



Reserve Bank Amendment (Enhanced Independence) Bill 2008

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Law and Bills Digest Section

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Reserve Bank Amendment (Enhanced Independence) Bill 2008

Date introduced: 20 March 2008

House: House of Representatives

Portfolio: Treasury

Commencement: Day after Royal Assent

Links: The [relevant links](#) to the Bill, Explanatory Memorandum and second reading speech can be accessed via BillsNet, which is at <http://www.aph.gov.au/bills/>. When Bills have been passed they can be found at ComLaw, which is at <http://www.comlaw.gov.au/>.

Purpose

To amend the *Reserve Bank Act 1959* (the Act) to allow the Governor-General instead of the Treasurer to appoint, suspend and terminate the Governor and Deputy Governor of the Reserve Bank.

Throughout this digest, reference to the Governor-General means the Governor-General acting on the advice of Federal Executive Council.

Basis of policy commitment

On the 6 December 2007, the Government released a [Statement on the Conduct of Monetary Policy](#). The Statement set out 'the common understanding of the Governor, as Chairman of the Reserve Bank Board, and the Government on key aspects of Australia's monetary policy framework'. In both the Statement and the accompanying [joint media release](#) of the Prime Minister the Hon. Kevin Rudd and the Treasurer the Hon. Wayne Swan, the Government announced that it would make a number of changes to enhance the independence of the Reserve Bank of Australia (RBA) and the transparency of certain of its operations. The release outlined the following elements would be implemented:

- the positions of Governor and Deputy Governor to be raised to the same level of statutory independence as the Commission of Taxation and the Australian Statistician
- the appointments of both positions would be made by the Governor-General in Council, and their terminations will require parliamentary approval
- the Secretary to the Treasury and the Governor of the RBA will maintain a register of 'eminent candidates of the highest integrity' from which the Treasurer will make appointments to the Board, and

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- The new Statement on the Conduct of Monetary Policy included measures such as the publication of Board minutes, and a statement of reasons for the decisions of the Board.

The first two dots points are the subject of this Bill.

When in opposition, Mr Swan foreshadowed changes to improve the appointments process for the RBA Board by stating¹:

The changes would seek to prevent a re-run of the Robert Gerard affair where Treasurer Peter Costello intervened in the short listing process to nominate and eventually select for the Board an influential Liberal Party donor who was subject to a high profile tax office investigation that resulted in more than \$100 million in tax and penalties being paid.

This refers to the case of a Board member Mr Robert Gerard AO, who was appointed by the previous government on 25 March 2003, and who tendered his resignation on 2 December 2005 after it was revealed that his private company was involved in Federal court action over a dispute on tax matters with the Australian tax office.²

Background

When the Reserve Bank was first established in 1959, the Governor-General had the function of appointing and terminating the positions of the Governor and the Deputy Governor of the RBA. In the *Financial Sector Legislation Amendment Act (No. 1) 2002*³ this state of affairs was changed to give the functions to the Treasurer. Under those amendments the Treasurer was given the function of:

- Appointing the members of the RBA Board under section 14 of the Act
- Terminating Board members under section 18 of the Act
- Appointing and terminating the Governor and the Deputy Governor
- Appointing and terminating members of the Payments System Board

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1. Wayne Swan, Federal Labor to Improve Transparency of RBA Board Appointments, media release, 30 October 2007.
 2. M Mellish and L Tingle 'Scandal: Gerard Quits' Australian Financial Review 3 December 2005.
 3. For a discussion on the amendments made by the (then) Bill, see, Mark Tapley, 'Financial Sector Legislation Amendment Bill (No. 1) 2002', *Bills Digest*, No. 168, Parliamentary Library, Canberra, 2001-02.

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The change from the Governor-General to the Treasurer was not opposed at the time. The then government argued that the amendments would streamline the appointment and termination process.

Commenting on the 2002 Bill, the *Bills Digest* said⁴:

Some may argue however that the claimed efficiency gains in the process of appointment and termination come at the expense of an important safeguard against capricious action by a future Treasurer.

In November 2002, the then government commissioned John Uhrig, AO, to review the corporate governance of statutory authorities. In June 2003, the then Prime Minister was given the [Review of the Corporate Governance of Statutory Authorities and Office Holders](#), and it was finally released on 12 August 2004.⁵ The Report contained 6 main recommendations:

- *the Government should clarify the expectations of statutory authorities* by Ministers issuing Statements of Expectations, authorities responding with Statements of Intent, and the Minister making both documents public
- *the role of portfolio departments as the principal source of advice to Ministers should be reinforced* by requiring statutory authorities to provide relevant information to departmental secretaries, in parallel to that information being provided by statutory authorities to Ministers
- *boards should be used only when they can be given full power to act*. It is not feasible to have a board in authorities where Ministers play a key role in the determination of policy. In this case, governance can best be provided by executive management
- *the government should create a centrally located group* to advise on the application of appropriate governance structures when establishing statutory authorities
- *an Inspector-General of Regulation should be created* to investigate procedures used by regulatory authorities, and
- *the legislative basis for statutory agencies should be simplified*—the *Financial Management and Accountability Act 1997* should be applied to budget funded statutory authorities; the *Commonwealth Authorities and Companies Act 1997* should be applied to authorities that are legally and financially separate from the Commonwealth.

4. *ibid.*

5. For a discussion on the Uhrig Review, see Dr Richard Grant, 'The Uhrig Review and the future of statutory authorities', [Research Note](#), no. 50, Parliamentary Library, Canberra, 2004-05.

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In summary, Mr Uhrig recommended more formal reporting requirements for agencies, two new central agencies to monitor the governance of statutory authorities, and the application of either an ‘executive management’ or ‘board’ template.⁶

In 2006, Dr Meredith Edwards⁷ published results of an Australian Research Council (ARC) empirical study on corporate governance practices in the Australian public sector. Dr Edwards outlines the four main stages in selecting and appointing to a public sector board to achieve better practices. These are:

- Preparation: developing a vacancy profile
- Selecting and locating suitable candidates
- Assessing and vetting potential candidates
- Final selection and appointment⁸

It is noteworthy that the present Bill is silent on the appointment of the members of the Board other than the Governor and Deputy Governor. The second reading speech⁹ refers to the register of eminent candidates that will be drawn up by the Secretary to the Treasury and the Governor of the Reserve Bank and which will be made available for the Treasurer to select appointees. On Board appointments Uhrig stated:

In order to get the best from the board, and the entity itself, it is important to ensure the board has the necessary skills and experience to carry out its responsibilities. The ability of a board to provide effective governance will be placed in jeopardy if its members are inexperienced or inappropriately skilled or the board as a whole is

6. *ibid.*

7. Dr Meredith Edwards, ‘Corporate Governance in the Public Sector from Theory to Practice’, *Public Administration Today*, October – December 2006, p.5. For further reading see also Emeritus Professor Meredith Edwards, ‘Appointments to Public Sector Boards in Australia: A comparative assessment’, *Issues Paper Series No. 3*, University of Canberra, July 2006.

8. The issue of the qualifications of ‘knowledge and experience’ in assessing the skills of members of Boards is a recurring theme in discussions on best practices in governance. Some examples of legislation requiring members of bodies to have knowledge and experience include: the *Telstra Corporation Act 1991*, section 8BUA (at least 2 directors must have knowledge or experience in the communication needs of regional, rural or remote areas); the *Trade Practices Act 1974*, section 7 (the Minister must be satisfied of the person’s knowledge and experience in industry, commerce, economics, law, public administration or consumer protection). The Australian Securities and Investment Commission, and the Australian Prudential Regulation Authority are mentioned in the main text of the Digest.

9. The Hon. Wayne Swan, Treasurer, ‘Second reading speech: Reserve Bank Amendment (Enhanced Independence) Bill 2008’, House of Representatives, *Debates*, 20 March 2008.

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dysfunctional. To ensure this does not occur, Ministers need to be well supported in terms of advice in the appointment process.¹⁰

The other issue on which the Bill is silent is the continued presence of the Secretary of the Treasury on the Reserve Bank board as an ex officio member. According to the *Bills Digest* on the 2002 amendments:

It is worth noting that the position of a representative of the Treasury on the RBA Board has been a matter of public controversy. The RBA is the only central bank in the OECD that has a treasury official on its governing board. Critics have claimed that this undermines perceptions of the Bank's independence from government. There is a considerable body of economic literature which suggests that central bank independence enhances the effectiveness and credibility of monetary policy. In 2000 the ALP members of the House of Representatives Standing Committee on Economics, Finance and Public Administration called for the examination of a proposal to enhance the independence of the Bank by removing the Secretary to the Treasury from the RBA Board. Supporters of the current arrangements argue that they assist in the co-ordination of monetary and fiscal policy. (*footnotes omitted*)¹¹.

The Uhrig review discouraged any representational appointments (stakeholders and government representatives) to boards, and Dr Edwards, commenting on the issue of a government representative in the survey results, stated:

There were more differences in view as to whether a departmental representative should be on the board. Uhrig was opposed to departmental representatives being on boards but kept the door open: 'Membership of the board by the departmental secretary is unwise unless there are specific circumstances which require it.'...

Now that the Uhrig recommendations are coming into force and the relative power of the portfolio secretary vis a vis the board chair has been enhanced, the case for a departmental representative on the board could, arguably, be said to be reduced.¹²

Appointment and Termination of other statutory office-holders

The Commissioner for Taxation

As previously mentioned, the Government's announcement of the new procedures in relation to the Governor and the Deputy Governor stated that the positions were being raised to the same level of statutory independence as the Commissioner for Taxation and the Australian Statistician.

10. Dr Edwards, op. cit. quoted at p. 6.

11. op. cit. p. 7.

12. op. cit, p. 8.

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The Commission of Taxation is appointed by the Governor-General under section 4 of the *Taxation Administration Act 1953* (TAA) and suspended, retired or removed on the grounds set out in section 6C of that Act.

Section 6C of the TAA is set out in full in Appendix A to this Digest. It is worth noting in particular that the ground of 'proved misbehaviour' applies to the Taxation Commissioner but is not an included ground in this Bill.

In brief, section 6C of the TAA provides that the Taxation Commissioner can be removed from office by the Governor-General on the grounds of proved misbehaviour or incapacity at the request of both houses of Parliament (subsection 6C(1)). The Commissioner can be suspended from office by the Governor-General on the same grounds without the involvement of Parliament (subsection 6C(2)).

In the event of suspension for misbehaviour or incapacity, there is a statement presented to Parliament and if Parliament does not present an address under subsection (1) to the Governor-General within 15 sitting days the suspension will terminate (subsection 6C(4)) and the Commissioner will be reinstated.

The Governor-General must remove the Commissioner on the grounds of bankruptcy, taking outside unauthorised employment or for absence from duty (paragraphs 6C(6)(a)-(c)). Parliament has no role in the Commissioner's removal on these grounds.

The Australian Statistician

The provisions for the removal of the Australian Statistician are similar to the taxation provisions, but the expression 'misbehaviour' is used, not 'proved misbehaviour'.¹³

Chief Executive Officer of the Australian Customs Service

Under the *Customs Administration Act 1985* the Chief Executive Officer (CEO) can be removed or suspended under provisions in the same terms as the *Taxation Administration Act 1953*.

Australian Prudential Regulation Authority

The Chair and members of the Australian Prudential Regulation Authority (APRA) are appointed by the Governor-General.¹⁴ The Minister must be satisfied a person is qualified for appointment by virtue of his or her knowledge or experience relevant to APRA's functions and powers.¹⁵

13. Australian Bureau of Statistics Act 1975, section 12.

14. Australian Prudential Regulation Authority Act 1998, sections 16 and 18.

15. *ibid*, subsection 17(1).

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The Governor-General can terminate the appointment of a member of the APRA for misbehaviour, incapacity, bankruptcy and certain insolvency activities, absence from duty, unapproved outside employment, non-disclosure of conflicts of interest and other matters.¹⁶

Australian Securities and Investments Commission

The members of the Australian Securities and Investment Commission (ASIC) are appointed by the Governor-General on the nomination of the Minister.¹⁷ The *Australian Securities and Investments Commission Act 2001* requires the Minister to nominate a person as a member of ASIC to have knowledge or experience in fields such as business, administration of companies, financial markets, financial products and financial services, law, economics or accounting.¹⁸

The Governor-General can terminate the appointment of a member of the ASIC for misbehaviour, incapacity, bankruptcy and certain insolvency activities, absence from duty, unapproved outside employment, non-disclosure of conflicts of interests and contravention of similar probity requirements.¹⁹

National Competition Council

Members of the National Competition Council are appointed by the Governor-General and must have knowledge or experience in industry commerce, economics, law, consumer protection or public administration.²⁰

Termination and suspension of the Governor or the Deputy Governor under the Bill

Under the proposed changes in Bill the Governor-General can terminate or suspend the Governor or the Deputy Governor on the grounds set out in **new subsection 25(8)** of the Bill. The grounds (truncated) are:

- incapacity to perform the duties
- taking outside employment, or
- insolvency.

16. *ibid*, section 25.

17. Australian Securities and Investments Commission Act 2001, subsection 9(2).

18. *ibid*, subsection 9(4).

19. *ibid*, section 111.

20. Trade Practices Act 1974, section 29C.

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It should be noted that the positions of Governor and Deputy Governor (and board members) are held subject to ‘good behaviour’²¹, and this is discussed below in the main provisions part of this Digest.

The Bill incorporates similar mechanisms as those applying to the Tax Commissioner of requiring an address from both Houses of Parliament to the Governor-General and the role of the Governor-General in suspending and removing the position holder.

Central Banks – the Overseas experience

A Working Paper published by the International Monetary Fund surveyed boards and management structures and practice in Central Banks included guidelines on central bank autonomy and accountability.²²

In relation to the position of Governor, the main guideline is that the entity nominating (selecting) the Governor should be separate from the entity appointing the position holder:

[t]o provide some measure of balance, bearing in mind the institutional balance.²³

In relation to dismissal, the guideline is:

Dismissal should be only for breaches of qualification requirements, or misconduct: lack of performance could also be grounds if clearly defined in terms of the primary objective and specific targets. The latter could be ruled upon according to a suitable and independent judicial procedure, and perhaps be with the consent of the legislature.²⁴

In relation to Boards, similar guidelines on selection and appointment applied, as well as to dismissal.

On the composition of a Board, there should be a reasonably well informed (knowledge/expertise) and a balanced view, but conflicts of interest are to be avoided. Direct government representatives should be eliminated from a policy board and also from a monitoring board. However:

If a government representative does participate in a policy board, it should at least be without the right to vote (though it might be with a limited, temporary veto power).²⁵

21. *Reserve Bank Act 1959*, paragraph 24(1)(c).

22. Tonny Lybek and JoAnne Morris, *IMF Working Paper*, ‘Central Bank Governance: A Survey of Boards and Management’ International Monetary Fund, WP/04/226, 2004.

23. *ibid*, Appendix 1, p. 48

24. *ibid*.

25. *ibid*.

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Position of significant interest groups/press commentary

The *Daily Telegraph*²⁶ has recently published very critical arguments about the Governor of the RBA. In particular it featured this Bill on 8 April 2008 in an article by Malcolm Farr headed '[RBA boss Glenn Stevens is "Mr Unsackable"](#)'. This article refers to concerns that the reforms are going too far 'and that a rogue governor whose statements create turmoil in financial markets could not be removed'. The article states that the proposed laws have been drawn up 'as a political response to claims by the previous Coalition government that Labor would intrude on the bank's operation'.

On the same day, 8 April 2008, the *Daily Telegraph's* Piers Akerman²⁷ also attacked the Bill in similar terms by stating, amongst other things:

Nor is there any provision for terminating an incompetent or rogue bank governor, and there doesn't appear to be any way of dismissing a governor who is convicted of criminality, let alone making a series of bad decisions.

The *Australian* criticised the *Daily Telegraph* for the attack on the Reserve Bank Governor by reporting:

This economically illiterate piece of populism is offensive but, fortunately, irrelevant in the broader debate on monetary policy.

The *Age* reported on the Bill on 27 March 2008 and gave credit for improved independence measures, but cautions that the new arrangements may give too much protection:

Independence needs to be balanced with accountability for performance, especially in relation to inflation outcomes. Yet the proposed Reserve Bank Amendment (Enhanced Independence) Bill does not contain any provision for removing the RBA's senior officers on the grounds of poor inflation outcomes.²⁸

The *Australian Financial Review* reported on 10 April 2008 that the Treasurer, Mr Swan supported the independence of the Reserve Bank:

The Reserve Bank has been under concerted attack in some section of the media in the past week for being out of touch with the effect its policies have on households.

The opposition has joined the attack.

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26. Rhys Haynes and Justin Vallejo, 'Is this the most useless man in Australia?' *Daily Telegraph*, 5 April 2008, p. 1.; David Penberthy, 'Don't put Western Sydney on the Reserve Bench', *Daily Telegraph*, 7 April 2008, p. 15.
 27. Piers Akerman, 'Monster on the loose-and Swan let it free', *Daily Telegraph*, 8 April 2008, p. 17.
 28. Stephen Kirchner, 'Independence: 2 accountability: 0', *the Age*, p.12, 27 March 2008.

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Mr Swan last night backed the central bank but refused to comment on whether it has pushed interest rates up one time too many.

“You either believe in the independence of the Reserve Bank or you don’t,” he said.

Main provisions

Items 1 and 2 amend section 24 and section 24B of the Act to delete reference to the Treasurer and substitute it with the Governor-General. Section 24 currently provides that the Governor and the Deputy Governor are to be appointed by the Treasurer for a period of 7 years but are eligible for reappointment. Paragraph 24(1)(c) provides that the Governor and the Deputy Governor ‘hold office subject to good behaviour’. Members of the Reserve Bank Board also hold office subject to good behaviour.²⁹ Section 24B is the resignation provision.

Item 3 repeals section 25 and substitutes **new section 25** to provide for the termination of the appointments of the Governor and the Deputy Governor. Existing section 25 provides:

Vacation of Office

If [the Governor](#) or the [Deputy Governor](#):

- (a) becomes permanently incapable of performing his or her duties; or
- (b) engages in any paid employment outside the duties of his or her office; or
- (c) becomes bankrupt, applies to take the benefit of any law for the relief of bankrupt or insolvent debtors, compounds with his or her creditors or makes an assignment of his or her salary for their benefit;

the Treasurer shall terminate his appointment.

These grounds for termination are replicated in **new subsection 25(8)** and therefore are the only grounds for the termination of the positions. Under the existing arrangements, paragraph 24(1)(c) may give the Treasurer the *discretion* to terminate the Governor on ‘(lack of) good behaviour’ grounds whereas section 25 *requires* the Treasurer to terminate if one or more of the stated grounds are met. There is currently no limitation in section 25 as there is in this Bill and the TAA that there shall be no termination ‘except as provided by this section’.³⁰

29. Paragraph 14(4) (b) of the *Reserve Bank Act 1959*.

30. **Proposed paragraph 25(9)** Reserve Bank Amendment (Enhanced Independence) Bill 2008 and subsection 6C(8) TAA.

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New subsection 25(1) provides that the Governor-General can terminate the appointments if each House of Parliament presents to the Governor-General an address praying for the termination of the appointments on a ground specified in **new subsection 25(8)**. Suspension prior to such termination is not necessary under this subsection.

The Governor-General can suspend the Governor or Deputy Governor from office on a ground specified in **subsection 25(8)** and the Minister (the Treasurer or Minister representing the Treasurer) has to table a statement concerning the suspension in both Houses of Parliament within 7 sitting days. Within 15 sitting days of the statement, the Houses can then declare by resolution that the appointment should be terminated (**new subsection 25(4)**). If both Houses do not pass such a resolution, the suspension ceases, and the position holder will continue in office (**new subsection 25(6)**). In the event the resolution is passed by each House, the Governor-General must terminate the appointment under **new subsection 25(5)**.

New subsection 25(9) provides that the termination of the Governor or the Deputy Governor can only be terminated on a specified ground and by the means specified by **new section 25**. This limits termination to the grounds specified and in the manner specified by the section. As noted earlier, the Governor and Deputy Governor hold office 'subject to good behaviour' which is an on-going requirement and a prerequisite for holding office. The Reserve Bank Act is the only Commonwealth Act which has this particular expression. Under the changes proposed by the Bill, in the event the position holder is not of good behaviour there is no mechanism for termination as this requirement is not specified as a ground under **new subsection 25(8)**. If a Governor or Deputy Governor did not offer a resignation to the Governor-General under **amended section 24B** there is no power to remove the Governor or Deputy. This can be contrasted to the present position in that although the grounds of removal from office are the same, there is no strict limitation on the Treasurer's current power to terminate an appointment as will the case under the proposed amendments.

Concluding comments

The reforms in the Bill achieve an arms length process in the appointment and termination of the Governor and Deputy Governor by substituting the Governor-General in place of the Treasurer, and incorporating Parliament in the suspension and termination of the positions. These changes are based on the processes that apply to the statutory positions of the Commissioner for Taxation and the Australian Statistician. However, the Bill does not follow exactly other aspects of these positions such as the grounds of termination or suspension.

The Bill does not address the rest of the Board's appointment and termination processes, the continuing presence of the departmental representative on the Board, or the qualifications of members of the Board. In this regard, it may be useful to reflect on the key points in the previously-mentioned IMF paper which surveyed Central Bank Boards

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and Management for best practice in order to address both transparency and accountability.³¹

Parliament may note that there are disparities and differences existing in the legislation across the board dealing with statutory authorities, agencies and Boards depending on the functions and roles of the bodies in question. A full examination and comparison of these aspects of governance has not been undertaken in this Digest, due to the minor and technical changes being made in this Bill.

31. See pp.8-9 of this Digest.

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Appendix

Australian Taxation Act 1953

6C Suspension and removal from office of Commissioner or Second Commissioner

(1) The Governor-General may remove the Commissioner or a Second Commissioner from office on an address praying for the removal of the Commissioner or the Second Commissioner, as the case may be, on the ground of proved misbehaviour or physical or mental incapacity being presented to the Governor-General by each House of the Parliament in the same session of the Parliament.

(2) The Governor-General may suspend the Commissioner or a Second Commissioner from office on the ground of misbehaviour or physical or mental incapacity.

(3) Where the Governor-General suspends the Commissioner or a Second Commissioner, the Minister shall cause a statement of the grounds of the suspension to be laid before each House of the Parliament within 7 sitting days of that House after the suspension.

(4) If, at the expiration of 15 sitting days of a House of the Parliament after the day on which the statement was laid before that House, an address under subsection (1) has not been presented to the Governor-General by each House of the Parliament, the suspension terminates

(5) The suspension of the Commissioner or a Second Commissioner from office under this section does not affect any entitlement of the Commissioner or Second Commissioner, as the case may be, to be paid remuneration and allowances.

(6) If:

(a) the Commissioner or a Second Commissioner becomes bankrupt, applies to take the benefit of any law for the relief of bankrupt or insolvent debtors, compounds with his or her creditors or makes an assignment of his or her remuneration for their benefit;

(b) the Commissioner or a Second Commissioner engages, except with the approval of the Minister, in paid employment outside the duties of the office of Commissioner or Second Commissioner, as the case may be; or

(c) the Commissioner or a Second Commissioner is absent from duty, except on leave of absence, for 14 consecutive days or 28 days in any 12 months;

the Governor-General shall remove the Commissioner or Second Commissioner, as the case may be, from office.

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(7) The Governor-General may, with the consent of the Commissioner or a Second Commissioner, retire the Commissioner or Second Commissioner, as the case may be, from office on the ground of physical or mental incapacity.

(8) The Commissioner or a Second Commissioner shall not be suspended, removed or retired from office except as provided by this section.

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