

Committee Membership Amendment Ordinance 1995

Explanatory Statement

Introduction

1. In 1994, at the request of the Standing Committee, the Legal Committee gave an opinion on the consequences of a bankrupt serving as a member of a diocesan organisation or parish council or holding office as churchwarden.
2. The Standing Committee then requested that a bill for the Committee Membership Amendment Ordinance 1995 be promoted to the Synod for the purpose of ensuring that persons who are "insolvent under administration" are ineligible to be appointed as members of the Standing Committee or certain other unincorporated boards or committees or to hold the office of churchwarden.

Summary of the Legal Opinion

3. The following items summarise the main points of the Legal Committee's opinion.
4. If the rules which apply to determine membership of a church board or council (commonly found in an ordinance) do not expressly provide that an undischarged bankrupt is ineligible to be appointed to the board or council then the appointment of an undischarged bankrupt to that board or council is valid. If the rules do not provide that a member ceases to hold office upon becoming a bankrupt, then a member who becomes bankrupt will not forfeit his or her membership of the relevant board or council.
5. Under the Church Administration Ordinance 1990 an undischarged bankrupt can be elected or appointed as a churchwarden. However if a churchwarden becomes bankrupt, the Ordinance provides that the person immediately ceases to hold that office.
6. What if a bankrupt person is, contrary to the relevant rules, appointed to a board or council and participates in proceedings or that person, being a member, becomes bankrupt and contrary to the relevant rules continues to participate in proceedings? What if a churchwarden becomes a bankrupt and continues to perform the functions of that office? The question of the validity of the proceedings in which the bankrupt participates turns on the circumstances and, in particular, the nature of the proceedings. If the board or council or the churchwardens determine questions affecting rights then the participation of a disqualified or unqualified person in discussion or voting may invalidate any resolution. Further, if the unqualified or disqualified person was counted in a quorum for a meeting and otherwise there would not have been a quorum, then the meeting is invalid.

7. In relation to incorporated boards and councils the Corporations Law applies. Under the Corporations Law an “insolvent under administration”, a term which includes a bankrupt, must not, without leave of the court, be a director (by whatever name called) or otherwise manage a corporation. A breach of this provision is an offence. In practical terms, this prevents a bankrupt from being a member of the council or board of an incorporated body. The Corporations Law does not provide that a person who is an insolvent under administration is not qualified to be appointed to the board or council of an incorporated body but if an insolvent under administration accepts election or appointment without the approval of the court that person will commit an offence. Similarly if a person is a member of a board or council of an incorporated body and becomes an insolvent under administration the person should, unless the court otherwise approves, immediately resign his or her membership, otherwise an offence will be committed.

8. The principal reason for prohibiting insolvents under administration from managing corporations is protective, that is, to protect the public and corporate structure from being used to the financial detriment of investors, shareholders or creditors dealing with the corporation.

9. The Corporations Law does not apply to unincorporated bodies and thus a bankrupt can be elected or appointed to a board or council if the constituting ordinance allows it.

10. From a bankrupt’s point of view there is an important reason why he or she should resist being elected or appointed to an unincorporated board or council, or as churchwarden, while he or she remains an undischarged bankrupt even if the relevant rules permit the appointment. Under section 269 of the Bankruptcy Act 1966 a bankrupt commits a serious offence if she or he obtains credit, goods or services either alone or jointly with another person without disclosing the fact of that person’s bankruptcy. It is possible that in acting on an unincorporated board or council or as churchwarden section 269 could be infringed.

11. There are a number of circumstances which indicate an ability to pay debts and bankruptcy is only one of them. Under the Corporations Law an “insolvent under administration” means a person who -

- “(a) under the Bankruptcy Act 1966 or the law of an external Territory, is a bankrupt in respect of a bankruptcy from which the person has not been discharged; or
- (b) under the law of a country other than Australia or the law of an external Territory, has the status of an undischarged bankrupt;

and includes -

- (c) a person who has executed a deed of arrangement under Part X of the Bankruptcy Act 1966 or the corresponding provisions of the law of an external Territory or of the law of a country other than Australia, where the terms of the deed have not been fully complied with; and

- (d) a person whose creditors have accepted the Bankruptcy Act 1966 or the corresponding provisions of the law of an external Territory or the law of a country other than Australia where a final payment has not been made under that composition.”.

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12. The Standing Committee believes that insolvency under administration should make a person ineligible to be elected or appointed to the Standing Committee, an unincorporated board or council or to the office of churchwarden. (The Corporations Law already applies in relation to corporations). In addition, becoming an insolvent under administration should make a person ineligible to remain a member of such board or council or the holder of the office of churchwarden. Foremost in the Standing Committee's mind is the policy of protecting the assets of the relevant body, council or church by ensuring that there is no possibility that a person in proven financial difficulties could take improper advantage of their position as member of the committee, board or council or as churchwarden.

13. The Committee Membership Amendment Ordinance 1995 will amend the ordinances which constitute the Standing Committee and the unincorporated boards and councils subject to the Accounts Ordinance 1975 to make it clear that an insolvent under administration is not eligible to be appointed to the Standing Committee or to the board or council and a member, who becomes an insolvent under administration, thereupon ceases to hold membership. The reason why the only unincorporated boards and council to which the amendments will apply are those subject to the Accounts Ordinance 1975 is because they are the boards and councils which have significant financial resources.

14. The amending ordinance will also amend the Church Administration Ordinance 1990 so that a person who is an insolvent under administration cannot be elected or appointed as a churchwarden.

15. The unincorporated boards and councils affected by the bill are -

Anglican Media Council	Marrickville Area Deanery Committee
Anglican Youth Department	PARC
Arundel House	St John's Provisional Cathedral Chapter
Cathedral Chapter	Chapter
Continuing Education for Ministers	St Michael's Provisional Cathedral Chapter
Department of Evangelism	Chapter
“Gilbulla” Board of Management	Sydney Diocesan Educational and Book Committee
Inner City Committee	WARC

Recommendation

16. The Standing Committee recommends that the Synod pass the bill as an ordinance.

For and on behalf of the Standing Committee.

MARK PAYNE

Legal Officer

18 March 1996