputed Returns and Qualifications on the ground that he was not eligible to be chosen because he had not resigned from an office of profit under the Crown.[34] The motion was defeated and Senator Field was sworn in.[35] A writ was served on Senator Field on 1 October 1975 challenging his eligibility.[36] The Senate then granted him leave of absence for one month.[37] The Senate was dissolved on 11 November and the matter did not come to court.

On 11 April 1992 Mr Philip Cleary was elected at a by-election for the division of Wills. Mr Cleary, a teacher, had been on leave without pay at the time of nomination and polling, but had resigned from his teaching position before the declaration of the poll. A petition to the Court of Disputed Returns disputed the election on the ground that Mr Cleary had held an office of profit under the Crown by reason, inter alia, of his being an officer of the Education Department of Victoria. The Court ruled on 25 November 1992 that Mr Cleary had not been duly elected and that his election was absolutely void. In its reasons for judgment the Court found unanimously that, as a permanent officer in the teaching service, Mr Cleary had held an office of profit under the Crown, that it was irrelevant that he was on leave without pay, and that the section applied to State as well as Commonwealth officers. The majority judgment of the Court was that the word 'chosen' in section 44(iv) related to the whole process of being elected, which commenced from and included the day of nomination, and that Mr Cleary was therefore 'incapable of being chosen'.[38] Mr Cleary was subsequently elected as the Member for Wills at the March 1993 general election.

On 2 March 1996 Miss J. Kelly was elected for the division of Lindsay. At the time of her nomination Miss Kelly had been an officer of the Royal Australian Air Force, although she had, at her request, been transferred to the RAAF Reserve before the date of the poll. A petition to the Court of Disputed Returns challenged the election on the basis of section 44(iv). Before the decision of the Court it became common ground between the

33 *Re Culleton [No 2]* [2017] HCA 4.
34 J 1974–75/905–6; S. Deb. (9.9.1975) 603.
35 J 1974–75/905–6.
36 *Odgers*, 6th edn, pp. 152–3.
37 J 1974–75/928.
38 *Sykes v. Cleary* (1992) 109 ALR 577. VP 1990–92/1907 (25.11.1992).

parties that Miss Kelly had been incapable of being chosen as a Member of the House of Representatives while serving as an officer of the RAAF at the time of her nomination as a candidate. The Court ruled on 11 September 1996 that Miss Kelly had not been duly elected and that her election was absolutely void.[39] A new election was held for the division and Miss Kelly was elected.

Also in 1996 was the case of Ms J. Ferris, who was elected as a Senator for South Australia. However, between the date of nomination and the declaration of the result Ms Ferris had been employed by a Parliamentary Secretary and, anticipating a challenge under section 44(iv), she resigned before taking her seat. The South Australian Parliament subsequently appointed her to the casual vacancy thus created.[40]

In November 2017 Ms H. Hughes, who had been identified by special count as the candidate to fill the Senate place for which Senator Nash was ineligible under section 44(i) (*see* page 138), was found ineligible under section 44(iv). After the election she had been employed as a part-time member of the Administrative Appeals Tribunal. The High Court found that because of the disqualification of Senator Nash, the process of choice for the election of a Senator remained incomplete. By choosing to accept the appointment during this period Ms Hughes had forfeited the opportunity to benefit in the future from any special count of the ballot papers.[41]

In February 2018 the High Court ruled that Mr S. Martin, Councillor of the Devonport City Council and Mayor of Devonport, was not incapable (by holding these offices) of being chosen or of sitting as a Senator by reason of section 44(iv).[42]

The view has been expressed that a person who accepts an office of profit under the Crown is disqualified from the date of appointment to and acceptance of the office rather than from the time he or she commences duties or receives a salary.[43]

The provisions of section 44(iv) concerning 'any pension payable during the pleasure of the Crown out of any of the revenues of the Commonwealth' have not been subject to judicial determination. It may be considered that a pension payable under the provisions of an Act of the Commonwealth Parliament would not be caught by the term 'payable during the pleasure of the Crown'.[44]

Section 44(v) of the Constitution

In 1975 a witness before the Joint Committee on Pecuniary Interests alleged that Senator Webster (a member of the committee) was disqualified from sitting as a Senator under section 44(v), as he was a director, manager, secretary and substantial shareholder in a company which had had contracts with Commonwealth government departments.[45] The chair of the committee wrote to the President of the Senate informing him of the allegation.[46] The President read the letter to the Senate[47] which agreed to a resolution

39 *Free v. Kelly & Anor*, Judgment 11 September 1996, (No. S94 of 1996). Miss Kelly was also ordered to pay two thirds of the petitioner's costs. A further basis of challenge under s. 44(i), a claim that at the time of nomination Miss Kelly held dual Australian and New Zealand citizenship, was not pursued at the trial of the petition.

40 For further details and discussion *see Odgers*, 14th edn, pp. 168–9.

41 *Re Nash [No 2]* [2017] HCA 52.

42 *Re Lambie* [2018] HCATrans 7 (6 February 2018).

43 Opinion of Solicitor-General relating to appointment of Senator Gair as Ambassador to Ireland, dated 4 April 1974—*see* S. Deb. (3.4.1974) 638–9; *and see Odgers*, 6th edn, pp. 56–7.

44 *And see* advice by Australian Government Solicitor, dated 4 March 2005.

45 Joint Committee on Pecuniary Interests of Members of Parliament, *Declaration of interests*, Transcript of evidence, Vol. 2, 5 March – 15 April, AGPS, Canberra, 1975, p. 1503.

46 'Qualifications of Senator Webster', *Reference to Court of Disputed Returns*, PP 113 (1975) 11.

47 J 1974–75/597 (15.4.1975).

referring the following questions to the Court of Disputed Returns: whether Senator Webster was incapable of being chosen or of sitting as a Senator; and whether Senator Webster had become incapable of sitting as a Senator.[48]

The two questions referred to the Court were answered in the negative.[49] The Chief Justice in his judgment said that the facts refuted any suggestion of any lack of integrity on the part of Senator Webster, or of any intention on his part to allow the Crown to influence him in the performance of his obligations as a member of the Senate and further that there was at no time any agreement of any kind between Senator Webster and the Public Service of the Commonwealth.[50]

On 10 June 1999 a motion was moved in the House—

> That the following question be referred to the Court of Disputed Returns for determination, pursuant to section 376 of the *Commonwealth Electoral Act 1918*: Whether the place of the honourable Member for Leichhardt (Mr Entsch) has become vacant pursuant to the provisions of section 44(v) of the Constitution.

The Attorney-General moved, as an amendment—

> That all words after 'That' be omitted with a view to substituting the following words: 'the House determines that the Member for Leichhardt does not have any direct or indirect pecuniary interest with the Public Service of the Commonwealth within the meaning of section 44(v) of the Constitution by reason of any contract entered into by Cape York Concrete Pty Ltd since 3 October 1998 and the Member for Leichhardt is therefore not incapable of sitting as a Member of this House'.

The amendment and amended motion were carried. Attempts to rescind them and to censure the Attorney-General for 'usurping the role of the High Court in its capacity to act as the Court of Disputed Returns' were negatived.[51]

Mr Robert Day resigned as Senator for South Australia on 1 November 2016. On 7 November the Senate referred his qualification as a Senator to the Court of Disputed Returns. The Court ruled on 5 April 2017 that, prior to and at the date of the 2016 federal election, Mr Day was a person who had an indirect pecuniary interest in an agreement with the Public Service of the Commonwealth. Premises leased by the Commonwealth for use by Mr Day as his electorate office had been owned by a company indirectly associated with Mr Day and the company had directed on 26 February 2016 that rental payments be made to a bank account owned by Mr Day. By reason of s. 44(v) of the Constitution, Mr Day was therefore incapable of sitting as a Senator on and after that date, being a date prior to the dissolution of the 44th Parliament. Mr Day was incapable of being chosen as a Senator in the 45th Parliament, and there was therefore a vacancy in the Senate for the place for which he had been returned.[52]

In 2017 a suit was brought in the High Court against the Hon. Dr D. Gillespie, MP, under the *Common Informers (Parliamentary Disqualifications) Act*, in relation to his ownership of a shop leased to an outlet of Australia Post, a government-owned corporation. However, the question of Dr Gillespie's qualification under section 44(v) was not considered by the court under these proceedings (*see* page 159).

48 J 1974–75/628–9 (22.4.1975).
49 J 1974–75/821 (9.7.1975).
50 *In re Webster* (1975) 132 CLR 270.
51 VP 1998–2001/594–607 (10.6.1999); H.R. Deb. (10.6.1999) 6720–35. *See also* 'Interpretation of the Constitution or the law' in Ch. on 'The Speaker, Deputy Speakers and officers' for note of Speaker's decision on the validity of the amendment.
52 *Re Day [No 2]* [2017] HCA 14.

Section 45(ii) of the Constitution

The interpretation and application of section 45(ii) arose in 1977 in connection with Mr M. Baume, MP, who, before entering Parliament, had been a member of a stockbroking firm which had collapsed. On 5 May 1977 a motion was moved:

> . . . that the question whether the place of the Honourable Member for Macarthur [Mr Baume] has become vacant pursuant to the provisions of section 45(ii) of the Constitution of the Commonwealth of Australia be referred for determination to the Court of Disputed Returns pursuant to section 203 of the Commonwealth Electoral Act.[53]

It was argued that an agreement made by Mr Baume with the appointed trustee of the firm constituted a deed of arrangement or, alternatively, that he received benefits as a consequence of arrangements made by other members of the firm under the Bankruptcy Act. Speaking against the motion the Attorney-General presented three legal opinions, including a joint opinion by himself and the Solicitor-General, to the effect that the matters did not come within the scope of section 45(ii), and stated that the deed executed by Mr Baume was not a deed of arrangement within the meaning of the Bankruptcy Act, not being a deed executed by him as a debtor under the Act as a deed of arrangement. On the question of whether Mr Baume had received benefits under the Bankruptcy Act as a result of deeds executed by other members of the firm, the opinions were to the effect that while benefits had been conferred, these were not the benefits to which section 45(ii) refers, and that the provision applies where a debtor takes benefits as a party to a transaction, as distinct from receiving benefits as a non-participant. The Attorney-General argued that there was no need for the matter to be referred to the Court of Disputed Returns and that the Government wanted it to be decided by the House. The motion for referral was negatived.[54]

There has been no precedent in the House of Representatives of the seat of a Member being vacated because he or she has become bankrupt. Therefore, while a seat is vacated at the instant that the Member is declared bankrupt, the machinery for bringing this fact to the attention of the House is not established. The proper channel of communication would seem to be between the court and the Speaker and this could be achieved by a notification to the Clerk of the House who would then advise the Speaker. The Speaker would then inform the House, if it were sitting, and issue a writ for a by-election following the usual consultations. If the House was not sitting, the Speaker could issue the writ as soon as convenient and not wait for the House to reconvene.

Section 163 of the Commonwealth Electoral Act

Senator W. R. Wood, it transpired, had not been an Australian citizen at the time of his election, as required by subsection 163(1) of the Commonwealth Electoral Act, although he had believed himself to be a citizen and subsequently became one. On 16 February 1988 the Senate referred the following questions to the Court of Disputed Returns:

- whether there was a vacancy in the representation of New South Wales in the Senate for the place for which Senator Wood had been returned;
- if so, whether such vacancy could be filled by the further counting or recounting of ballot papers cast for candidates for election for Senators for New South Wales at the election;

53 H.R. Deb. (5.5.1977) 1598–1610; VP 1977/108–12 (5.5.1977).
54 H. R. Deb. (5.5.1977) 1598–1608. *See also* PP 131 (1981) 33–4.

- alternatively, whether in the circumstances there was a casual vacancy for one Senator for the State of New South Wales within the meaning of section 15 of the Constitution.[55]

The decision of the court, handed down on 12 May 1988, was to the effect that there was a vacancy, that the vacancy was not a casual vacancy within the meaning of section 15 of the Constitution, and that the vacancy could be filled by the further counting or recounting of ballot papers. The court held that Mr Wood had not been eligible for election, that a vacancy had existed since the election, and that a recount should be conducted as if Mr Wood had died before polling day but with his name remaining on the ballot paper and attracting votes and with votes cast for him given to the candidate next in the order of the voter's preference.[56] Following a recount the court declared Ms I. P. Dunn, of the same party as Mr Wood, to be the elected candidate.[57]

SWEARING-IN

The Constitution provides that every Member of the House of Representatives, before taking his or her seat, must make and subscribe an oath or affirmation of allegiance before the Governor-General or some person authorised by the Governor-General.[58] The oath or affirmation takes the following form:

OATH

I, *A.B.*, do swear that I will be faithful and bear true allegiance to Her Majesty Queen Elizabeth the Second, Her heirs and successors according to law. SO HELP ME GOD!

AFFIRMATION

I, *A.B.*, do solemnly and sincerely affirm and declare that I will be faithful and bear true allegiance to Her Majesty Queen Elizabeth the Second, Her heirs and successors according to law.[59]

The oath of allegiance need not necessarily be made on the authorised version of the Bible, although this has been the common practice. A Member may recite the oath while holding another form of Christian holy book, or, in respect of a non-Christian faith, a book or work of such a nature. The essential requirement is that every Member taking an oath should take it in a manner which affects his or her conscience regardless of whether a holy book is used or not.[60]

The oath or affirmation of allegiance taken by all Members at the beginning of a new Parliament is normally administered by a person authorised by the Governor-General, who is usually a Justice of the High Court.[61] This person is ushered into the Chamber and conducted to the Chair by the Serjeant-at-Arms. The commission from the Governor-General to administer the oath or affirmation is read to the House by the Clerk.[62]

The taking of the oath or affirmation follows the presentation by the Clerk of the returns to the writs for the general election, showing the Member elected for each

55 S. Deb. (16.2.1988) 3–16.
56 *In re Wood* (1988) 167 CLR 145.
57 J 1987–90/845 (22.8.1988).
58 Constitution, s. 42.
59 Constitution, Schedule.
60 Advice of Attorney-General's Department, dated 16 February 1962. The choice of oath or affirmation is not a sure indicator of religious views; some strongly religious Members have chosen to affirm—*see* Deirdre McKeown, *Oaths and affirmations made by the executive and members of the federal parliament since 1901*, Parliamentary Library research paper, 2013–14: pp 4–6.
61 *See also* Ch. on 'The parliamentary calendar'.
62 E.g. VP 2013–16/2 (12.11.2013).

electoral division.[63] A Member may not take part in any proceedings of the House until sworn in.[64] It is also considered that a Member should not participate in the work of committees until sworn in.

All Members elected for that Parliament are called by the Clerk in turn and approach the Table in groups of approximately ten to twelve, make their oath or affirmation, and subscribe (sign) the oath or affirmation form. The Ministry is usually sworn in first, followed by the opposition executive. Other Members are then sworn in. The numbers of Members who have sworn an oath or made an affirmation are inserted on Attestation Forms which are signed by the person authorised.

Members not sworn in at this stage may be sworn in later in the day's proceedings or on a subsequent sitting day by the Speaker, who receives a commission from the Governor-General to administer the oath or affirmation. This commission is presented to the House by the Speaker.[65] Those Members elected at by-elections during the course of a Parliament are also sworn in by the Speaker. In the case of a vacancy in the Speakership and the election of a new Speaker another commission is provided. A new Member elected at a by-election has been sworn in by an Acting Speaker, an authority for him or her to administer the oath or affirmation during any absence of the Speaker having been issued by the Governor-General.[66] The oath or affirmation is sworn or made by the Member in the presence of the Clerk at the head of the Table. The oath or affirmation form is then signed by the Member and passed to the Speaker for attestation.

The authority from the Governor-General to the Speaker to administer oaths or affirmations to Members is customarily renewed when a new Governor-General is appointed,[67] although this practice may not be strictly necessary.[68]

In the event of the demise of the Crown, the UK House of Commons meets immediately and Members again take the oath.[69] This practice is not followed in Australia.[70]

NEW MEMBERS

Before a new Member elected at a by-election takes his or her seat, the Speaker announces the return of the writ for that division and, after admitting the new Member to the Chamber, administers the oath or affirmation, as described above.[71] This procedure has often taken place at the beginning of a day's proceedings, immediately after Prayers,[72] but 2 p.m. has been used with increasing frequency.[73]

It is customary for a new Member elected at a by-election, on being admitted, to be escorted to the Table by two Members of the Member's own party. This custom is derived from the UK House of Commons which resolved on 23 February 1688 that 'in

63 S.O. 4(e).

64 On the opening day of the 21st Parliament a Member who had not been sworn in entered the House during the election of the Speaker. Having been advised that he could not take his seat until sworn in, he withdrew and was later sworn in by the Speaker, VP 1954–55/8 (4.8.1954).

65 E.g. VP 2013–16/7 (12.11.2013).

66 E.g. VP 1987–88/771 (17.10.1988).

67 E.g. VP 2008–10/517 (15.9.2008).

68 Advice of Attorney-General's Department, dated 24 July 1969.

69 *May*, 24th edn, p. 154.

70 VP 1934–36/511–12 (10.3.1936); VP 1951–53/255 (6.2.1952), 257 (7.2.1952).

71 If the Member is not present the announcement of the return of the writ may be made one or more days before the admission of the Member, e.g. VP 2008–10/513 (15.9.2008), 532 (17.9.2008).

72 E.g. VP 1993–96/1613 (5.12.1994).

73 E.g. VP 2008–10/575–6 (25.9.2008).

compliance with an ancient order and custom, they are introduced to the Table between two Members, making their obeisances as they go up, that they may be the better known to the House'.[74]

FIRST SPEECH

The term 'first speech' is used to describe the first speech made by a Member following his or her first election to the House,[75] even though the Member may have had previous parliamentary experience in a State Parliament or the Senate. In a new Parliament, a newly elected Member normally makes his or her first speech during the Address in Reply debate. Members elected at by-elections have sometimes made their first speeches in debate on Appropriation Bills to which the normal rule of relevance does not apply. The relevance rule has been suspended to allow Members to make first speeches during debate on bills to which the rule would otherwise have applied.[76] Standing and sessional orders have been suspended to allow a Member elected at a by-election to make a statement—in effect a first speech—for a period not exceeding 20 minutes,[77] and without limitation of time.[78]

A speech made in relation to a condolence motion is not regarded as a first speech, nor is the asking of a question without notice.[79] A speech by a newly elected Member in his or her capacity as Minister or opposition spokesperson—for example, a Minister's second reading speech on a bill or the opposition speech in reply, or a speech in reply on a matter of public importance—is also not regarded as a first speech, which has been declared to be 'a speech of a Member's choice that is made at the time of his or her choosing'.[80] It is considered that a Member should not make a 90 second or three minute statement or a speech in the adjournment debate until he or she has made a first speech.

There is a convention in the House that a first speech is heard without interjection[81] or interruption, and the Chair will normally draw the attention of the House to the fact that a Member is making a first speech.[82] In return for this courtesy the Member should not be unduly provocative. There have been occasions, however, when a Member's first speech has not been heard in silence.[83] It has also been customary not to make other than kindly references to the first speech of a Member,[84] although this convention has also not always been observed. In 1967 a Member moved an amendment to a motion to take note of a ministerial statement during his first speech.[85]

A recording of a Member's first speech is taken from the televised proceedings of the House and a copy made available to the Member.

74 *May*, 24th edn, p. 374.
75 That is, first ever election—election to a different seat is not counted.
76 E.g. VP 2008–10/452–3 (26.8.2008).
77 VP 2002–04/708 (6.2.2003).
78 VP 2013–15/1636 (13.10.2015).
79 E.g. *see* H.R. Deb. (25.2.1964) 19; H.R. Deb. (10.3.1964) 415; H.R. Deb. (1.5.1996) 156; H.R. Deb. (14.2.2008) 394.
80 H.R. Deb. (9.5.1990) 83; H.R. Deb. (17.5.1990) 746.
81 H.R. Deb. (23.2.1950) 91.
82 E.g. H.R. Deb. (5.9.1991) 816; H.R. Deb. (11.10.2000) 21235; H.R. Deb. (15.10.2008) 9235; H.R. Deb. (29.9.2010) 159.
83 H.R. Deb. (25.3.1976) 1046; H.R. Deb. (26.11.1980) 99.
84 H.R. Deb. (13.4.1954) 364.
85 H.R. Deb. (16.5.1967) 2166–72; VP 1967–68/116 (16.5.1967).

VALEDICTORY SPEECH

Members who do not intend to stand for re-election at the end of a Parliament, and Members resigning during a Parliament, are traditionally given the opportunity to make valedictory remarks to the House. Generally, these are made as statements by indulgence of the Speaker,[86] although on occasion Members have made valedictory speeches while technically speaking on the second reading of a bill.[87]

Since 2010 Members who have stood for re-election but not been elected, not having had the opportunity to make valedictory remarks, have been given the opportunity to provide a written statement in lieu of a speech. Since 2016, Members who have not recontested a general election, whether or not they have made valedictory remarks in the House, have also been given the opportunity to provide a written statement. A booklet *Statements of thanks and appreciation by former Members of the [previous] Parliament* has been presented to the House early in the new Parliament.[88]

PECUNIARY INTEREST

In the House of Representatives matters to do with the pecuniary interests of Members[89] are governed by precedent and practice established in accordance with sections 44 and 45 of the Constitution, standing orders 134 and 231 and by resolutions of the House.

Section 44(v) of the Constitution states that any person who has any direct or indirect pecuniary interest in any agreement with the Public Service of the Commonwealth otherwise than as a member and in common with the other members of an incorporated company consisting of more than 25 persons shall be incapable of being chosen or of sitting as a Senator or a Member of the House of Representatives (*see* page 141 for cases of Senator Webster and Mr Entsch).

Section 45(iii) provides that if a Senator or Member of the House of Representatives directly or indirectly takes or agrees to take any fee or honorarium for services rendered to the Commonwealth, or for services rendered in the Parliament to any person or State, the place of the Senator or Member shall thereupon become vacant. There are no recorded cases of any substantive action taken under this section.

Standing order 134(a) states that a Member may not vote in a division on a question about a matter, other than public policy, in which he or she has a particular direct pecuniary interest. Public policy can be defined as government policy, not identifying any particular person individually and immediately.

A Member's vote can only be challenged on the grounds of pecuniary interest by means of a substantive motion moved immediately following the completion of a division. If the motion is carried, the vote of the Member is disallowed.[90] On this matter *May* states:

> A motion may be made, however, to object to a vote of a Member who has a direct pecuniary interest in a question. Such an interest must be immediate and personal. On 17 July 1811 the rule was explained thus by Mr Speaker Abbot: 'This interest must be a direct pecuniary interest, and separately

86 The time is not limited. Between 2013 and 2016 a limit of 20 minutes was specified, but not strictly enforced.

87 The rules of relevance have not been enforced on such occasions, and points of order not taken, e.g. H.R. Deb. (24.6.2010) 6540, 6545, 6561.

88 E.g. VP 2016–18/509 (9.2.2017).

89 Certain additional considerations relating to Ministers are covered in the Chapter on 'House, Government and Opposition'.

90 S.O. 134(b).

> belonging to the persons whose votes were questioned, and not in common with the rest of his Majesty's subjects, or on a matter of state policy'.[91]

It would seem highly unlikely that a Member would become subject to a disqualification of voting rights in the House of Representatives because the House is primarily concerned with matters of public or state interest. All legislation which comes before the House deals with matters of public policy and there is no provision in the standing orders for private bills.[92]

There have been a number of challenges in the House on the ground of pecuniary interest and in each case the motion was negatived or ruled out of order.

A case occurred in 1923 when the Speaker, on a motion to disallow a Member's vote, delivered a lengthy statement in which he referred to a statement in *May* similar to the above-mentioned reference and certain cases in the State Parliaments. He drew attention to the distinction which had to be made between public and private bills and quoted the opinion of a Speaker of the Victorian Legislative Assembly that the practice was correctly stated that the rules governing a matter of pecuniary interest did not apply to questions of public policy, or to public questions at all.[93]

In 1924 the question was raised as to whether the votes of certain Members, who were interested shareholders in a company which was involved in the receipt of a large sum from the Government, should be allowed. The Speaker made it quite clear that it was not his decision to rule on the matter as the responsibility lay with the House, although he felt it his duty to point out, as he had on a previous occasion, the precedents and practice involved. The Speaker suggested that, if Members considered the matter sufficiently important, it might be debated as a matter of privilege following the moving of a substantive motion. No further action was taken.[94]

In 1934 the Speaker was asked to rule whether certain Members were in order in recording a vote if they were directly interested as participants in the distribution of the money raised by means of the legislation. The Speaker stated that he could not have a knowledge of the private business of Members and therefore was not in a position to know whether certain Members had, or did not have, a pecuniary interest in the bill. He referred to the relevant standing order and advised that the words 'not held in common with the rest of the subjects of the Crown' really decided the issue. The matter was not further pursued.[95]

In 1948 the Chair in ruling on a point of order stated that 'the honourable Members referred to are interested financially in the ownership of certain commercial broadcasting stations, but only jointly and severally with other people. Therefore, they are entitled to vote on the measure now before the House'.[96] A similar case was recorded in 1951 when the Speaker ruled that a Member who was financially interested in a bill, other than as a shareholder in a company under discussion, should declare himself. The Speaker concluded his remarks by saying that it was not his duty to make an inquiry.[97]

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91 *May*, 24th edn, p. 83.

92 Joint Committee on Pecuniary Interests of Members of Parliament, *Declaration of interests*, Transcript of evidence, vol. 1, 30 January–27 February, AGPS, Canberra, 1975, p. 65.

93 VP 1923–24/179–80 (23.8.1923); H.R. Deb. (23.8.1923) 3380–3.

94 VP 1923–24/405 (11.9.1924); H.R. Deb. (11.9.1924) 4334–7.

95 H.R. Deb. (12.12.1934) 1130.

96 H.R. Deb. (24.11.1948) 3470.

97 H.R. Deb. (15.11.1951) 2154. For a precedent of a Member declaring his interest in a bill before a division is taken *see* H.R. Deb. (3.11.1977) 2817.

In 1957[98] and 1958,[99] when the House was dealing with banking legislation, the Chair ruled out of order any challenge to a Member's vote, the ground of the ruling being that the vote was cast on a matter of public policy. This distinction was recognised in 2006 in response to a point of order before the House voted on a bill to provide for the sale of a health insurance fund.[100]

In 1998 a Member concluded that he should not vote on a bill containing, inter alia, an amendment to the Parliamentary Contributory Superannuation Act which he understood dealt with an anomaly in respect of his own superannuation entitlements.[101] Even in this case it could be argued that the issue was one of public policy and that the amendments in question would have effect in respect of others in similar circumstances (the Member was not identified personally and immediately).

In 1984 the House resolved, inter alia, that Members must declare any relevant interest at the beginning of a speech (in the House, in the then committee of the whole or in a committee), and if proposing to vote in a division. It was not necessary to declare an interest when directing a question. In 1988 the requirement was abolished, following a report from the Committee of Members' Interests which expressed doubt that the requirement served any useful purpose.[102] Members of course are still free to make such a declaration, and from time to time do so.[103]

In the UK House of Commons declarations of relevant interests are required in debate and other proceedings, and when giving notice, including notice of questions. However, it is recognised that during certain proceedings, such as oral questions, declaration may not be practicable.[104]

For summaries of the recommendations of the Joint Committee on Pecuniary Interests of Members of Parliament (1974–5),[105] and the (government) Committee on Public Duty and Private Interest (1978–9)[106] *see* earlier edition.[107]

Personal interest in committee inquiry

Standing order 231 states that no Member may sit on a committee if he or she has a particular direct pecuniary interest in a matter under inquiry by the committee. No instances have occurred in the House of a Member not sitting on a committee for the reason that he or she was pecuniarily interested. The requirements for oral declaration introduced by the resolution mentioned above, in force from 1984 to 1988, also referred to committee proceedings. Members have been advised to declare at committee meetings any matters, whether of pecuniary or other interest, where there may be, or may be perceived to be, a possible conflict of interest. (For further discussion *see* 'Pecuniary and personal interest' in Chapter on 'Parliamentary committees'.)

98 VP 1957–58/282 (21.11.1957); H.R. Deb. (21.11.1957) 2447–9.

99 VP 1958/30 (19.3.1958); H.R. Deb. (19.3.1958) 478–9.

100 H.R. Deb. (2.11.2006) 60.

101 Superannuation Legislation (Commonwealth Employment) Repeal and Amendment Bill 1998, Schedule 11. In the event the only divisions (from which the Member abstained) occurred on opposition second reading and detailed stage amendments, VP 1998–2001/110–113 (1.12.1998).

102 VP 1983–84/945–6 (8.10.1984); *Report relating to the need for oral declarations of interests by Members*, PP 261 (1988) 8; VP 1987–90/961 (30.11.1988).

103 E.g. H.R. Deb (16.12.1992) 3940; H.R. Deb. (9.8.2007) 125 (Main Committee).

104 *See May*, 24th edn, pp. 80–2.

105 Joint Committee on Pecuniary Interests of Members of Parliament, *Declaration of interests,* PP 182 (1975) 46.

106 Committee of Inquiry into Public Duty and Private Interest, *Report*, PP 353 (1979).

107 At pp. 146–7 of the 4th edition.

Professional advocacy

The matter of professional advocacy first arose in the House of Representatives in 1950 in relation to the appearance of a Member, Dr Evatt, before the High Court on behalf of certain clients.[108] In 1951 the Speaker responded to a request as to the interpretation of a resolution of the UK House of Commons in 1858 which sought to prevent Members from promoting or advocating in the House matters which they had been concerned with as advocates—for example, in court proceedings.[109] The Speaker ruled that the resolution was binding on all Members, excepting the Attorney-General when appearing in court on behalf of the Commonwealth.[110] In the same year the Speaker also ruled that Dr Evatt could not speak or vote in the House on a certain bill as he had appeared in court on a case dealing with the matter. Dr Evatt maintained that the ruling was based on a misconception, the rule having applied to Members of the House of Commons who may have been engaged as professional advocates to promote bills and endeavour to have them accepted by the House. He also assured the Chair that he had received no retainer nor given any undertaking to act in any way on anybody's behalf in connection with his duties as a Member. Standing orders were suspended to enable him to speak and his vote was not challenged on any division on the bill.[111]

The matter arose again in 1954 at the time when a notice of motion in the name of Dr Evatt to print a royal commission report was to be called on (the then method of initiating debate on a report). The Speaker expressed the view that a Member, having spoken and voted on a measure before the House, was precluded from taking part in any court action arising therefrom and that Dr Evatt had had no right therefore to appear before that royal commission as a counsel. It was his further view that, having so appeared, Dr Evatt should not discuss in the House any reports or matter that arose out of the proceedings at the time he was there as a barrister. Standing orders were then suspended to enable Dr Evatt to proceed with his motion, and he also voted in associated divisions.[112]

Two points would appear to emerge from these cases:

- the suspensions of standing orders were in relation to then standing order 1 (since omitted) which enabled the House, when its own standing orders and practice did not cover the situation, to resort to the practice of the House of Commons, and
- the House, by agreeing to the suspensions of standing orders and by permitting Dr Evatt to vote without challenge, had a different view from the Speaker concerning the matter.

Lobbying for reward or consideration

In 1995 the UK House of Commons strengthened an earlier resolution referring to lobbying for reward or consideration, providing:

> '. . . that in particular, no Members of the House shall, in consideration of any remuneration, fee, payment, reward or benefit in kind, direct or indirect, which the Member or any member of his or her family has received, is receiving, or expects to receive, advocate or initiate any cause or matter on behalf of any outside body or individual; or urge any Member of either House of Parliament,

108 H.R. Deb. (25.10.1950) 1391–405; H.R. Deb. (26.10.1950) 1546–56.
109 *May*, 24th edn, p. 257.
110 H.R. Deb. (8.3.1951) 175; VP 1950–51/323 (13.3.1951); H.R. Deb. (13.3.1951) 329–30.
111 VP 1951–53/65–6, 68–70 (10.7.1951); H.R. Deb. (10.7.1951) 1211–12.
112 VP 1954–55/133–4 (28.10.1954), 246 (2.6.1955); H.R. Deb. (28.10.1954) 2467–8.

including Ministers, to do so, by means of any speech, Question, Motion, introduction of a Bill, or amendment to a Motion or Bill.[113]

Such action in the Australian Parliament could result in the disqualification of the Member or Senator concerned, his or her seat becoming vacant pursuant to section 45(iii) of the Constitution (*see* page 147). Contempt of the House and offences against the Criminal Code could also be involved—*see* Chapter on 'Parliamentary Privilege'.

Registration—Committee of Privileges and Members' Interests

Standing order 216 provides for a Committee of Privileges and Members' Interests[114] to be appointed at the commencement of each Parliament. In relation to Members' interests the committee is required:

- to inquire into and report upon the arrangements made for the compilation, maintenance and accessibility of a Register of Members' Interests;
- to consider proposals made by Members and others on the form and content of the register;
- to consider specific complaints about registering or declaring interests;
- to consider possible changes to any code of conduct adopted by the House; and
- to consider whether specified persons (other than Members) ought to be required to register and declare their interests.

The committee is required to prepare and present a report on its operations in connection with the registration and declaration of Members' interests as soon as practicable after 31 December each year, and it also has power to report when it sees fit.

The substantive requirements insofar as Members are concerned were established by resolution of the House.[115] The principal provisions are:

- Within 28 days of making an oath or affirmation, each Member is required to provide to the Registrar of Members' Interests a statement of the Member's registrable interests and the registrable interests of which the Member is aware of the Member's spouse and any children wholly or mainly dependent on the Member for support, in accordance with resolutions adopted by the House and in a form determined by the Committee of Privileges and Members' Interests from time to time. The statement is to include:
  - in the case of new Members, interests held at the date of the Member's election;
  - in the case of re-elected Members of the immediately preceding Parliament, interests held at the date of dissolution of that Parliament;

  and changes in interests between these dates and the date of the statement.
- Members are required to notify any alterations to those interests to the Registrar within 28 days of the alteration occurring.
- The registrable interests include:
  - shareholdings in public and private companies;
  - family and business trusts and nominee companies, subject to certain conditions;
  - real estate, indicating the location and the purpose for which it is owned;

113 *May*, 24th edn, p. 79. The resolution was strengthened in 2002 to include approaches to Ministers and public servants.

114 Prior to 2008 the Committee of Members' Interests was separate from the Committee of Privileges.

115 Resolutions of 9 October 1984 a.m., and modified by the House on 13 February 1986, 22 October 1986, 30 November 1988, 9 November 1994, 6 November 2003 and 13 February 2008 (a.m.). The terms of the resolutions are reproduced as an attachment to the *Standing Orders*.

- registered directorships of companies;
- partnerships, including the nature of the interests and the activities of the partnerships;
- liabilities, indicating the nature of the liability and the creditor concerned;
- the nature of any bonds, debentures and like investments;
- savings or investment accounts, indicating their nature and the name of the bank or other institutions concerned;
- the nature of any other assets, excluding household and personal effects, each valued at over $7500;
- the nature of any other substantial sources of income;
- gifts valued at more than $750 from official sources or more than $300 from other sources, provided that a gift from family members or personal friends in a purely personal capacity need not be registered unless the Member judges that an appearance of conflict of interest may be seen to exist;
- any sponsored travel or hospitality received where the value of the sponsored travel or hospitality exceeds $300;
- membership of any organisation where a conflict of interest with a Member's public duty could foreseeably arise or be seen to arise; and
- any other interests where a conflict of interest with a Member's public duties could foreseeably arise or be seen to arise.

- At the commencement of each Parliament and at other times as necessary, the Speaker is required to appoint an employee of the Department of the House of Representatives as the Registrar of Members' Interests.[116] That person also assists the Committee of Privileges and Members' Interests in relation to matters concerning Members' interests.
- The Registrar, in accordance with procedures adopted by the Committee of Privileges and Members' Interests, is required to maintain a Register of Members' Interests in a form determined by the committee.
- As soon as possible after the commencement of each Parliament, the Chair of the Committee of Privileges and Members' Interests is required to present a copy of the completed register, and to also present as required notifications by Members of alterations of interests.[117]
- The Register of Members' Interests is required to be available for inspection by any person under conditions laid down by the committee.[118] [Since the start of the 43rd Parliament in 2010 the Register has been published on the Parliament House website.]

Explanatory notes authorised by the Committee of Privileges and Members' Interests provide guidance on the interpretation of the requirements. The Speaker has no responsibility in relation to the requirements other than the responsibility to appoint an employee of the Department of the House as the Registrar.[119]

On 13 February 1986 the House resolved that any Member who:

116 Commonly the Deputy Clerk.

117 Copies of notifications received after the last presentation in a Parliament and before dissolution have also been presented, by leave—e.g. VP 2008–10/168 (17.3.2008).

118 VP 1983–84/945–6 (18.10.1984); H.R. Deb. (9.10.1984) 1876–9.

119 H.R. Deb. (26.3.2007) 39, 123. *See also* H.R. Deb. (19.9.1994) 1039.

- knowingly fails to provide a statement of registrable interests to the Registrar of Members' Interests by the due date;
- knowingly fails to notify any alteration of those interests to the Registrar of Members' Interests within 28 days of the change occurring; or
- knowingly provides false or misleading information to the Registrar of Members' Interests—

'shall be guilty of a serious contempt of the House of Representatives and shall be dealt with by the House accordingly'.

Proposed code of conduct

In June 1995 the Speaker presented for discussion the draft proposals of a working group of Members and Senators on a code of conduct for Members of Parliament entitled *Framework of ethical principles for Members and Senators.*[120] The principles listed were intended to provide a framework of reference for Members and Senators in the discharge of their responsibilities, and outlined the minimum standards of behaviour which the group felt the Australian people had a right to expect of their elected representatives.

In 2008, in a report concerning an exchange between two Members, the Committee of Privileges and Members' Interests indicated that it proposed to review the issue of a Code of Conduct.[121] The Speaker later said that he would refer a matter concerning actions by a Member outside the House to the committee as an example of an incident of concern.[122]

On 23 November 2010, the House of Representatives referred the development of a draft Code of Conduct for Members of Parliament to the Committee of Privileges and Members' Interests. The Committee was to consult with the equivalent committee in the Senate with the aim of developing a uniform code and uniform processes for its implementation for Members and Senators.[123] The committee presented its work on the inquiry as a discussion paper in November 2011.[124]

MEMBERS' REMUNERATION AND EXPENSES

Salaries

The authority for payment of salaries to Members of Parliament and Ministers was expressly provided for in the Constitution,[125] which reflected the practice followed by various State Parliaments. Thus, while it was not an innovation, Australia nevertheless preceded in this regard the UK House of Commons which did not make permanent provision for the payment of Members until 1911.[126] For a summary of the earlier history of remuneration arrangements for Members *see* pages 181–3 of the second edition.

Remuneration of Members of the House of Representatives and Senators is determined by the Remuneration Tribunal, pursuant to the *Parliamentary Business Resources Act 2017*. The remuneration includes an annual allowance known as 'base

120 H.R. Deb. (21.6.1995) 1983–4.
121 H.R. Deb. (23.10.2008) 10184.
122 H.R. Deb. (4.12.2008) 12725.
123 VP 2010–13/236 (23.11.2010).
124 Standing Committee of Privileges and Members' Interests, *Draft code of conduct for Members of Parliament, discussion paper*, November 2011. The text of the draft code was reproduced in the sixth edition, pp. 148–9.
125 Constitution, ss. 48, 66 (in s. 48 the payment to Members and Senators is referred to as an allowance).
126 *May*, 24th edn, p. 52.

salary' payable for the purposes of section 48 of the Constitution, an electorate allowance, and in the case of an office holder, an office holder's salary.[127] There are three rates of electorate allowance, depending on the size of a Member's electorate. The office holder's salary is the additional salary paid to holders of a number of parliamentary offices,[128] including the Presiding Officers and their Deputies, Opposition Leaders and their Deputies, whips, shadow ministers, Manager of Opposition Business, members of the Speaker's panel, and chairs and deputy chairs of parliamentary committees.[129] Ministers also receive an additional salary, as well as the basic parliamentary salary and electorate allowance.[130] As part of their remuneration Members may be provided with a vehicle, or an allowance in lieu of a vehicle, and an allowance or expenses in relation to internet or telephone services at their private residence.[131] Information on the current rates of remuneration can be found on the Remuneration Tribunal's website.[132]

A Member is paid salary and allowances from and including the day of the election, to and including:

- the day of dissolution, if not seeking re-election; or
- the day before the election, if re-nominating but defeated at the election.

A Member who is re-elected is paid continuously.

The additional salary payable to the Speaker continues to be paid until and including the day before the next Speaker is elected, even if the Speaker does not seek re-election at an election as a Member, is defeated at the election or resigns. These payments are continued because certain administrative functions continue to be performed by the Speaker between the date of dissolution or resignation and the election of a new Speaker. For the purposes of exercising any powers or functions under a law of the Commonwealth the incumbent Speaker is deemed to continue to be the Presiding Officer for this purpose under the terms of the *Parliamentary Presiding Officers Act 1965.*

In the case of the Deputy Speaker, entitlement to additional salary ceases:

- at the date of dissolution, if he or she does not seek re-election as a Member; or
- on the day before the election, if he or she is defeated at the election.

If the Deputy Speaker is re-elected as a Member, additional salary continues to be paid until and including the day before a successor is elected, as he or she may also have administrative functions to perform under the Parliamentary Presiding Officers Act.

The additional salary payable to whips, members of the Speaker's panel and chairs of parliamentary committees ceases at the date of dissolution. The additional salary payable to Ministers continues until a new Ministry is selected and sworn in by the Governor-General.[133]

127 *Parliamentary Business Resources Act 2017,* s. 14.

128 *Parliamentary Business Resources Act 2017,* s. 7.

129 *See also* section on 'Leaders and office holders' in Ch. on 'House, Government and Opposition'. Additional salaries for shadow ministers and the Manager of Opposition Business commenced in 2011, *see* Remuneration Tribunal, *Review of the remuneration of Members of Parliament: initial report*, December 2011.

130 The *Parliamentary Business Resources Act 2017* sets the total annual sum payable under section 66 of the Constitution for ministerial salaries (s. 55) which amount may be varied by regulation, (s. 61). The Remuneration Tribunal advises the Government on, but does not determine, the additional salary payable to Ministers, *Parliamentary Business Resources Act 2017,* s. 44. *See* section on 'Ministerial salaries' in Ch. on 'House, Government and Opposition'.

131 *Parliamentary Business Resources Act 2017,* s. 14(4).

132 <www.remtribunal.gov.au>.

133 Pursuant to s. 64 of the Constitution a Minister may continue in office (for up to 3 months) although no longer a Member.

Parliamentary work expenses framework

In 2015 a review committee to consider an independent parliamentary entitlements system was established by the Government. Following the committee's report in 2016[134] the Government announced that it accepted all the committee's recommendations in principle.[135]

Parliamentary Business Resources Act

The *Parliamentary Business Resources Act 2017* established a new framework for remuneration, business resources and travel resources for current and former members of the federal Parliament in a single legislative authority.

Consequential amendments were made to relevant legislation, including the repeal of the *Parliamentary Entitlements Act 1990* and the *Parliamentary Allowances Act 1952*, and the repeal of provisions in the *Ministers of State Act 1952*, *Remuneration Tribunal Act 1973*, and the *Remuneration and Allowances Act 1990*.[136]

Independent Parliamentary Expenses Authority

In 2017 the Independent Parliamentary Expenses Authority (IPEA) was established to audit and report on parliamentarians' work expenses, provide advice, and monitor and administer claims for travel expenses and allowances by parliamentarians and their staff.[137]

Work expenses and use of public resources

Members are personally responsible and accountable for, must be prepared to publicly justify, and must act ethically and in good faith in using and accounting for, their use of public resources for conducting their parliamentary business.[138] Members must not claim expenses, an allowance or any other public resources unless the expenses are incurred, or the allowance or resources are claimed, for the dominant purpose of conducting a Member's parliamentary business.[139] Members must ensure that expenses incurred, or allowances or resources claimed, provide value for money.[140]

Members are paid travel expenses and allowances, and other work expenses, and provided with public resources, as prescribed by regulations or as determined by the Minister for Finance.[141] Rates of travel allowance are determined by the Remuneration Tribunal.[142] Travel allowance is paid to cover expenses incurred in overnight stays away from the electorate on parliamentary business, which includes nights spent in Canberra during the sittings of the House, overnight stays in connection with meetings of parliamentary committees and a limited number of overnight stays within the electorate, the actual amount depending on the size of electorate. Travel allowance is also payable, on a limited basis, for meetings of a Member's parliamentary party and for meetings of

134 Review Committee, *An independent parliamentary entitlements system*, Report, 22 February 2016.
135 Minister for Finance, *Media release*, 23 March 2016.
136 *Parliamentary Business Resources (Consequential and Transitional Provisions) Act 2017*.
137 *Independent Parliamentary Expenses Authority Act 2017*.
138 *Parliamentary Business Resources Act 2017*, s. 25.
139 *Parliamentary Business Resources Act 2017*, s. 26.
140 *Parliamentary Business Resources Act 2017*, s. 27.
141 *Parliamentary Business Resources Act 2017*, s. 33.
142 *Parliamentary Business Resources Act 2017*, s. 45.

party committees. Former Prime Ministers have limited entitlements to travel at government expense after they cease to be Members of Parliament.[143]

Members are provided with office accommodation in Parliament House and in their electorate and are entitled to employ three full-time staff members, or equivalent part-time staff. One staff member may be located in Canberra. In some of the larger electorates a second office and an additional staff member are provided. Each Member also has a limited budget to employ casual staff. The number and level of Members' staff, the location and extent of office accommodation outside Parliament House and the nature of office furniture and equipment, including computer services, for these offices are determined by the Minister for Finance. Electorate staff are employed under the *Members of Parliament (Staff) Act 1984*.

Compensation for Members in the event of death or injury in connection with official business is covered by a parliamentary injury compensation scheme which provides similar benefits to those received by Commonwealth employees under the *Safety, Rehabilitation and Compensation Act 1988*.[144]

Superannuation benefits

The *Parliamentary Superannuation Act 2004* introduced new parliamentary superannuation arrangements for persons who first became members of the Federal Parliament, or returned to the Parliament after a previous period in Parliament, at or after the 2004 general election. Under these arrangements employer contributions of 15.4% of total parliamentary salaries (but not including certain allowances such as electorate allowance) are paid into a superannuation fund or retirement savings account nominated by the Member or Senator. These Members also have access to salary-sacrifice arrangements in respect of superannuation contributions.

Members and Senators who were sitting members of Parliament immediately before the 2004 general election were not affected by the new arrangements while they continued to remain in Parliament and remained covered by the former defined benefits scheme described in earlier editions, established by the *Parliamentary Contributory Superannuation Act 1948*.[145]

A Member whose place becomes vacant through the operation of section 44 paragraph (i) of the Constitution, concerning allegiance to a foreign power, or paragraph (ii) concerning treason or conviction for an offence, or through section 45 paragraph (iii), as it relates to services rendered in the Parliament, is entitled to a refund of employee contributions only.[146] Under the *Crimes (Superannuation Benefits) Act 1989* a similarly restricted entitlement may apply to a Member convicted of certain offences committed while a Member, including a Member so convicted after resignation.[147]

143 *Parliamentary Retirement Travel Act 2002,* (entitlements for other former parliamentarians were abolished in 2017).

144 *Parliamentary Business Resources Act 2017,* s. 41. Prior to 2016 compensation was by means of ex gratia cover.

145 *See* 4th edn, pp. 151–2. However, the Remuneration Tribunal can determine that a proportion of a current salary is not to be counted for the purposes of the 1948 Act.

146 *Parliamentary Contributory Superannuation Act 1948*, s. 22.

147 Under the Act: for a superannuation order to be applied for the person must be convicted and sentenced to a term of imprisonment longer than 12 months (s. 17); sentence does not include a sentence that is wholly suspended (s. 2). The provision was relevant in respect of Mr A. Theophanous, a former Member convicted of corruption committed while a Member (on 22.5.2002).

ATTENDANCE

The Clerk of the House keeps a Members' roll for each State which shows the name of the Member elected for each division, the dates of his or her election, of making the oath or affirmation, and of ceasing to be a Member, and the reason for cessation of membership.[148] On each day of sitting the names of Members who attend in the Chamber are taken by the Serjeant-at-Arms and the names of absent Members are recorded in the Votes and Proceedings.[149] A List of Members and an Attendance Roll are published in each sessional volume of the Votes and Proceedings. A Member's presence at a committee meeting or in the Federation Chamber alone is not counted for the purposes of recording attendance at a sitting of the House. This is because the record is maintained to record compliance with section 38 of the Constitution, which is only satisfied by attendance in the Chamber of the House—*see* 'Absence without leave' at page 158.

Leave of absence

A motion to grant leave of absence does not require notice, states the cause and period of leave (for individually identified Members), and has priority over all other business.[150] Leave is usually granted for reasons such as parliamentary or public business overseas, ill health or maternity/paternity.[151] A further motion may be moved to extend the period of leave.[152] During both World Wars leave for long periods was granted to several Members who were serving in the Armed Forces. There have been occasions when Members have been granted leave without having been sworn in. The longest period of absence was in relation to the Member for the Northern Territory (Mr Blain) who was granted leave, without having been sworn in as a Member, from 8 October 1943 to 26 September 1945 while he was a prisoner of war.[153]

A Member granted leave of absence by the House is excused from the service of the House or on any committee. The leave is forfeited if the Member attends in the Chamber of the House before the end of the period of leave.[154] Another Member may be appointed to a committee to serve in the place of a Member granted leave of absence.[155] Service of the House means attendance in the Chamber,[156] and is interpreted as appearing on the floor of the Chamber—Members on leave may be present in the public gallery. Members have placed questions on the Notice Paper while on leave. However, they may not lodge notices while on leave, as these must be delivered to the Clerk at the Table in the Chamber. Members on leave have participated in committee proceedings, including by teleconference. A committee chair granted maternity leave has continued to serve as chair and participate in committee business, for example by editing and approving a draft report. She did not attend committee meetings which were chaired by the Deputy Chair in her absence.

148 S.O. 25.
149 S.O. 27(c). The entry also indicates if an absent Member has been granted leave.
150 S.O. 26(a).
151 E.g. VP 2004–07/142 (8.2.2005) (maternity/paternity); VP 2010–13/1828 (19.9.2012) (parliamentary business overseas); VP 2013–16/410 (24.3.2014) (ill health). Leave has been granted for urgent private business, H.R. Deb. (17.10.1935) 833. Speaker Holder ruled in 1906 that leave of absence may be asked for any reason whatever, but that it is for the House to determine whether it shall be granted, H.R. Deb. (18.7.1906) 1430–31.
152 E.g. VP 2004–07/648 (10.10.2005).
153 VP 1943–44/29 (8.10.1943); VP 1944–45/21 (1.9.1944); VP 1945–46/37 (23.3.1945); VP 1945–46/260 (26.9.1945).
154 S.O. 26(b).
155 VP 1948–49/13 (3.9.1948).
156 S.O. 2.

VACANCY

During the course of a Parliament a Member's place may become vacant by resignation, absence without leave, ineligibility or death. When a vacancy occurs the Speaker issues a writ for the election of a new Member.[157] If the Speaker is absent from the Commonwealth, or there is no Speaker, the Governor-General in Council may issue the writ.[158] The writ may be issued by the Acting Speaker performing the duties of the Speaker during the Speaker's absence.[159]

Resignation

A Member may resign his or her seat in the House by writing to the Speaker or, if there is no Speaker or if the Speaker is absent from the Commonwealth, to the Governor-General.[160] The resignation takes effect and the Member's seat becomes vacant from the time the letter of resignation is received by the Speaker or the Governor-General. The Member cannot specify a future time for the resignation to take effect.[161] To be effective a resignation must be in writing, signed by the Member who wishes to resign, and be received by the Speaker. The receipt by the Speaker of a facsimile or scanned copy of a Member's letter of resignation, the Speaker having been satisfied as to its authenticity by contact with the Clerk, has been accepted as complying with the requirements—that is, the Speaker must be able to be satisfied that the writing is what it purports to be, namely, the resignation of the Member in question.[162] A resignation by telegram has been held not to be effective.[163] A resignation that is in writing signed by another person at the direction of the Member, where the Member is physically unable to sign the resignation personally but is mentally capable of understanding the nature of the resignation and of authorising that other person to sign it on his or her behalf, would meet the constitutional requirements regarding resignation, provided these facts were able to be established satisfactorily. However, it has been considered that signature should be insisted upon whenever possible in view of the importance of the question, and legal advice should be sought in specific cases if the matter arises in practice.[164]

Absence without leave

A Member's place becomes vacant if, without permission of the House, he or she does not attend the House for two consecutive months of any session of the Parliament.[165] This constitutional requirement is not met by attendance at a committee of the House, including the Federation Chamber.[166] It could be interpreted that the phrase 'attend the House' means attend the House when it is sitting,[167] but in order that the position of

157 E.g. VP 1977/261 (8.9.1977); VP 1998–2001/1610 (29.6.2000); VP 2008–10/447 (26.8.2008); VP 2013–16/310 (24.2.2014).
158 Constitution, s. 33; *see also* Ch. on 'Elections and the electoral system'.
159 S.O. 18(a). E.g. VP 1996–98/489 (16.9.1996).
160 Constitution, s. 37. *See* VP 1980–83/77 (24.2.1981) for examples of both methods.
161 Advice of Attorney-General's Department, dated 19 May 1964.
162 Advice of Attorney-General's Department, dated 4 March 1981.
163 Advice of Attorney-General's Department, dated 26 February and 9 March 1960.
164 Opinion of Attorney-General, dated 3 August 1977.
165 Constitution, s. 38.
166 Opinion of Senior General Counsel, Attorney-General's Department, dated 22 June 1995. The advice had been sought by the Clerk of the House in response to a Procedure Committee recommendation that the matter be clarified—Standing Committee on Procedure, *Time for review: bills, questions and working hours,* PP 194 (1995) 17. As noted in the opinion, the Main Committee [i.e. Federation Chamber] was in effect a Committee of the Whole House. *And see* H.R. Deb. (8.6.1994) 1671; H.R. Deb. (1.4.2004) 28009; (11.5.2004) 28145; H.R. Deb. (19.6.2008) 5462.
167 Opinion of Solicitor-General, dated 13 September 1935.

Members is not placed in doubt it is normal practice at the end of a period of sittings for a Minister to move 'That leave of absence be given to every Member of the House of Representatives from the determination of this sitting of the House to the date of its next sitting'. This motion is moved to cover the absence of Members from the House between the main periods of sittings each year. The motion is still moved even though it is known that there will be a dissolution of the House pending an election.[168] On occasion the motion has been debated.[169]

No Member's place has become vacant because of the Member being absent without leave but, in 1903, the seat of a Queensland Senator (Senator Ferguson) became vacant when he failed to attend the Senate for two consecutive months.[170] The Serjeant-at-Arms, who records the attendance of Members in the House, advises the whip of the relevant party when a Member has been absent for about six weeks. The leader of the Member's party normally either moves for the House to grant the Member leave of absence[171] or arranges for the Leader of the House to do so. If an absent Member is an independent or has not kept the party whip informed of his or her intentions, then the Serjeant-at-Arms contacts the Member after six weeks' absence to ensure that the Member is aware of the consequence of an absence from the House without leave for a period of two months.

If a seat became vacant because a Member was absent, the appropriate procedure would appear to be for the Speaker to advise the House of the facts and, depending on the electoral cycle, to inform the House of his or her intention to issue a writ for the election of a Member for the relevant electoral division.

Ineligibility

Pursuant to section 45 of the Constitution a Member's place immediately becomes vacant should he or she become ineligible because of the operation of that section or section 44—*see* 'Qualifications and disqualifications' at page 136.

Penalty for sitting while ineligible

Section 46 of the Constitution states that, until the Parliament otherwise provides, any person declared by the Constitution to be incapable of sitting as a Member shall be liable to pay £100 ($200) to any person who sues for it in a court of competent jurisdiction for each day on which he so sits. The case of Senator Webster (*see* page 141) prompted the enactment of the *Common Informers (Parliamentary Disqualifications) Act 1975*, which fixed a maximum penalty of $200 in respect of a past breach and $200 per day for the period during which the Member sits while disqualified after being served with the originating process. The Act also restricts suits to a period no earlier than 12 months before the day on which the suit is instituted. The High Court of Australia is specified as the court in which common informer proceedings are to be brought.

Proceedings under the Common Informers Act are limited to the imposition and recovery of penalty. Whether the Member concerned is disqualified must first be determined pursuant to section 47 of the Constitution or section 376 of the Electoral

168 VP 1978–80/1694 (18.9.1980).
169 E.g. VP 2010–13/2206 (21.3.2013).
170 J 1903/211 (13.10.1903).
171 In practice a seconder is not called for the party leader's motion.

Act—that is, by the relevant House or by the Court of Disputed Returns pursuant to a referral by that House.[172]

Consequences of Member sitting while ineligible

In an early decision concerning the eligibility of a person chosen to fill a vacancy in the Senate, the High Court noted '. . . the return is regarded ex necessitate as valid for some purposes unless and until it is successfully impeached. Thus the proceedings of the Senate as a House of Parliament are not invalidated by the presence of a Senator without title.'[173]

Death

The death of a sitting Member is usually announced to the House at the first opportunity on the next day of sitting following the Member's death. Standing order 49 provides that precedence will be ordinarily given by courtesy to a motion of condolence, which is moved without notice. The motion of condolence is usually moved by the Prime Minister and seconded by the Leader of the Opposition, and may be supported by other Members. Speech time limits do not apply. At the conclusion of the speeches the Speaker puts the question and asks Members to signify their approval of the motion by rising in their places. After a suitable period of silence, the Speaker thanks the House. The sitting of the House is then normally suspended for a few hours as a mark of respect.[174]

On the death of a Prime Minister or senior office holder—for example, a Presiding Officer or party leader—the House traditionally adjourns until the next day of sitting. The House does not normally suspend the sitting following a condolence motion in respect of a sitting Senator[175] but may do so in respect of a Senate Minister.

The practice of the House also ensures that the death of a former Member or Senator is recorded. In cases where a condolence motion is not moved, the Speaker makes brief mention of the death of the former Member and then invites Members to rise in their places as a mark of respect to the memory of the deceased. It is usual for the Speaker to convey a message of sympathy from the House to the relatives of the deceased.

The Speaker normally accepts, as proof of the death of a Member, an announcement in the media or a statement from a source accepted as reliable, such as a member of the family or party. The Speaker has never called for the production of a death certificate before declaring a seat vacant.

In December 1967 Prime Minister Holt was presumed to have died by drowning, although his body was never found. The joint report of the Commonwealth and Victoria police satisfied the Attorney-General and the Secretary of the Attorney's Department that there was overwhelming evidence that Mr Holt had died by drowning.[176] The Speaker was satisfied beyond doubt that a vacancy had occurred, and consequently declared the seat vacant and issued a writ for the election of a new Member on 19 January 1968.[177]

172 High Court ruling in *Alley v. Gillespie* [2018] HCA 11, the first, and so far only, suit pursuant to the Act (*see* p. 142). The court ordered the plaintiff's proceedings be stayed until the question whether the defendant was incapable of sitting was determined.

173 *Vardon v. O'Loghlin* (1907) 5 CLR 201 at 208.

174 The most recent references to deaths of sitting Members are: Hon. R. F. X. Connor, VP 1977/235 (23.8.1977); Hon. F. E. Stewart, VP 1979/747 (1.5.1979)—House adjourned to next day of sitting; Hon. E. L. Robinson, VP 1980–83/77–8 (24.2.1981); Mr G. S. Wilton, VP 1998–2001/1531 (19.6.2000); Mr P. E. Nugent, VP 1998–2001/2261 (10.5.2001), 2263–4 (22.5.2001)—death announced at the special sitting in Melbourne, condolences when House next met in Canberra; Mr D. J. Randall, VP 2013–16/1472 (10.8.2015). *See also* 'Motion of condolence' in Chapter on 'Motions', and 'Adjournment of the House for special reason' in Chapter on 'Order of business and the sitting day'.

175 E.g. VP 2005–07/1833 (8.5.2007).

176 Advice of Attorney-General's Department, dated 10 January 1968.

177 VP 1968–69/2 (12.3.1968).

Expulsion

Section 8 of the *Parliamentary Privileges Act 1987* provides that the House does not have power to expel a Member. Before this provision was enacted the House had the power to expel Members derived from the privileges and practice of the UK House of Commons passed to the Australian Parliament under section 49 of the Constitution.

The House of Representatives expelled a Member on one occasion only. On 11 November 1920, the Prime Minister moved:

> That, in the opinion of this House, the honorable Member for Kalgoorlie, the Honorable Hugh Mahon, having, by seditious and disloyal utterances at a public meeting on Sunday last, been guilty of conduct unfitting him to remain a Member of this House and inconsistent with the oath of allegiance which he has taken as a Member of this House, be expelled this House.

The speech to which the motion referred was delivered at a public meeting in Melbourne, and concerned British policy in Ireland at that time. The Leader of the Opposition moved an amendment to the effect that the allegations against Mr Mahon should not be dealt with by the House, and that a charge of sedition should be tried before a court, but the amendment was negatived and the original motion was agreed to on division.[178] After the motion of expulsion was agreed to, a further motion was moved declaring the seat vacant which was agreed to on division.[179] Mr Mahon stood for re-election in the resulting by-election but was not successful.

MEMBERS' TITLES

MP (Member of Parliament)

Members of the House of Representatives are designated MP and not MHR. This was the decision of the Federal Cabinet in 1901[180]—a decision which has since been reaffirmed in 1951[181] and in 1965.[182] The title is not retained by former Members.

A Member's status as a Member does not depend on the meeting of the Parliament, nor on the Member taking his or her seat or making the oath or affirmation. A Member is technically regarded as a Member from the day of election—that is, when he or she is, in the words of the Constitution, 'chosen by the people'. A new Member is entitled to use the title MP once this status is officially confirmed by the declaration of the poll.

Honourable

All Members of the 1st Parliament of the Commonwealth of Australia were granted the privilege by the King to use the title 'Honourable' for life within the Commonwealth of Australia.[183] Members subsequently elected do not hold this title except in the instances described in the following paragraphs.

Members of the Executive Council have the title 'Honourable' while they remain Executive Councillors. A Member who becomes a Minister is appointed to the Executive Council. It rests with the Governor-General to continue or terminate membership of the Executive Council and consequently the right to the title. With one exception, Ministers

178 VP 1920–21/431–2 (11.11.1920); H.R. Deb. (11.11.1920) 6382–3.
179 VP 1920–21/433 (11.11.1920).
180 H.R. Deb. (24.7.1901) 2939.
181 H.R. Deb. (6.7.1951) 1134.
182 H.R. Deb. (21.10.1965) 2058.
183 *Members of 1st Parliament of the Commonwealth—Title of 'Honourable'*, PP 21 (1904).

appointed to the Executive Council have not in the past had their appointment to the Council terminated upon termination of their commission and hence have retained the title 'Honourable' for life.[184] Parliamentary Secretaries also have the title 'Honourable' when, as has been the recent practice, they have been appointed to the Executive Council.[185] A Member may also retain the title from previous service as a state Minister, or as a member of a Legislative Council in some States.

It has been the custom for a Member elected Speaker to use the title 'Honourable' during his or her period of office and to be granted the privilege of retaining the title for life if he or she served in the office for three or more years.[186] However, Speaker Harry Jenkins, elected in 2008, did not use the title 'Honourable'.

Members of the House of Representatives are referred to in the Chamber as 'honourable Members'. The use of the term 'honourable' in the Chamber originates in UK House of Commons' practice.

The title 'Right Honourable' is granted to members of the Sovereign's Privy Council. Formerly, Prime Ministers and senior Ministers were appointed to the Privy Council.[187]

Academic and other titles

The use of academic and other titles, where appropriate, in House documents was considered by the Standing Orders Committee in 1972.[188] The House agreed with the committee's recommendation that the title 'Doctor' or 'Reverend' or a substantive military, academic or professional title could be used by Members in House documents.[189]

Longest serving Member

Traditionally, the Member of the House with the longest continuous service was referred to as the 'Father of the House'. This was a completely informal designation and had no functions attached to it. At the commencement of the 45th Parliament in 2016 the Hon. K. J. Andrews had the longest continuous service of any Member, having been elected in 1991 and serving continuously since then. A record term of 51 years, from 1901 to 1952, was served by the Right Honourable W. M. Hughes.

DRESS AND CONDUCT IN THE CHAMBER

While the standard of dress in the Chamber is a matter for the individual judgment of each Member,[190] the ultimate discretion rests with the Speaker. In 1983 Speaker Jenkins stated that his rule in the application of this discretion was 'neatness, cleanliness and decency'.[191] In a statement to the House in 1999, Speaker Andrew noted that Members had traditionally chosen to dress in a formal manner similar to that generally accepted in

184 *See also* Ch. on 'House, Government and Opposition' (case of Senator Sheil).

185 Since 2000 Parliamentary Secretaries have been technically 'Ministers of State' for constitutional purposes and thus automatically appointed.

186 *See* earlier editions for further detail.

187 If they so chose—Members of the Australian Labor Party generally did not become Privy Councillors and the practice was not reintroduced in 1996 following the election of the Howard Government. The last Member to hold this title was the Rt Hon. I. McC. Sinclair (retired 31.8.1998). Mr Sinclair and the Rt Hon. Sir Billy Snedden were both Privy Councillors before becoming Speaker.

188 PP 20 (1972).

189 VP 1970–72/1013 (18.4.1972).

190 H.R. Deb. (17.2.1977) 172; *see also* Senate House Committee, *Senators' dress in the Senate Chamber*, PP 235 (1971).

191 H.R. Deb. (8.9.1983) 573.

business and professional circles, and that this was entirely appropriate; that it was widely accepted throughout the community that the standards should involve good trousers, a jacket, collar and tie for men and a similar standard of formality for women; and that these standards applied equally to staff occupying the advisers boxes, members of the press gallery and guests in the distinguished visitors gallery. The Speaker said he did not propose to apply this standard rigidly. For example, it would be acceptable for Members to remove jackets if the air-conditioning failed, and it was accepted practice that Members hurrying to attend a division or quorum might arrive without a jacket. However, they should leave the Chamber at the conclusion of the count.[192] In 2005 this statement was endorsed by Speaker Hawker, who reminded Members of the accepted practice that Members should choose to dress in a formal manner in keeping with business and professional standards. He noted that while he did not intend to apply the standards rigidly, it was not in keeping with the dignity of the House for Members to arrive in casual or sports wear.[193] Clothes with printed slogans are not generally acceptable in the Chamber, and Members so attired have been warned by the Chair to dress more appropriately.

Rulings from earlier years include: that a Member was not permitted to remove his jacket in the Chamber;[194] that it was acceptable for Members to wear tailored 'safari' suits without a tie;[195] and that Members were permitted to wear hats in the Chamber but not while entering or leaving[196] or while speaking.[197]

The conduct of Members in the Chamber is governed by the standing orders and practice and is interpreted with some discretion by the Chair. It has always been the practice of the House not to permit the reading of newspapers in the Chamber, although latterly this has been accepted if done discreetly. It is in order for a Member to refer to books or newspapers when they are actually connected with the Member's speech.[198] Members may not smoke in the Chamber[199] and refreshments (apart from water) may not be brought into, or consumed in, the Chamber.[200]

The Chair has also ruled that:[201]

- a Member may keep his hands in his pockets while speaking;[202]
- the beating of hands on[203] or kicking[204] of Chamber desks is disorderly;
- a Member may distribute books to other Members in the Chamber;[205]
- a Member may not distribute apples to other Members in the Chamber;[206]
- climbing over seats is not fitting behaviour;[207]
- a Member should not sit on the arm of a seat;[208] and

192 H.R. Deb. (11.3.1999) 3787–88, VP 1998–2001/396 (11.3.1999).
193 H.R. Deb (13.9.2005) 16–17.
194 H.R. Deb. (26.2.1959) 318.
195 H.R. Deb. (17.2.1977) 172.
196 H.R. Deb. (23.3.1950) 1197–8.
197 H.R. Deb. (10.3.1926) 1476.
198 H.R. Deb. (6.11.1973) 2791.
199 H.R. Deb. (24.10.1952) 3742. Smoking is these days prohibited inside Parliament House.
200 E.g. H.R. Deb. (18.6.2007) 33.
201 For general rules for Members' conduct in, and manner and right of, debate *see* Ch. on 'Control and conduct of debate'.
202 H.R. Deb. (8.6.1939) 1530.
203 H.R. Deb. (25.3.1997) 2881.
204 H.R. Deb. (28.11.1951) 2832.
205 H.R. Deb. (4.5.1950) 2227–8.
206 H.R. Deb. (1.6.2004) 29652–4.
207 H.R. Deb. (8.6.1955) 1561.
208 H.R. Deb. (25.7.1974) 695–6.

- a Minister who had tossed papers onto the Table was required to retrieve them.[209]

Use of electronic devices

Mobile phones must not be used for voice calls and any audible signal from phones or pagers must be turned off. Members who have allowed phones to ring have been directed by the Chair to apologise to the House.[210] However, text messaging is permitted and notebook computers may be used for emails, if done discreetly and so as not to interrupt the proceedings of the House.[211] The use of cameras, including mobile phone cameras,[212] and iPods[213] on the floor of the House is not permitted.

In 2015 the House adopted the following resolution on the use of electronic devices:

(1) The House permits Members' use of electronic devices in the Chamber, Federation Chamber and committees, provided that:
  (a) use of any device avoids interference or distraction to other Members, either visually or audibly, and does not interfere with proceedings—in particular, phone calls are not permitted and devices should be operated in silent mode;
  (b) devices are not used to record the proceedings (either by audio or visual means);
  (c) communication on social media regarding private meetings of committees or in camera hearings will be considered a potential breach of privilege; and
  (d) the use of devices is as unobtrusive as possible and is directly related to the Members' parliamentary duties; and

(2) The House notes that:
  (a) communication via electronic devices, whether in the Chamber or not, is unlikely to be covered by parliamentary privilege; and
  (b) reflections on the Chair by Members made on social media may be treated as matters of order just as any such reflections made inside or outside the Chamber.[214]

SERVICE ON NON-PARLIAMENTARY ORGANISATIONS

Members of the House are appointed by motion in the House to serve on the following bodies for the periods indicated:

- National Archives of Australia Advisory Council (one Member)—for a period as is fixed by the House, not exceeding three years;[215]
- Council of the National Library of Australia (one Member)—for a period as is fixed by the House, not exceeding three years;[216] and
- Parliamentary Retiring Allowances Trust (two Members)—while remaining a Member.[217]

Details of Members appointed to these bodies are printed in the Notice Paper. The House may discharge or replace the Members it has appointed.

209 H.R. Deb. (28.8.2000) 19405, *and see* H.R. Deb. (17.6.2004) 30785.

210 H.R. Deb. (11.9.1996) 4060; H.R Deb. (26.11.1997) 11272; H.R. Deb. (13.2.2003) 11782; H.R. Deb. (16.6.2008) 4844.

211 H.R. Deb. (16.9.2003) 20151.

212 H.R. Deb. (27.5.2004) 29398–9; H.R. Deb. (18.3.2010) 2917–18, 3011–13—Speaker stated that he would regard a Member found to have used a mobile device to take a photograph during proceedings as having behaved in a most disorderly manner and subject to disciplinary action. The general question of mobile devices was referred to the Committee of Privileges and Members' Interests, *see* Appendix 25.

213 H.R. Deb. (14.9.2006) 87.

214 VP 2013–16/1243–4 (26.3.2015). The resolution was in response to the Procedure Committee report, *Use of electronic devices in the Chamber and Federation Chamber*, PP 201 (2014).

215 *Archives Act 1983*; VP 2013–16/338 (3.3.2014).

216 *National Library Act 1960*; VP 2013–16/485 (26.5.2014).

217 *Parliamentary Contributory Superannuation Act 1948*; VP 2013–16/311 (24.2.2014). A trustee who has ceased to be a Member by reason of dissolution or expiration of the House does not thereby cease to be a trustee until he or she ceases to receive a parliamentary allowance.