Chapter 6

SENATORS

THE CONSTITUTIONAL choices made by the framers of the Australian Constitution delineated the political character of members of the Senate. The provision for direct election of senators made them the representatives of the people rather than the appointees of any other body. The provisions for a six-year fixed term for senators and for elections by rotation provided the opportunity for senators to have a greater degree of independence from the executive government. The provisions for each state to elect senators by voting as one electorate and for the equal representation of the states gave senators a wider representative capacity than members for local constituencies. Developments since 1901 have also significantly affected the character of senators as representatives. The introduction of proportional representation for Senate elections in 1949 made senators as a group more representative of the range of opinions in the community. The establishment in 1970 of a comprehensive committee system in the Senate provided senators with greater opportunity for productive interaction with the people through committee inquiries and hearings.

Qualifications of senators

The Constitution, sections 16 and 34, prescribe certain qualifications for election to, and membership of, the Senate, but allow the Parliament to alter those qualifications by statute. The current statutory prescription of the qualifications of a senator are contained in the *Commonwealth Electoral Act 1918*, section 163. To be elected as a member of either House of the Parliament a person must:

- have reached the age of 18 years
- be an Australian citizen
- be either an elector entitled to vote at a House of Representatives election or be a person qualified to become such an elector.

The Constitution, section 44, prescribes certain disqualifications which render a person incapable of being chosen or of sitting as a member of either House. The section is as follows:

> Any person who —
>
> (i) Is under any acknowledgment of allegiance, obedience, or adherence to a foreign power, or is a subject or a citizen or entitled to the rights or privileges of a subject or a citizen of a foreign power: or
>
> (ii) Is attainted of treason, or has been convicted and is under sentence, or subject to be sentenced, for any offence punishable under the law of the Commonwealth or of a State by imprisonment for one year or longer: or

> (iii) Is an undischarged bankrupt or insolvent: or
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> (iv) Holds any office of profit under the Crown, or any pension payable during the pleasure of the Crown out of any of the revenues of the Commonwealth: or
>
> (v) 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 twenty-five persons:
>
> shall be incapable of being chosen or of sitting as a senator or a member of the House of Representatives.
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> But sub-section (iv) does not apply to the office of any of the Queen's Ministers of State for the Commonwealth, or of any of the Queen's Ministers for a State, or to the receipt of pay, half-pay, or a pension by any person as an officer or member of the Queen's navy or army, or to the receipt of pay as an officer or member of the naval or military forces of the Commonwealth by any person whose services are not wholly employed by the Commonwealth.

The rationale of these disqualifications provisions is that they prevent senators being subject to undue external influence which could prejudice their performance of their duties. A person having an allegiance to a foreign power could be unduly influenced by that power. A person under sentence for an offence is subject to the control of the executive government. An undischarged bankrupt or insolvent is subject to the control of creditors or the courts. A person holding an executive government position could be subject to undue influence by the executive government. The granting of a pension at the discretion of the executive government could obviously be used to buy allegiance of senators. A person having an interest in an agreement with the Commonwealth could similarly be subject to such undue influence, and could also be influenced by personal interest in performing the legislative duties of a senator.

Undoubtedly the most significant of these qualifications is that relating to an office of profit under the Crown. It is designed to ensure that the executive government of the Commonwealth or a state cannot purchase the allegiance of a senator by awarding the senator a government job. This purpose is important, because without the provision a government could award jobs to senators other than ministers and thereby place them in a similar position to ministers as regards supporting the decisions and proposals of the government. The provision is a vital safeguard against bribery of senators. The manner in which the disqualification is expressed, however, gives rise to some questions of interpretation.

Employing its power under sections 16 and 34 of the Constitution, the Parliament has in the Commonwealth Electoral Act prescribed further disqualifications for election to either House. A person may not be elected if the person:

- is a member of a parliament of a state or of the legislature of a territory (s. 164)
- has been convicted within two years of the election of certain offences relating to bribery and undue influence (s. 386).

The prohibition in s. 164 of the Commonwealth Electoral Act on members of state and territory legislatures was, by its legislative history and relevant parliamentary statements, clearly intended to be a prohibition on their election, but is stated to be a bar to their nomination only. Theoretically a person could be elected to the Senate if they were elected to a state or territory legislature after the lodging of their Senate nomination, leaving aside state or territory prohibitions on membership of two legislatures. This situation could have arisen in the context of the Senate and Australian Capital Territory elections of 2001.

There is also nothing in Commonwealth law to prevent the appointment to a casual vacancy in the Senate of a person who is a member of a state or territory legislature.

The disqualification provisions of section 44 of the Constitution have been construed by the High Court, sitting as the Court of Disputed Returns (see below), in a number of judgments.

In relation to the qualification of citizenship, the Court has held that the election of a person who was not an Australian citizen at any material time during the election is void (disqualification of Senator Wood, *In Re Wood* 1988 167 CLR 145).

Paragraph (i.) of section 44, relating to adherence to a foreign power, has been construed by the Court as relating only to a person who has formally or informally acknowledged allegiance, obedience or adherence to a foreign power and who has not revoked that acknowledgment. In relation to persons who have dual nationality, the question is to be determined by whether the person has taken reasonable steps to renounce a foreign nationality, and what amounts to the taking of reasonable steps depends on the circumstances of a particular case (*Nile v Wood* 1988 167 CLR 133; *Sykes v Cleary* 1992 109 ALR 577). British nationality is foreign nationality for this purpose (disqualification of Senator-elect Hill, *Sue v Hill* 1999 163 ALR 648). (See Supplement)

Paragraph (ii.) of section 44, relating to conviction for offences, operates only while a person is under sentence or subject to be sentenced for an offence described by the section, that is an offence punishable (not necessarily actually punished) by imprisonment for one year or longer. (*Nile v Wood* 1988 167 CLR 133). A person is under sentence while a sentence which has been imposed has not been completed, and is subject to be sentenced while there is a continuing possibility of a sentence being imposed, for example, where a sentence is suspended as part of a conditional release with a bond. Presumably if a conviction is quashed on appeal the vacancy which was taken to have occurred upon conviction and sentence is then taken not to have occurred. If such a presumed vacancy has been filled the filling of the vacancy would then also be void (for a contrary interpretation in the UK, see *Attorney-General v Jones* 1999 3 All ER 436). Therefore, if a member of either House is convicted and sentenced such as to involve the disqualification, the member should not attend the House and the member's place should not be filled until any appeal against the conviction is determined.

In paragraph (iii.) of section 44, relating to bankruptcy, the word "undischarged" qualifies both of the words "bankrupt" and "insolvent", and the paragraph applies only to a person who has been formally declared bankrupt or insolvent and who has not been discharged from that condition (*Nile v Wood* 1988 167 CLR 133; *Sykes v Australian Electoral Commission* 1993 115 ALR 645 at 650).

In relation to paragraph (iv.) of section 44, relating to office of profit under the Crown or pension payable by the Crown, in order to fall within the paragraph an office must be remunerated and must be under the Crown, that is, an office to which appointment is made by the executive government. The paragraph therefore covers persons permanently employed by the executive government. The taking of leave without pay by a person who holds such an office does not alter the character of the office (*Sykes v Cleary* 1992 109 ALR 577). The exemption of ministers from the prohibition in the paragraph does not cover parliamentary secretaries, who were accordingly not paid any remuneration until an amendment of the Ministers of State Act in 2000 provided for them to be sworn in as ministers, but without that title (see Chapter 19, Relations with the Executive Government, under Parliamentary secretaries). Receipt of a pension does not disqualify a person unless the pension is payable during the pleasure of the Crown; a pension payable under the provisions of a statute would not activate the disqualification.

After the general election of 1996, the question was raised whether Senator-elect Jeannie Ferris of South Australia was disqualified from election and as a senator because she had accepted a position on the staff of a parliamentary secretary. It appeared likely that she would be disqualified if the question were determined, because the position in question was clearly an executive government position, a parliamentary secretary being an office-holder of the executive government. In debate in the Senate on the matter, the government argued that the appointment to the position was not validly made, but as she had actually taken up the position and was paid for it for a period, the likelihood was that this would not avoid the disqualification. The argument was also advanced that the disqualification provisions do not apply to a senator-elect, but only to a candidate and to a senator who has commenced a term. It would seem to be a strange result, however, if the safeguard intended to be provided by the disqualification could be defeated by conferring an executive government position on a senator-elect, which could influence the conduct of the senator during an election and after the beginning of the senator's term. In any case, the writ for the election had not been returned at the time when Senator Ferris took up the position, so that the election was technically still in progress and she was still in the process of being chosen.

The Senate agreed to a motion to refer the matter to the Court of Disputed Returns, but the motion was amended to provide that it would not take effect until after the commencement of Senator Ferris' term if she were a member of the Senate at that time (29/5/1996, J.251-3). The intention of this amendment appeared to be to allow an opportunity for Senator Ferris to resign and to have her place filled as a casual vacancy. (It is not entirely clear whether senators-elect can resign, but the death of a senator-elect is treated as giving rise to a casual vacancy: case of Senator Barnes: 1/7/1938, J.78.) The Senate's resolution did not take effect, because Senator Ferris resigned after the commencement of her term and was not a member of the Senate on the date specified in the resolution. She was then, however, appointed by the South Australian Parliament to the place rendered vacant by her resignation, and she appeared with the other senators returned at the general election to be sworn in when the Senate next met (20/8/1996, J.452-3). If she had been disqualified at the time of her election, her resignation and appointment to the consequent vacancy would not seem to cure the defect, because if she were not validly elected there could be no valid resignation and consequent vacancy. This was made clear by the Court of Disputed Returns in *Vardon v O'Loghlin* 1907 5 CLR 201 at 208-9. As the Court found *In Re Wood* and *Sue v Hill* (see

above), if a candidate has not been validly elected the cure is a recount of the ballot papers to determine the candidate who was validly elected to the place in question.

Notice of a motion was given to refer the matter to the Court of Disputed Returns, but the notice was withdrawn, apparently for lack of support (12/9/1996, J.592-3). It was then pointed out that an action to test the matter could be brought under section 46 of the Constitution. No further action was taken.

In 1996 the Court of Disputed Returns ordered a new election in a House of Representatives electorate when it came to light that the member elected in the 1996 general election was a member of the Air Force at the time of her election. It is unclear whether she was disqualified on a proper interpretation of the part of the proviso in section 44 relating to forces of the Commonwealth. The question was not argued before the Court, but was conceded by her counsel. It was stated in submissions that members of the forces who had sought election to either House in the past had been transferred to the reserve before nominating, but it is not clear that even this precaution is necessary, and it is unfortunate that the Court did not determine the issue on a full consideration. (*Free v Kelly* 1996 185 CLR 296)

In 1974 a senator accepted a position as an ambassador without resigning from the Senate, and there was a dispute about the effect of this on the senator's place in the Senate. This dispute was unresolved at the time of the simultaneous dissolutions of the two Houses in 1974. (For an account of this case, see *ASP*, 6th ed., pp 55-8.)

Paragraph (v.) of section 44, relating to pecuniary interest in an agreement with the public service of the Commonwealth, was construed very narrowly by the Court of Disputed Returns in a particular case in 1975. It was held that, in order to fall within the paragraph, an agreement must have currency for a substantial period of time and must be one under which the Crown could conceivably influence the contractor in relation to parliamentary affairs (*Re Webster* 1975 132 CLR 270; for a critique of this judgment, see the report of the Senate Standing Committee on Constitutional and Legal Affairs on the *Constitutional Qualifications of Members of Parliament*, PP 131/1981, pp 76-80). In 2002 the Senate took under consideration the question of whether Senator Scullion was disqualified because of contracts with government departments and agencies (14/5/2002, J.323). Independent advice was sought on the matter (18/9/2003, J.2436-7). The advice indicated that he was not disqualified (10/2/2004, J.2963).

The disqualifications in section 44 render a person incapable of being chosen or of sitting as a member of either House. The disqualifications therefore operate from the time the process of election starts, that process including nomination of candidates (*Vardon v O'Loghlin* 1907 5 CLR 201 at 210; *Sykes v Cleary* 1992 109 ALR 577).

It has not been explicitly determined whether the disqualifications apply to a senator-elect, but it would be anomalous if they did not, having regard to the purposes of the disqualifications (see above for the case of Senator Ferris, 1996).

If a senator is found to have been disqualified at the time of election, the election of that senator is void. The resulting failure validly to fill a place in the Senate is remedied by a recount of ballots cast in the election to determine the person validly elected. If a senator becomes

disqualified after completion of the election process, this creates a casual vacancy which may be filled under section 15 of the Constitution. (See *Vardon v O'Loghlin*, *In Re Wood* and *Sue v Hill*, cited above.)

There is no obligation on the Australian Electoral Commission to determine whether a person is disqualified at the time of the person's nomination (*Sykes v Australian Electoral Commission* 1993 115 ALR 645).

The Constitution provides in section 45 that the place of a member of either House becomes vacant when the member becomes subject to the disqualifications mentioned in section 44. This automatic vacating of a member's place also operates if the member:

> (ii.) Takes the benefit, whether by assignment, composition, or otherwise, of any law relating to bankrupt or insolvent debtors: or
>
> (iii.) 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 Constitution, section 43, provides that a person may not be elected to, or be a member of, both Houses of the Parliament simultaneously. Because the disqualification prevents a person being chosen as well as being a member of both Houses, this prevents a person nominating for election to both Houses in an election. Multiple nominations are also prohibited by section 165 of the Commonwealth Electoral Act.

The disqualifications contained in section 44 were examined in some detail by the Senate Standing Committee on Constitutional and Legal Affairs in 1981 (report on the *Constitutional Qualifications of Members of Parliament*, PP 131/1981). The Committee found the relevant provisions to be anomalous and out of date and recommended that they be comprehensively changed. This report, however, was written before most of the judgments of the Court of Disputed Returns to which reference has been made, and those judgments have considerably clarified the meaning and application of those provisions.

Determination of disqualifications

The Constitution, section 47, provides that, until the Parliament otherwise provides, any question respecting the qualifications of a member of either House and any question of a disputed election to either House shall be determined by the relevant House. This provision reflects the traditional power of a House to determine its own composition (see Chapter 2, Parliamentary Privilege, under Power of the Houses to determine their own constitution).

The Parliament has otherwise provided in the Commonwealth Electoral Act. Under sections 376 to 381 of that Act either House may refer any question concerning the qualifications of its members to the High Court, which is constituted as the Court of Disputed Returns, to hear and determine the question. The Court is required to hear the question in public, and has the power to:

(a) declare that a person was not qualified to be a member of either House

(b) declare that a person was not capable of being chosen or of sitting as a member of either House

(c) declare that there is a vacancy in either House.

The Court may remit questions of fact to a lower court for determination.

Questions relating to the qualifications of Senator Webster in 1975 and Senator Wood in 1988 were referred by the Senate to the Court under these provisions (see the judgments relating to those senators, cited above; for earlier cases see *ASP*, 6th ed., pp 172-4).

A motion concerning the qualification of a senator takes precedence as Business of the Senate over other business (SO 58).

The Commonwealth Electoral Act, sections 352 to 374, provides that the validity of any election to the Senate may be disputed by a petition addressed to the Court of Disputed Returns within 40 days after the return of the writ. Election is defined to include the appointment of a person to a casual vacancy. The Court must examine the petition in public and has the power to:

- declare that any person who was returned as elected was not duly elected
- declare any candidate duly elected who was not returned as elected
- declare any election absolutely void.

The Court may determine questions involving constitutional qualifications under these provisions (*Sue v Hill* 1999 163 ALR 648).

The Constitution in section 46 provides a procedure whereby any person can seek a remedy for a member of either House continuing as a member while disqualified. The section provides:

> Until the Parliament otherwise provides, any person declared by this Constitution to be incapable of sitting as a senator or as a member of the House of Representatives shall, for every day on which he so sits, be liable to pay the sum of one hundred pounds to any person who sues for it in any court of competent jurisdiction.

The Parliament has exercised its legislative power under this section only to the extent of limiting the sums which may be claimed from a disqualified member to $200 for having continued as a member before the day on which the suit was originated and $200 for each day after that day (*Common Informers (Parliamentary Disqualifications) Act 1975*).

There is nothing to require a senator to be absent from the Senate when the senator's qualification is under consideration by the Court of Disputed Returns, although a senator who continues to attend in the Senate in such a period may run a risk of a successful suit under section 46 of the Constitution. Senator Webster in 1975 absented himself while the Court considered his case, but Senator Wood in 1988 attended in the Senate and participated in proceedings while his case was before the Court.

The Constitution, section 20, provides for the place of a senator to become vacant automatically if the senator is absent from the Senate without the Senate's permission for two consecutive months during any session. In the history of the Senate there has been only one occasion on which a senator has lost his seat because of non-attendance. Senator J. Ferguson, of Queensland, was elected to serve in the Senate from 1 January 1901, and his term of service was for three years. Because of non-attendance for two consecutive months, his seat became vacant, under section 20, on 6 October 1903.

The presence in the Senate of a senator found not to have been validly elected or to be disqualified does not invalidate the proceedings of the Senate in which the senator participated: *Vardon v O'Loghlin* 1907 5 CLR 201 at 208, *In Re Wood* 1988 167 CLR 145 at 162-3.

Designation of senators

The choice by the framers of the name of the upper house in the Commonwealth Parliament had the effect of conferring on its members the title of senator, a title used in the Constitution, and a title of their counterparts in the United States and some other countries.

The title "honourable" is granted to the following senators:

- the President of the Senate
- members of the Executive Council (current and former federal ministers and parliamentary secretaries)
- former members of state ministries, former Presidents of State Legislative Councils and former Speakers of State lower houses.

Senators-elect

Senators who have been elected to places in the Senate at periodical Senate elections but whose terms as senators have not begun are referred to as senators-elect.

The principal disqualifications for senators probably apply equally to senators-elect, in so far as they render a person incapable of election to the Senate as well as membership of the Senate. Thus senators-elect probably cannot accept positions in the public service of the Commonwealth, a state or territory, because this would disqualify them under the provision relating to an office of profit under the Crown. (For a consideration of this question, see the case of Senator-elect Ferris, under Qualifications of senators, above.)

For the death or resignation of a senator-elect, see Chapter 4, Elections for the Senate, under Casual vacancies.

Oath or affirmation of office

The Constitution, section 42, requires senators to make and subscribe (sign) before the Governor-General, or some person authorised by the Governor-General, an oath or affirmation of allegiance in the form set out in the Constitution.

Senators make and sign the oath or affirmation at the first sitting of the Senate which they attend after the commencement of their terms as senators. Senators taking their places after a periodical or general election are sworn in by the Governor-General. Senators taking their places at other times are usually sworn in by the President, who is authorised by the Governor-General, in accordance with section 42, to administer the oath or affirmation (see Chapter 7, Meetings of the Senate).

Section 42 requires that a senator make and subscribe the oath or affirmation before taking the senator's seat in the Senate. A senator must therefore be sworn in before sitting in the Senate or participating in its proceedings, but there is nothing to prevent a senator performing other official functions before taking the oath or affirmation. Thus the Senate appoints senators to committees, and senators may participate in the proceedings of those committees, before they have been sworn in. For this purpose, membership of committees is often changed with effect from the date of commencement of the terms of new senators who are appointed to committees.

Immunities of senators

Senators have certain immunities under the law, as part of the law of parliamentary privilege. These immunities are set out in Chapter 2, Parliamentary Privilege.

Leave of absence

Because of the provisions of section 20 of the Constitution, under which the place of a senator becomes vacant if the senator, without the permission of the Senate, fails to attend the Senate for two consecutive months of any session (see above, under Determination of disqualifications), the Senate grants leave of absence to senators.

Leave of absence may be granted to a senator by motion on notice, the motion stating the cause and period of absence. A notice of motion to grant leave of absence takes precedence as Business of the Senate (SO 47(1)). A senator granted leave of absence is excused from service in the Senate or on a committee (SO 47(2)). A senator forfeits leave of absence by attending the Senate before the leave expires (SO 47(3)).

It is now the practice to grant leave of absence even for short periods when there is no danger of section 20 applying. One reason for this is that the Journals of the Senate record attendance of senators and whether leave of absence has been granted.

Section 20 applies only to absence during a session, so the absence of a senator during a period when the Parliament is prorogued does not activate the section (for an explanation of sessions and prorogation, see Chapter 7, Meetings of the Senate).

It is not clear whether senators should be granted leave of absence during a long adjournment of the Senate to avoid disqualification under section 20. It can be argued that, when the Senate is adjourned, it is not possible for a senator to attend in the Senate, and all senators have implied permission to be absent during the adjournment. Erring on the side of caution, however, the Senate always grants leave of absence to all senators before a long adjournment. This grant of leave of absence covers new senators whose terms of office begin during a long adjournment. (Debates on the interpretation of section 20 and the necessity for this precaution occurred in 1907 and 1914: SD, 21/11/1907, pp 6297-9; 11/12/1914, pp 1566-9; for an analysis of the question of the competence of the Senate to grant leave of absence to senators who have not taken the oath or affirmation, see *ASP*, 6th ed., pp 956-7.)

Parties and party leaders

The standing orders and procedures of the Senate recognise the membership of senators of political parties and their holding office as leaders of political parties.

A senator's statement in the Senate that the senator is a member, a leader or office-holder of a political party is accepted for the purposes of recognition under the procedures. A senator who changes party membership or who becomes a leader of a party usually makes a statement to that effect to the Senate at the earliest opportunity. Statements concerning office-holders of parties are usually made by party leaders.

The leader in the Senate of the party or coalition of parties which has formed the ministry is recognised as Leader of the Government in the Senate, and the leader of the largest party not participating in the formation of the ministry is recognised as Leader of the Opposition in the Senate. These leaders are given a number of powers, such as the power to make nominations to committees, and certain precedence in receiving the call from the chair (see Chapter 10, Debate, and Chapter 16, Committees).

Other office-holders

The standing orders and procedures of the Senate also recognise senators who are ministers and parliamentary secretaries. Ministers are given certain powers, such as the power to move for the adjournment of the Senate at any time without notice and to move a motion at any time without notice relating to the conduct of the business of the Senate (SO 53(2), 56; see Chapter 19, Relations with the Executive Government). An order of 6 May 1993, as amended, allows parliamentary secretaries to exercise the powers of ministers except answering questions at question time and appearing for Senate ministers before committees considering estimates in relation to those ministers' responsibilities.

Seniority of senators

For certain purposes, such as the allocation of accommodation in Parliament House, the seniority of senators is significant. A list of a senators' seniority is maintained by the Usher of the Black Rod. Senators' seniority is determined in accordance with their period of continuous service as senators.

The senator with the longest continuous period of service used to be referred to as the "Father of the Senate", but this title is now seldom referred to or used (as no woman senator has ever been in this situation, it is not clear what the title would be in that circumstance).

Conduct of senators

The standing orders of the Senate prescribe rules governing the conduct of senators during their participation in the Senate proceedings. As these rules relate mainly to the conduct of debate, they are set out in Chapter 10, Debate, under Rules of debate and Conduct of senators.

Matters relating to the conduct of senators are also the subject of the Senate's Privilege Resolutions (see Chapter 2, Parliamentary Privilege). Resolution 6(3) prohibits senators asking for or receiving any benefit in return for discharging their duties in any way. Resolution 9 enjoins senators to exercise their freedom of speech in the Senate with regard to the rights of persons outside parliament and not to make statements reflecting adversely on such persons without proper evidence. Resolution 5 provides for the publication by the Senate of responses by persons who have been adversely affected by references about them in the Senate.

Senators are subject to the contempt jurisdiction of the Senate, and may be adjudged guilty of contempt (see Chapter 2, Parliamentary Privilege; for a Privileges Committee inquiry into the conduct of a senator, see 7/5/1997, J.1855-6).

Senators may be censured by the Senate for misconduct (31/5/1989, J.1762-3; 4/10/1989, J.2083-5; 29/3/1995, J.3182-4; 2/10/1997, J.2618; 11/3/1998, J.3359-60; 19/3/2002, J.216-7 (a parliamentary secretary acting in a non-government capacity)). For the censure of ministers and members of other houses, see Chapter 19, Relations with the Executive Government, under Ministerial accountability and censure motions. It has been stated that it is not proper for a House to censure any member other than a minister, but this alleged principle appears to arise from a consideration of the situation in the House of Representatives and other lower houses which are controlled by the government of the day, in that any successful censure motion could only be moved by the government against an Opposition member. If the question is considered apart from that difficulty, however, it may well be concluded that a House properly so called may be justified in censuring its own members, apart from ministers, for unacceptable conduct.

A senator may be prosecuted for an offence which has also been dealt with as a contempt of the Senate (cf *US v Traficant*, US Court of Appeals, 19/5/2004, not reported; Supreme Court declined to hear appeal, 10/1/2005).

In 1992, following dispute over the "Marshall Islands affair", in which a minister was alleged to have sought improperly to influence the president of that country, the Senate passed a resolution relating to the development of a code of conduct for members of the Parliament and ministers (25/6/1992, J.2610-3; 2616-8). No such code of conduct has yet been recommended to, or adopted by, the Senate.

Questions to senators

Questions may be put to senators at question time relating to matters connected with business on the Notice Paper of which they have charge (SO 72(1)). Question time, however, is mainly used to put questions to ministers (see Chapter 19, Relations with the Executive Government), and the procedure of putting questions to other senators is seldom used.

Because a question and answer may not anticipate debate on a matter on the Notice Paper (SO 73(2)), a question to a senator is in effect confined to procedural matters not going to the merits of the relevant item on the Notice Paper. Such a question may, for example, relate to a senator's intention to bring on an item of business, or the effect of certain circumstances on the currency or urgency of the item. (Rulings of Deputy President McClelland, SD, 26/5/1982, p. 2374; President McClelland, 24/10/1984, pp 2323, 2327; President Sibraa, 20/8/1992, p. 346; President Beahan, 6/12/1994, pp 3944-8, 7/12/1994, pp 4098-9; see also SD, 11/9/1969, pp 700-1; 16/4/1970, p. 856; 27/8/1981, p. 379.)

Questions may also be put to chairs of committees, subject to certain restrictions (see Chapter 16, Committees). (See Supplement)

Pecuniary interests

Procedures for the registration of senators' pecuniary interests are contained in special orders first adopted in 1994. Such procedures had been under consideration since 1983, but had not been adopted, mainly due to doubts about their effectiveness. They were finally adopted as part of a "package" of "accountability reforms" announced by the government following the resignation of a minister over alleged misallocation of certain cultural and sporting grants (SD, 3/3/1994, pp 1453-4).

A special order of the Senate requires senators to declare specified interests, of themselves, and of their partners of which they are aware, which are then entered in a register, kept by a designated officer of the Senate and open to public inspection (those relating to partners are confidential). The order originally obliged senators to declare relevant interests during proceedings in the Senate. It had been the practice for senators, before the adoption of the order, to declare any interests in matters before the Senate. The requirement was abolished in 2003, but senators may still do so. The system for the registration of interests is supervised by a standing committee, called the Committee of Senators' Interests (SO 22A). The Senate's order declares that failure to comply with the order is a serious contempt of the Senate. Another order, adopted on 26 August 1997, requires senators to register gifts presented to them in their official capacity. (See also Chapter 16, Committees, under Senators' Interests Committee.)

Historically, the formal requirements for registration of interests can be seen as the long term result of two significant inquiries. A Joint Committee of Pecuniary Interests of Members of Parliament was appointed in 1974 and reported in September 1975 (PP 182/1975). The committee considered whether arrangements should be made for the declaration of interests of members of Parliament and, if so, whether a register of interests should be compiled and what it should contain. The committee examined the concept of a code of conduct and the arguments for and against a formal register of interests and concluded that an appropriate balance could be

achieved between the flexible guidance of the former and the rigid requirements of the latter by instituting a system of declaration of interests in which it was compulsory to declare certain interests while declaration of others was discretionary.

The second inquiry was by the non-parliamentary Committee of Inquiry Concerning Public Duty and Private Interest, chaired by the Chief Justice of the Federal Court of Australia, Nigel Bowen, and established in 1978. The committee suggested a set of principles providing for the avoidance or resolution of conflicts of interest and applicable to various categories of persons holding public office or playing a role in public life. The committee's recommendations in relation to ministers were adopted, including confidential disclosure of pecuniary interests.

A motion proposing a system for the registration of senators' interests was referred to the Standing Orders Committee in October 1983 (20/10/1983, J.412-3). After lengthy consideration of and consultation on the issue, the Standing Orders Committee reported in May 1986 that there was a fundamental disagreement amongst its members about the effectiveness of the proposed register and the soundness of the proposals in the resolution relating to registration and declaration of interests (PP 435/1986). The committee considered that the question should be determined by the Senate.

Notice of a motion relating to the registration and declaration of senators' interests and the establishment of a Committee of Senators' Interests was given on 20 November 1986 (J.1429) and debated on 17 March 1987 (J.1680-3) but was unresolved before the 1987 double dissolution. Although it appears that the re-elected government intended to re-introduce the motion, this did not occur until well into the following Parliament (30/4/1992, J.2228). When this motion was debated in May 1992, the same fundamental disagreements about the effectiveness of the register were evident and debate was adjourned (4/5/1992, J.2240). Similar notices were again given shortly after the commencement of the 37th Parliament (18/5/1993, J.159) and again the Opposition claimed that the proposed system would be ineffective (SD, 19/5/1993, pp 800-8; 25/5/1993, p. 1193). Consideration of the matter was postponed until the Budget sittings later that year but, in the meantime, government senators and Senator Chamarette (Greens, WA) tabled declarations of their interests on 25 May 1993 (J.247, 248). Motions were debated on 19 and 30 August 1993 but were not dealt with conclusively until 17 March 1994 when the Committee of Senators' Interests was appointed. The Register of Interests, containing all senators' declarations, together with those of senior departmental officers, was tabled in the Senate on 9 June 1994 in accordance with the terms of the resolution of 17 March requiring this action within 14 sitting days.

Places in chamber

Each senator has a designated seat in the Senate chamber, with a desk.

Standing order 48 prescribes rules relating to senators' seating. The front seats on the right of the President are reserved for ministers, while the front seats on the left of the President are reserved for leaders of parties and senators designated as having responsibility for particular matters. In relation to seats other than front seats, senators are entitled to retain the seats occupied by them at the time of their taking their seats for the first time after their election so long as they continue as

senators without re-election. Subject to any order of the Senate, any question relating to the occupation of seats by senators is determined by the President.

In practice senators sit in party groups, and seating arrangements are made by party whips, subject to the approval of the President. Members of the government party or parties sit to the President's right behind the ministers, and members of the Opposition party or parties sit to the left of the President behind Opposition senators designated as shadow ministers. Members of minority parties and independent senators sit on the cross-benches, that is, on the seats located on the curve of the horseshoe-shaped banks of seats.

A resolution passed in 1986 allows opposition speakers leading for the opposition to speak from the Deputy Leader of the Opposition's place (18/9/1986, J.1214).

Senators may not have on their desks items which are objectionable to other senators (ruling of President Kingsmill, SD, 24/5/1932, pp 1231, 1239).

Dress

There are no rules laid down by the Senate concerning the dress of senators. The matter of dress is left to the judgment of senators, individually and collectively, subject to any ruling by the President (ruling of President McMullin, SD, 27/3/1968, p. 336; see also report of House Committee, PP 235/1971, adopted by the Senate 29/2/1972, J.885). Officers attending on the Senate, such as ministerial advisers, are also expected to maintain appropriate standards of dress (ruling of Chair of Committees, SD, 14/11/1974, pp 2409-10).

Senators' remuneration and entitlements

Section 48 of the Constitution empowers the Parliament to determine the allowances of members of the Houses.

The remuneration, allowances and entitlements of senators are determined by the *Parliamentary Allowances Act 1952*, the *Remuneration and Allowances Act 1990*, and determinations made by the Remuneration Tribunal under the *Remuneration Tribunal Act 1973*. Superannuation entitlements of senators are covered by parliamentary superannuation acts. The provision of personal staff for senators is covered by the *Members of Parliament (Staff) Act 1984*.

The executive government determines and provides certain entitlements to members of the Houses, such as offices in their states and electorates.

In 1990 a decision by the government to provide certain postage entitlements to members of the Houses beyond the entitlements determined by the Remuneration Tribunal was challenged in the courts. The decision was the subject of dispute because it was said to favour government members over non-government members. The High Court held that the executive government has no power to provide benefits to members of the Houses in the nature of remuneration without statutory authorisation. The appropriation of money for such benefits in an appropriation act is not sufficient authority. (*Brown v West* 1990 91 ALR 197.) Following this judgment, the *Parliamentary Entitlements Act 1990* was passed to authorise the provision of benefits to

members by the executive government. The Act sets out in general terms the benefits which the government may provide.

Resignation of senators

Section 19 of the Constitution provides that a senator may resign office by a letter addressed to the President, or to the Governor-General if there is no President or if the President is absent from the Commonwealth. The place of a resigning senator becomes vacant upon the receipt of the resignation by the President or Governor-General.

For the form of resignation, and principles covering the lodgment of resignation, see Chapter 4, Elections for the Senate, under Casual vacancies.

Distinguished visitors

The President may, by leave of the Senate, admit distinguished visitors to a seat on the floor of the chamber (SO 174).

The practice is for the President to inform the Senate that the distinguished visitor is present and to propose, with the concurrence of senators, to invite the visitor to take a seat on the floor of the chamber. When senators concur, the visitor is admitted and conducted to a chair on the left of the dais near the President's seat.

This honour is normally granted to heads of state and presiding officers of other houses.

It is not in order for senators to approach distinguished visitors in the chamber (rulings of President Calvert, SD, 6/2/2003, p. 8743; 18/6/2003, p. 11855).

On three occasions in the past the Senate agreed to meet with the House of Representatives in the House chamber to hear addresses by presidents of the United States. This procedure was first adopted in 1992 on the occasion of an address by the then US president. It was stated at that time that the procedure was adopted on the basis that a similar honour had been granted to the Australian prime minister in Washington in accordance with the custom of the US Congress, and that granting the equivalent honour to the US president would not set a precedent. The procedure was repeated in 1996; it was felt that the same honour should be extended to the then president. In 2003 it was extended to the then US President and the Chinese President, who happened to be visiting at the same time. The practice had developed into government-controlled occasions, with the prime minister issuing the invitations and the Senate acquiescing. In its third report of 2003 (PP 436/2003) the Procedure Committee recommended that the practice be abandoned after incidents at the last two addresses, when the Speaker of the House of Representatives purported to eject two senators from one meeting and exclude them from the other. The Privileges Committee supported this recommendation (PP 80/2004; 1/4/2004, J.3321). The committees' recommendations that for future addresses the government hold meetings of the House to which senators would be invited were subsequently adopted (2/3/2006, J. 1954).