Members of Parliament:

law and ethics

Gerard Carney
Conflict of interest

Introduction

Put in its simplest terms, a conflict of interest arises when the private interests of a member clash — or even coincide — with the public interest. Such a conflict of interest only raises an ethical dilemma when the private interest is sufficient to influence or appear to influence the exercise of official duties. This constitutes an ethical dilemma, for it tends to undermine public confidence in the integrity of the member, and ultimately of parliament itself, to act only in the public interest. A classic example of such a conflict of interest is where a member approaches a minister on behalf of a company in which the member is a shareholder. How can the public be assured that the member is acting in its interests rather than those of the company and the member? A more serious conflict of interest is, of course, where a minister retains financial interests in an industry within his or her portfolio. Ministers often lose their positions on account of such a conflict of interest, although some survive. Although the nature of a conflict of interest does not vary in any significant respect between members and ministers, the resolution of ministerial conflicts of interest fall outside the scope of this work.

Central to an understanding of conflict of interest in relation to members of parliament is the effect it has on public perception. Whether or not the member has furthered his or her own personal interest is irrelevant. An allegation of a conflict of interest cannot be defended on the ground that one did not seek any personal benefit. It is the appearance of having so acted which harms or undermines public confidence in the integrity of parliament — and it is that erosion of public confidence that poses the ethical dilemma.

2 Those who lost their ministerial positions recently include Senator Short (Assistant Treasurer) and Senator Gibson (Parliamentary Secretary to the Treasurer) in 1996 on account of certain shareholdings.
3 Those who survived allegations of conflict of interest include Senator Parer (Minister for Resources) in 1998 and Mr Entsch MP (Parliamentary Secretary to the Minister for Industry) in 1999.
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confidence which renders a conflict of interest ethically unacceptable. Whether the perception of a betrayal of the public trust is reasonably based is, unfortunately, not one which can be verified by any objective test. There is in the end no other umpire other than public opinion.

Members of parliament potentially face numerous conflicts of interest. So serious are some of these that they developed into grounds of disqualification, the most significant being: foreign allegiance; membership of another House; holding a public office; and being interested in a government contract. However, as the Bowen Report noted, these grounds deal with ‘only a small, and increasingly peripheral, part of the problem’. Conflicts of interest arise in many forms, both pecuniary and non-pecuniary. This chapter examines the nature of these conflicts of interest and then considers the two most prevalent mechanisms to deal with them: ad hoc disclosure and a register of interests.

Before doing so, it is worth considering briefly the connection which exists between conflict of interest and corruption. Of the two phenomena, corruption arouses the greater concern, with most people able to give an example of corrupt conduct more readily than they can a conflict of interest. The link between the two is that all cases of corruption involve a conflict of interest, but the reverse cannot be maintained. More specifically, corruption involves a clash between the official’s private and public interests where, usually, a financial benefit is knowingly obtained or sought at the expense of the public interest. A conflict of interest requires no such benefit. Consequently, corruption constitutes a serious crime whereas a conflict of interest merely describes a broad spectrum of conduct. At one extreme of this spectrum lies corruption and at the other end lies mildly unethical behaviour. Where along the spectrum particular conduct falls depends on the circumstances of each case and the manner in which the conflict has been dealt with.

Nature of a conflict of interest

Members probably face the widest range of potentially conflicting interests: personal, representational and other private pecuniary and non-pecuniary interests. Certain interests are personally inherent: as a resident of a town or city, State or Territory, as a parent, spouse, or child, as female or male, as indigenous or non-indigenous and so on. Other interests arise from their representative role: as a member of parliament, as the representative of an electorate and as a member of a political party. Further interests arise from outside activities: as a member of a non-political organisation, as a businessman, professional, farmer or employee. These wide ranging interests include therefore both pecuniary and non-pecuniary interests.5

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5 These conflicts have been discussed in M Young, Conflict of Interest Rules for Federal Legislators Library of Parliament Canada September 1996, pp 2-3.
Yet despite all these potential conflicts, the High Court has held that a member must endeavour to act only and always in the 'public interest'. In Wilkinson v Osborne two members of the NSW Legislative Assembly agreed with a land agent, for a fee, to influence the NSW Government to purchase certain land. In holding this undertaking to be void for being contrary to public policy, Griffith CJ concluded:

> There cannot be a plainer case of a man attempting to serve two masters. They owed to their employer, the appellant, the duty to press forward the contract regardless of the interest of the public, and as members of the Legislature it was their duty to consider the matter impartially before voting upon it.7

Isaacs J similarly condemned the agreement:

> Paid advocacy of that kind by a member of the Legislature having the duty of supervision and a possible veto is a position in which he allows his interest to conflict with his duty, and, therefore, is a position which the law will not allow. ... And so I put this case primarily on that principle, that it is one in which the bargain raises a conflict between interest and the duty of considering whether the purchase should be finally approved, and is therefore against public policy.8

His Honour later warned in Horne v Barber that 'it is inherently dangerous that a man in such a position should place himself in a situation of temptation'.9

These judicial descriptions of the fundamental obligation of members are appropriate in the context of avoiding a conflict of interest between the personal interests of a member, particularly those of a pecuniary nature, and the member's official duties.10 The rules are appropriately strict in that context. But in other contexts they are too simplistic, because they fail to explain how members should decide issues in the public interest within the confines of their political party and as representatives of their constituents. So which has primacy: the party, the electorate, or the nation? Even within the electorate, the conflicting interests of the constituents need to be handled. Indeed, it can be said that the primary function of a member is to reconcile all these competing representational interests.11

Little guidance has been given to members on to how to handle these competing interests. For instance, the UK Code of Conduct for Members of the House of Commons

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6 (1915) 21 CLR 89.
7 At 93-94.
8 At 102-103.
9 (1920) 27 CLR 494 at 501.
10 This duty was described by Lord Lyndhurst in Egerton v Brownlow 4 HLC 1 at 161: 'In the framing of laws it is his duty to act according to the deliberate result of his judgment and conscience, uninfluenced, as far as possible, by other considerations, at least of all by those of a pecuniary nature.'
only acknowledges the duty of members ‘to act in the interests of the nation as a whole; and a special duty to their constituents’. But Professor Paul Finn highlighted the difficulty of accommodating the pressures of a party system in his submission to the NSW Parliamentary ICAC Committee in 1992:

> We have to realise that public office is based on a conflict between duty and interest. We would be deluding ourselves if we did not start on the premise that politics is concerned about compromise, partiality and self interest behaviour. The problematic question is where on the spectrum does that behaviour become unacceptable?\(^{12}\)

A hypothetical example illustrates the range of competing interests which can arise with members. How does a member decide whether to support proposed legislation which restricts the logging of timber when his or her political party supports a policy of environmental protection, a significant part of the electorate represented depends on a forestry industry, and the member’s family operates a transport business in connection with that industry?

The last of these considerations, a personal or private interest, should be declared in any debate the member engages, whether inside or outside the House. Such an interest should be given no special weight other than that which it deserves as part of assessing the effect of the proposed legislation on ancillary industries. As for the other two interests, it is not simply a case of deciding which is the more important to the member; each should be carefully weighed in an endeavour to achieve the best outcome for the local and Australian community. This might entail reaching a compromise which allows the forestry industry to operate within ecologically sustainable development guidelines. But none of the mechanisms considered in this book provides detailed guidance as to how to resolve a conflict between party and electorate interests. Although a few ethical dilemmas may be covered by codes of conduct or other rules, such as those in relation to the use of electorate facilities for party purposes or re-election, it is clearly not feasible to provide detailed guidance to cover every ethical dilemma. On the other hand, more specific rules have been developed to deal with the conflict between the pecuniary or personal interests of members and their official duties. To these we now turn.

**Mechanisms dealing with a conflict of interest**

Mechanisms dealing with a conflict of interest have one or more of three objectives: avoidance, declaration or resolution.

**Avoidance**

Preventive mechanisms to avoid a conflict of interest arising require that the personal interest be disposed of or the individual be disqualified from public office.

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12 P Finn, oral submission to the NSW Parliamentary ICAC Committee 1992.
In relation to members of parliament, the latter approach was favoured by the prescription of grounds of disqualification (see Part I). Those grounds are premised on the view that to owe a foreign allegiance, be a government contractor, or hold another public office raises such a serious conflict of interest to warrant disqualification from parliamentary office.  

The alternative approach of dispensing with the personal interest is a more contemporary response. For instance, in most States the public office ground of disqualification permits a newly elected member to renounce that office or lose it automatically on being elected. However as a general rule members, unlike ministers, are not asked to dispense with their personal interests. Instead, a conflict of interest is allowed to arise provided this is declared at the appropriate time.

**Declaration**

Essentially, there are two ways a declaration may be made. The first is described as an ad hoc declaration which ought to be made whenever a member finds that a personal interest conflicts with his or her duties as a member. The other way is by way of a declaration of personal interests to a register of interests. Both of these mechanisms are considered further below.

**Resolution**

Where a conflict of interest arises (whether identified by declaration or otherwise), it is imperative that there be some well-established procedure to ensure that the conflict is removed or resolved and that any decision made or action taken is not tainted by it. Basically, there are two possible responses:

1. divest the member of his or her public duty or decision-making power; or
2. authorise the member to perform his or her public duty despite the personal interest.

The second of these is the one usually adopted at the parliamentary level because the first approach would effectively disenfranchise the member's electorate. The Bowen Report warned of this danger:

> Only in exceptional circumstances of an immediate and substantial conflict of interest should a Member of Parliament be required to abstain from voting or speaking. To require otherwise would effectively disfranchise his electors in relation to the matter under debate.  

This chapter examines both the extent to which members in Australia are under an obligation to declare their personal interests and the manner in which such conflicts of interest are resolved.

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13 The other grounds of disqualification (bankruptcy and criminal conviction) are concerned principally with the integrity of members rather than with conflicts of interest.

The initial ethical response to the realisation that a conflict of interest has arisen between one's public duties and personal interests is to declare that conflict to the appropriate authority or party. Essentially, two mechanisms have been developed to facilitate the declaration of a conflict of interest by members. The first, referred to as an ad hoc declaration, simply involves the making of a declaration each time a member becomes aware of a conflict of interest between his or her personal interests and official duties. The other mechanism is a register of interests which comprises the declarations of a range of interests made by members on entering parliament. These declarations of personal interests are usually made even before any conflict of interest arises. Hence, they differ from ad hoc declarations in that they tend not to reveal a conflict of interest but merely provide a database from which future conflicts may be detected. Given this difference, there is much to be said for adopting both of these mechanisms.

**Ad hoc declarations**

In relation to members of parliament, one of the simplest mechanisms available in order to help avoid or resolve conflicts of interest is that of ad hoc disclosure of one's personal interests whenever they conflict or appear to conflict with the duties of public office. This mechanism of ad hoc disclosure strikes at the very heart of a conflict of interest by revealing the personal interest which is or appears to be in conflict with a member's public duties — and it does so at the precise moment when a decision is made or other action is to be taken by the member. Obviously, a register of interests cannot have the same immediate impact.

Yet in Australia, as elsewhere within the Commonwealth, many members are under no specific obligation to declare their personal interests whenever they conflict or appear to conflict with their public duties. Rather, the most common requirement is to abstain from voting or sitting in parliament on matters in which they are interested. However, provision is made for some members to declare their personal interests not only in parliament, but appropriately in any situation in which a conflict of interest arises while performing an official duty.

Before considering more closely the duties of Australian members in relation to a conflict of interest, it is necessary first to trace the earlier development of the obligation of ad hoc disclosure in the United Kingdom.

**United Kingdom**

There are no formally recognised standards for ad hoc disclosure of interests by members of the House of Lords other than the House having agreed in 1969 'if a Peer decides that it is proper for him to take part in a debate on a subject in which he has a direct pecuniary interest he should declare it'. The position in the case of members of the House of Commons is quite different. It is important to appreciate
that two distinct rules evolved to govern the conduct of the members of that House. 

The earlier of the rules is that a member cannot vote in the House on a matter in which the member has a direct pecuniary interest. The narrow operation of this rule to voting in the House still permits participation in debate without any obligation of disclosure. Unfortunately though, the interpretation of a 'direct pecuniary interest' by Mr Speaker Abbott in 1811 and by subsequent Speakers' rulings restricted the operation of this rule so as to render it almost redundant. The 1969 Report from the Select Committee on Members' Interests (Declaration) (the Strauss Committee Report) described the rule as 'for practical purposes null and void'. The often quoted ruling of Mr Speaker Abbott in 1811 is:

This interest must be a direct pecuniary interest, and separately 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.

Consequently, no member is prevented from voting on public Bills which are matters of 'state policy' and only occasionally have members been prevented from voting on personal Bills.

On only one occasion has a vote been disallowed on a public Bill. This was in 1892 when three members voted financial assistance for an East African railway company of which two of them were directors and shareholders and the third a shareholder. This disallowance of their votes is difficult to justify in terms of Mr Abbott's ruling.

If an objection is to be made to a vote on the basis of this rule from the 17th century, it must be made as soon as the result of a division is declared. This rule merely prevents a member from voting; it requires no actual disclosure, nor does it prevent the member from participating in debates of the House.

The second rule of the House of Commons which actually required ad hoc disclosure of a personal interest is of more recent origin, having appeared early this century as a custom of the House: namely, to declare personal interests in the House when making a speech and to Standing Committees. This requirement of ad hoc disclosure remained a custom or convention until 1974. The only other obligation

17 4 HC (1969-70), 57.
18 Para 31.
19 HC Parl Debates (1811) 20, cc 1001-1012.
20 See the Strauss Committee Report at para 28.
21 D Limon and W McKay (eds), above note 15, p 362.
to make an ad hoc disclosure was in relation to personal Bills under SO 120 (Personal Business) where each member of a Committee on an opposed personal Bill was required to sign a declaration disclaiming any local or personal interest in the Bill before voting in Committee.

This second rule, to declare private interests when making a speech within the House, was seen as inadequate by the Strauss Committee in 1969 for a number of reasons: its limited application to only the House and Standing Committees; the uncertainty over the nature of the interest to be disclosed; and the lack of reference to the rule in such manuals as Erskine May. Accordingly, the Committee proposed a resolution for the House of Commons which the House finally adopted as a resolution on 22 May 1974:

That in any debate or proceeding of the House or its Committees or transactions or communications which a Member may have with other Members or with Ministers or servants of the Crown, he shall disclose any relevant pecuniary interest or benefit of whatever nature, whether direct or indirect, that he may have had, may have or may be expecting to have.

The effect of this resolution was to upgrade the custom for ad hoc disclosure within the House to a rule of the House, to which attached the penal sanctions of contempt if the rule were breached. Importantly, disclosure was required not only while participating in debate but in all other proceedings of the House and of its committees which included, of course, voting within the House. At least equally significantly, the obligation to disclose extended to all informal dealings which a member may have had with ministers, other members and civil servants. There was also a rather demanding requirement to declare not only those interests which a member had, but also those the member had had or may be expected to have.

In view of the limited interpretation of 'direct pecuniary interest' in the earlier rule of the House of Commons which rendered it useless (at least in the case of public Bills), the 1974 resolution adopted a different and wider expression: 'a relevant pecuniary interest or benefit of whatever nature, whether direct or indirect'. Notably, the obligation was still limited in terms of pecuniary interests. The Strauss Committee preferred to leave undefined this type of interest, relying instead on the common sense of members to interpret and apply the rule. However, the Committee did state:

An interest should be declared whenever a specific and relevant financial connection exists which might reasonably be thought to affect the expression of a Member's views on the matter under debate or other activity.

23 4 HC (1969-70), 57, paras 38-42.
24 At para 14.
26 Now The Guide to the Rules relating to the Conduct of Members (of the UK House of Commons) at para 38 requires a 'reasonable expectation'.
27 4 HC (1969-70), para 92.
28 At para 92.
Hence, remunerated employment, real estate holdings, shareholdings, financial investment, hospitality and sponsored travel were the types of financial interests which the Committee considered ought to be declared if relevant to the matters under discussion.29

Apart from escaping the narrow interpretation of 'direct pecuniary interest' in the earlier rule of the House of Commons, this second rule also applied to any discussions between members and other members, ministers and even civil servants. The use of the word 'proceeding' in the second rule ensures that disclosure within the House is required, not only during debates or voting, but also when asking a question — a time when disclosure of one's personal interest can be just as essential as it is in debates. The position in the UK in practice is that provided a member declares his or her interest to the House, the right to participate in debate and to vote remains unaffected. Only if the earlier rule applies, which would occur in exceptional circumstances, is the member deprived of the right to vote.

The adoption in 1996 of the Code of Conduct for Members of Parliament and The Guide to the Rules relating to the Conduct of Members made little change to these rules. The Code of Conduct requires that members 'always draw attention to any relevant interest in any proceeding of the House or its Committees, or in any communications with Ministers, Government Departments or Executive Agencies'. The Guide provides quite valuable assistance to members. In particular, it states the test as to when a declaration should be made: 'if it might reasonably be thought by others to influence the speech, representation or communication in question.'30

Declaration of interests in UK select committees

The detailed rules for ad hoc disclosure in relation to select committees are those contained in the First Report of the Select Committee on Members' Interests,31 which were later adopted by the House by resolution on 13 July 1992. Essentially, a member is obliged to withdraw from the committee's proceedings where the inquiry may directly affect a pecuniary interest of the member. Disclosure of other pecuniary interests must occur at the commencement of the committee's proceedings and at other relevant times, such as when the member asks a question of a witness which is directly related to those interests.

Commonwealth

Only since 1994 has the Senate required its members to make ad hoc disclosure of a conflict of interest. Such a requirement existed for a short period in the House of Representatives before it was revoked in 1988. Unfortunately, this occurred because ad hoc disclosure was seen as unnecessary with a register of interests in place. However, the House of Representatives retained the disqualification from voting which was first adopted by the House of Commons. The positions in the Senate and in the House of Representatives are considered separately.

29 At para 92.
30 At para 39.
31 House of Commons Paper No 108; Session 1990-91.
House of Representatives

The obligations of members of the House of Representatives to disclose personal interests and refrain from certain conduct are prescribed by SO 196 and SO 335 and by various resolutions of the House. Until 1984, the only requirements were those prescribed by SO 196 and SO 326. The former simply adopts the first of the two rules discussed above of the House of Commons, with the express addition of the limiting requirements of Mr Speaker Abbott's 1811 ruling:

196. No member shall be entitled to vote in any division upon a question (not being a matter of public policy) in which he has a direct pecuniary interest not held in common with the rest of the subjects of the Crown: The vote of a Member may not be challenged except on a substantive motion moved immediately after the division is completed, and the vote of a Member determined to be so interested shall be disallowed.

It is clear that the restricted and almost defunct nature of the first rule of the House of Commons has been transcribed into the standing orders of the House of Representatives by SO 196. The need to remedy the deficiencies of SO 196 was recognised by the Bowen Report. This report recommended the adoption by the Australian Parliament of a resolution in substantially the same terms as those of the House of Commons resolution of 22 May 1974. However, it questioned the House of Commons requirements to disclose interests the member 'may be expected to have' as possibly too stringent and unnecessary. On the other hand, it suggested that non-pecuniary interests should also be disclosed. In making these recommendations, the Bowen Report relied much more on the mechanism of ad hoc disclosure than on a register of interests:

... in much of the public debate on the disclosure of interests, there has been confusion between declaration and registration. As a consequence, in the public mind, the advantages of registration have been overvalued and the benefits of declaration not sufficiently appreciated. It is not sufficiently recognised as the Strauss Committee did in relation to members of Parliament, that a general register is directed to the contingency and that an interest might affect an officeholder's actions. The proper practice should be aimed at revealing an interest when it does so.

Although no resolution of the kind recommended by the Bowen Report was adopted by the Senate until 1994, a more limited obligation for ad hoc disclosure of certain personal interests was adopted by resolution of the House of Representatives on 9 October 1984. This was the fourth resolution adopted by the House on that
The preceding three resolutions established a public register of pecuniary interests of members of the House. The fourth resolution provided as follows:

(4) Declaration of interest in debate and other proceedings

That, notwithstanding the lodgment by a Member of a statement of the Member’s registrable interests and the registrable interests of which the Member is aware (1) of the Member’s spouse and (2) of any children who are wholly or mainly dependent on the Member for support, and the incorporation of that statement in a Register of Members’ Interests, a Member shall declare any relevant interest —

(a) at the beginning of his or her speech if the Member should participate in debate in the House, committee of the whole House, or a committee of the House (or of the House and the Senate), and

(b) as soon as practicable after division is called for in the House, committee of the whole House, or a committee of the House (or of the House and the Senate) if a Member proposes to vote in that division, and the declaration shall be recorded and indexed in the Votes and Proceedings or minutes of proceedings (as applicable) and in any Hansard report of those proceedings or that division:

Provided that it shall not be necessary for a Member to declare an interest when directing a question seeking information in accordance with standing order 142 or 143.

The obligation to declare ‘any relevant interest’ arose only when the member intended to participate in debate or to vote in the House or in committee. Unlike the 1974 resolution of the House of Commons, no requirement of ad hoc disclosure arose outside the House in discussions with ministers or the public service.

Furthermore, the nature of the interest to be declared — ‘any relevant interest’ — was left undefined, in contrast with the detailed definition of ‘registrable interests’ which were required to be declared to the Register of Members’ Interests. Instead of interpreting ‘relevant interest’ to refer to any interest which is or appears to be in conflict with a member’s public duties, it was interpreted by the House of Representatives Committee of Members’ Interests to mean those ‘registrable interests’ declared to the register.37 Yet this interpretation ignored the meaning of ‘relevant’: surely the interest is only relevant if it raises or appears to raise a conflict of interest. The Committee of Members’ Interests recommended to the House of Representatives either the revocation of the fourth resolution or its amendment so as to require only the declaration of pecuniary interests which could conceivably bring the member into a potential conflict of interest situation.38

Unfortunately, the House of Representatives adopted39 the former recommendation

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35 At para 12.
39 HR Debates 30 November 1988, at 3511, 3518.
on 30 November 1988 by revoking the fourth resolution as unnecessary duplication, given the obligation to declare the same interests to the Register of Members' Interests. If these interests had already been declared, there was no justification for requiring their disclosure again on an ad hoc basis. The House obviously overlooked the benefit of an ad hoc declaration at the very moment when a member is speaking. It is submitted that the prudent approach would have been for the House to amend the fourth resolution to require the disclosure of only those interests which could conceivably bring the member into a potential conflict of interest situation.

Consequently, there is presently no obligation on the part of members of the House of Representatives to declare ad hoc any personal interest which is or appears to be in conflict with their public duties. Standing Order 196, as noted earlier, is of no practical effect. The declaration of registrable interests to the public register occurs only once after being elected to the House (that is, within 28 days of making and subscribing the oath or affirmation as a member), although any change to these interests must be notified within 28 days of their occurrence.

**Senate**

A decade after the House of Representatives adopted both mechanisms of ad hoc disclosure and a register of interests, the Senate resolved to follow suit in 1994. Despite the House of Representatives revocation of the fourth resolution, the Senate passed a resolution requiring the disclosure of any 'relevant interest' on an ad hoc basis in terms practically identical to those of the House of Representatives' fourth resolution. Disclosure is required when a member first begins to participate in debate and before voting in any division. As submitted earlier, this is clearly the most desirable approach. Significantly, the obligation is merely to disclose the interest; the member retains the capacity to participate fully in the deliberations of the Senate.

Appropriately, the requirement to declare any 'relevant interest' has been interpreted by the Registrar of Senators' Interests to mean any interest from those required to be declared to the register which raises a conflict of interest. This is a judgment to be made sensibly by each senator.

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40 Resolution on Registration and Declaration of Senators' Interests: Senate Debates 3 March 1994, Vol s 163, at 1417-1423. This resolution was adopted in 1994 following the resignation of the Minister for Environment, Sport and Territories, Ros Kelly, over her role in the 'Sports-Rorts Affair': see H Evans (ed), *Odgers' Australian Senate Practice* (9th ed) Department of Senate Canberra 1999, p 161.

41 See para 5 of the Resolution on Registration and Declaration of Senators' Interests.

42 See the Advice from the Registrar of Senators' Interests (Peter O'Keefe) to the Committee of Senators' Interests entitled 'Oral Declaration of Relevant Interests in the Senate' (July 1998) in Appendix 6 to the 1998 Annual Report of the Committee of Senators' Interests (Report 1/1999) at 30-31: 'interests ... which a reasonable person would consider capable of being advanced by the outcome of a particular debate or vote so that there is a risk that the senator's natural concern to advance them may influence performance of their duty to act in the public interest'.
Committees

By SO 335 no member of the House of Representatives can sit on a committee if he or she has ‘any direct pecuniary interest’ in the subject of the inquiry. This, like SO 196, adopts the terminology which was so narrowly interpreted by Mr Speaker Abbott to require no disclosure on matters of public policy. But where a conflict of interest arises outside the narrow scope of SO 335, the practice is for members to declare this to any committee on which they serve. This is despite the revocation in 1988 of the fourth 1984 resolution which required ad hoc disclosure both in the House and its committees.43

Similarly, by SO 27(5) no senator can sit on a committee ‘if the senator has a conflict of interest in relation to the inquiry of the committee’. However, this is interpreted narrowly to apply only where there is ‘a real, immediate and personal conflict’ such as an inquiry into the affairs of the senator.44

In less direct instances of a conflict of interest, para 5 of the 1994 resolution merely requires senators to declare their interest at the commencement of the committee’s deliberations and at the time of any division — preserving the right to participate fully in the committee’s deliberations. Such a disclosure would be required where, for instance, there is an inquiry into the oil industry and a senator owns a relatively small parcel of shares in an oil company. On the other hand, if the inquiry is into the operations of that company, SO 27(5) would probably apply to prevent the senator from sitting on that committee.

States and Territories

The ad hoc declaration of a conflict of interest at the State and Territory level is governed primarily by standing orders. Most State Houses have simply adopted the first rule of the House of Commons with its restricted scope of operation to private Bills and its prohibition against voting. There is in Victoria, however, a statutory requirement for ad hoc disclosure of personal interests,45 while codes of conduct in NSW and Tasmania impose additional requirements of disclosure. The obligations of State members vary between the upper and lower Houses.

Members of the lower Houses

Members of the lower House of each of the State Parliaments are prevented from voting in the House if the member has a direct pecuniary interest in the matter. This prohibition against voting only is found in the Standing Orders of the lower Houses of NSW,46 Queensland,47 South Australia,48 Tasmania,49 Victoria50 and Western

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45 Members of Parliament (Register of Interests) Act 1978 (Vic), s 3 (1)(d).
46 Legislative Assembly of NSW, SO 186-187.
47 Legislative Assembly of Queensland, SO 158.
48 House of Assembly of South Australia, SO 170.
49 House of Assembly of Tasmania, SO 203.
50 Legislative Assembly of Victoria, SO 2.
Australia. It is, of course, based on the first rule of the House of Commons discussed above, and hence, like SO 196 of the House of Representatives, attracts the same restricted interpretation accorded to the House of Commons' rule by Mr Speaker Abbott's 1811 ruling.

Notably, in Western Australia, the description of the interest is somewhat wider, but in substance no different from a direct pecuniary interest — namely, 'an immediate direct personal pecuniary interest and does not include such an interest which is general'. Similar provision is also made in Tasmania.

In 1946, Mr Speaker Brassington in the Queensland Legislative Assembly made a Statement on Pecuniary Interest in relation to the former SO 158, which provided:

A Member shall not be entitled to vote either in the House or in a Committee upon any question in which he has a direct pecuniary interest, and the vote of any Member so interested shall be disallowed.

The Speaker adopted the definition of direct pecuniary interest given by Mr Speaker Gully of the House of Commons in 1898:

There must be a direct pecuniary interest of a private and particular and not of a public and general nature, and where the question before the House is of a public and general nature and incidentally involves the pecuniary interest of a class, which includes Members of the House, they are not prevented by the rule of the House from voting.

This interpretation was followed in the Legislative Assembly of Western Australia in 1935 when the Speaker ruled that members who belonged to the legal profession were entitled to vote on proposed amendments to the Legal Practitioners Act establishing a legal indemnity assurance fund.

A further useful definition was given by the Queensland Members' Ethics and Parliamentary Privileges Committee in 1996:

The definition of what constitutes a 'direct pecuniary interest' is not easy. In this Committee's view it constitutes a direct financial benefit accruing to the Member or a trust company or other business entity in which the Member has an appreciable interest. It would also extend to such an interest held by a Member's spouse, domestic partner or dependent child.

51 Legislative Assembly of Western Australia, SO 2, SO 195-196.
52 As above.
53 House of Assembly of Tasmania, SO 203.
55 A new SO 158 was substituted on 4 June 1999 in similar terms.
57 WA Parl Debates, 21 November 1935, at 1936.
However, it is not to be taken to extend to interests held in common with the public, or a large section of the public; or to vocational interests or matters of public policy.\textsuperscript{58}

The Committee noted that it was a ‘rare occurrence’ when this definition was satisfied.

The general rule in relation to disallowing a member’s vote is that a motion needs to be put to disallow the vote.\textsuperscript{59} This of course gives the House the option to allow or disallow the vote. Express provision to this effect is found in SO 204 of the Tasmanian House of Assembly and SO 158 in Queensland.

An interesting issue which is now confined to the NSW Parliament is whether its Houses possess, by virtue of the principle of necessity, the power to disallow the vote of a member pursuant to a standing order. Despite the seriousness of disallowing a vote and depriving the relevant constituents of their parliamentary representative, direct conflicts of interest are equally of concern. The avoidance of the latter appears necessary to protect the integrity of the parliamentary process.

\textit{Territories}

The position in the two Territories differs from that in the States. Members of both Legislative Assemblies are prevented not only from voting but also from participating in any debate. However, these restrictions only arise in circumstances where they are party to or have a direct or indirect interest in a contract with the Territory.\textsuperscript{60}

\textbf{A wider obligation}

While no obligation of ad hoc disclosure is prescribed by any of these standing orders, such an obligation is prescribed in Victoria by s 3(1)(d) of the \textit{Members of Parliament (Register of Interest) Act 1978} (Vic):

\begin{quote}
A Member shall make full disclosure to the Parliament of—

(i) any direct pecuniary interest that he has:
(ii) the name of any trade or professional organization of which he is a member which has an interest;
(iii) any other material interest whether of a pecuniary nature or not that he has

in or in relation to any matter upon which he speaks in the Parliament.
\end{quote}

A wider duty of ad hoc disclosure is also prescribed by codes of conduct in NSW and Tasmania. In the codes of both the NSW Houses,\textsuperscript{61} cl 1 requires members to declare any

\begin{itemize}
  \item \textsuperscript{58} Members’ Ethics and Parliamentary Privileges Committee, \textit{Review of the Register of Members’ Interests of the Legislative Assembly Report No 2 October 1996}, p 4.
  \item \textsuperscript{59} Queensland SO 158; Tasmania House of Assembly SO 204.
  \item \textsuperscript{60} Section 15 \textit{Australian Capital Territory (Self-Government) Act 1988} (Cth), Legislative Assembly of the ACT, SO 156; s 21(3) \textit{Northern Territory (Self-Government) Act 1978} (Cth).
\end{itemize}
conflict of interest whenever it arises in the execution of their office. Unlike the Victorian requirement, the duty is not confined to matters arising in parliament:

**Disclosure of conflict of interest**

(a) Members of Parliament must take all reasonable steps to declare any conflict of interest between their private financial interests and decisions in which they participate in the execution of their office.

(b) This may be done through declaring their interests on the Register of Disclosures of the relevant House or a Committee, or in any other public and appropriate manner.

(c) A conflict of interest does not exist where the Member is only affected as a member of the public or a member of a broad class.

Note that this provision prescribes an effective obligation on the part of members to disclose not only a pecuniary interest but 'any other material interest'.

Similarly, the Code of Ethical Conduct for Members of the House of Assembly of Tasmania in SO 2A requires members to declare a 'pecuniary interest in any matter being considered as part of their official duties as a Parliamentarian'. This is the optimum requirement given the significant role played by members in making representations to ministers and others on behalf of their constituents.

**Members of upper House**

Members of the upper Houses in all States (endowed with a second chamber) except Western Australia are subject to similar obligations to those imposed on members of their respective lower Houses. The same obligation not to vote on any question in which the member has a direct or pecuniary interest exists for members of both Houses in NSW, South Australia, and Victoria. However, the position in Tasmania is quite different. Instead of simply preventing a member from voting on any question in which the member has a direct pecuniary interest, SO 155(1) of the Legislative Council specifically requires the member to declare such an interest to the Council and empowers the Council to decide upon motion whether the member may vote. Standing Order 155(2) disallows any vote of a member who fails to declare such an interest.

Again, the statutory obligation to declare in parliament arises for members of the Victorian Legislative Council. Also, by virtue of their code of conduct, the wider duty of declaration is owed by members of the NSW Legislative Council when performing official duties.

**Committees of lower Houses**

The Standing Orders of the lower Houses of NSW, South Australia and Western

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62 Legislative Council of NSW SO 126.
63 Legislative Council of South Australia SO 225.
64 Legislative Council of Victoria SO 155.
65 Legislative Assembly of NSW SO 317.
66 House of Assembly of South Australia SO 321.
Australia\textsuperscript{67} disqualify members from sitting on select committees if they are in some way interested in the matter before the committee. The nature of the interest varies: 'a pecuniary interest' in Western Australia; 'a direct pecuniary interest' in South Australia; and in NSW, the member need only be 'personally interested'. No disqualification from sitting on a committee arises in Tasmania\textsuperscript{68} or Victoria, although in each State, members are disqualified from voting on matters before the committee in which they have a direct pecuniary interest.\textsuperscript{69}

In Queensland, members are neither denied the right to sit on or vote in committees, but SO 203 requires them to 'disclose to the Committee any conflict of interest the Member may have in relation to a matter before a Committee'. Note that the interest is not confined to a pecuniary interest. Similar obligations apply in NSW and Tasmania (by each code of conduct) and in Victoria (by statute).

The standing orders of both the ACT\textsuperscript{70} and the Northern Territory\textsuperscript{71} prevent members from sitting on a committee in which they have a direct pecuniary interest (ACT) or are 'personally interested' (Northern Territory).

**Committees of upper Houses**

Members of the upper Houses of NSW,\textsuperscript{72} South Australia,\textsuperscript{73} Tasmania\textsuperscript{74} and Western Australia\textsuperscript{75} are prevented from sitting on committees if they have an interest in the subject of the inquiry. The nature of the interest again varies from being 'pecuniarily interested' in NSW, 'personally interested' in Western Australia (select committees only), to a direct pecuniary interest in South Australia and Tasmania. Members on standing committees of the Western Australian Legislative Council are only prevented from voting if they have a direct pecuniary interest.\textsuperscript{76} Similarly, in Victoria, SO 155 simply denies the right to vote. However, here again the statutory requirement to declare a conflict of interest arises under s 3(1)(d) of the *Members of Parliament (Register of Interests) Act 1978* (Vic).

**Nature of a pecuniary interest**

The concept of a 'pecuniary interest' arises not only in this context of ad hoc disclosure but also occurs in connection with the disqualification of members having a pecuniary interest in a government contract. Further, it often arises in a more general way in relation to a register of interests, which is often confined to the declaration of

\textsuperscript{67} Legislative Assembly of Western Australia SO 357.
\textsuperscript{68} House of Assembly of Tasmania SO 205.
\textsuperscript{69} Legislative Assembly of Victoria SO 2.
\textsuperscript{70} Legislative Assembly of the ACT SO 224.
\textsuperscript{71} Legislative Assembly of the Northern Territory SO 263.
\textsuperscript{72} Legislative Council of NSW SO 238 and 257B.
\textsuperscript{73} Legislative Council of South Australia SO 379.
\textsuperscript{74} Legislative Council of Tasmania SO 234.
\textsuperscript{75} Legislative Council of Western Australia SO 343.
\textsuperscript{76} Legislative Council of Western Australia SO 326B.
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pecuniary interests. In each of these contexts, the distinction may be drawn between
direct and indirect pecuniary interests — and any reference to a pecuniary interest
inevitably raises the distinction between a pecuniary and non-pecuniary interest.

It is important to identify in each of these contexts whether the relevant interest
is in a contract, a matter, an inquiry or something else. This obviously affects the
nature of the interest. Clear definitions of each of these descriptions of interests are
difficult to formulate.

A useful description of a pecuniary interest is given by the Riordan Report: ‘any
direct or indirect financial concern, stake or right in, or title to, any real or personal
property or anything entailing an actual or potential benefit.’

The difference between a direct and indirect pecuniary interest is not entirely clear.
The obvious situation to consider is where a member is a shareholder in a company
which possesses a direct pecuniary interest. The nature of a shareholder’s interest
was considered in Chapter 4 in relation to the disqualification of government
contractors under s 44(v) of the Commonwealth Constitution. But the issue in that
context is whether the member as a shareholder has an indirect interest in the
government contract to which his or her company is a party. That is a narrow
inquiry compared with whether the member has a pecuniary interest per se.

In the context of ad hoc disclosure and a register of interests, the focus is broader.
Appreciating the challenge, as noted earlier, the Queensland Members’ Ethics and
Parliamentary Privileges Committee attempted to define a ‘direct pecuniary interest’
for the purposes of Mr Speaker Abbott’s 1811 ruling:

[I]t constitutes a direct financial benefit accruing to the Member or a trust company
or other business entity in which the Member has an appreciable interest. It would
also extend to such an interest held by a Member’s spouse, domestic partner or
dependent child. ... However, it is not to be taken to extend to interests held in
common with the public, or a large section of the public; or to vocational interest
or matters of public policy.

The Western Australian Commission on Government also considered that an
indirect pecuniary interest arose where the official’s family, rather than the official,
receives the financial benefit. The Commission recommended that the obligation
of ad hoc disclosure extend to the disclosure of family interests in so far as they are
’a part of the financial arrangements of the member’.

Since the purpose of disclosure obligations is to deal with an apparent or actual
conflict of interest, technical legal interpretations of ‘pecuniary interest’ should be
eschewed in favour of a practical definition which looks to see if the member stands
in any way to benefit financially or materially from the situation. Any interests

77 Report of the Commonwealth Joint Committee on Pecuniary Interests of Members of
78 Members’ Ethics and Parliamentary Privileges Committee, above note 59, p 4.
80 At para 9.2.4.5(2).
which fall outside this test must therefore constitute non-pecuniary interests. The alternative solution is to prescribe in some detail the nature of the interests required to be disclosed. This approach has been adopted in Canada where, for instance, in Manitoba, *The Legislative Assembly and Executive Council Conflict of Interest Act 1983* presumes an 'indirect pecuniary interest' to exist where a member is sufficiently connected to a person, corporation, partnership or organisation which (or a subsidiary of which) has a direct pecuniary interest in the matter. The connection can be as a partner, guarantor or creditor of the other party, or in relation to corporations, as a shareholder (with 5 per cent of the issued capital stock), director or officer of the corporation.\(^81\) Overriding these intricate relationships is an exemption in respect of any interest valued at less than $500\(^82\) or, in the case of an interest in a government program, contract or service, valued at less than 1 per cent of the value of the program.\(^83\)

Although the preferable course is to avoid complex definitions of this nature, unless members declare a conflict of interest in appropriate cases, detailed rules may become necessary.

**Enforcement**

If a member fails to comply with a standing order by voting in parliament when disqualified from doing so, a motion needs to be passed by the House to disallow that vote.

In Victoria, enforcement of the obligation of disclosure under s 3(1)(d) of the *Members of Parliament (Register of Interests) Act 1978* lies with the appropriate House. By s 9 of the Act, a wilful contravention constitutes contempt of parliament and the member may be fined up to $2000 in addition to other sanctions able to be imposed for contempt. Failure to pay the fine within the prescribed time renders the member's seat vacant.

Failure to comply with the obligation of disclosure found in the codes of conduct in NSW and Tasmania would constitute contempt of parliament even though this is not expressed in any of the codes. The sanctions for contempt lie with each House (see Chapter 5). However, in NSW, the Independent Commission Against Corruption (ICAC) is also empowered to make a finding of 'corrupt conduct' where there is a substantial breach of either code.\(^84\) Obviously this will not be the case with every failure to make an ad hoc disclosure.

**Recommendations for reform**

Only members of the Commonwealth Senate, of the NSW and Victorian Parliaments, and of the Tasmanian House of Assembly are obliged to make ad hoc disclosure of their interests. Indeed, the more common obligation prescribed by the

\(^81\) Section 3(1) *The Legislative Assembly and Executive Council Conflict of Interest Act 1983*.

\(^82\) Section 3(6).

\(^83\) Section 3(3).

\(^84\) Section 9 *Independent Commission Against Corruption Act 1988* (NSW).
standing orders of the Australian State Parliaments is merely to abstain from voting rather than one of disclosure, and even then the nature of the interest must be a direct one. Consequently there appears to be a need in Australia for an effective obligation of ad hoc disclosure to be imposed on members.

Apart from the sanctions able to be imposed, it is probably unimportant whether the obligation is imposed on members by a House resolution, standing orders or statute. What is important is that the obligation is drafted in sufficiently wide terms to cover the conflicts of interest which may arise in public office. For an effective obligation of ad hoc disclosure, the following need to be addressed: (1) when disclosure is required; (2) the nature of the interest to be disclosed; (3) consequences of disclosure; and (4) sanctions.

When disclosure is required

There seems to be no reason why an obligation of ad hoc disclosure is not appropriate in relation to all dealings which members have with each other within or outside parliament and with other public officials. To confine the requirement to parliamentary proceedings fails to address the many dealings members have with the executive branch and the private sector. This was recognised by the Nolan Committee in the United Kingdom:

> It is particularly important to emphasise that this obligation exists on each and every occasion when a Member approaches other Members or Ministers on a subject where a financial interest exists. Such contacts are often informal and private, and are therefore where the greatest risk of impropriety arises.\(^{85}\)

Nature of interest to be disclosed

The approach adopted here in Australia in relation to the limited obligations of disclosure and in the UK is to define the interest generally, leaving it to the members to decide whether they possess such an interest. The degree of specificity of interests to be disclosed will to some extent be dependent upon the particular sanctions imposed for non-disclosure. Where specific and severe penalties are prescribed for imposition by the courts, a far greater degree of specificity is needed than would be the case where the enforcement role is left to a parliamentary committee or to the House itself.

How, then, should this interest be defined? Should the interest be limited to one of a pecuniary nature or should it also cover a non-pecuniary interest? The 1974 resolution of the House of Commons refers only to pecuniary interests, as do the standing orders of most of the Australian State Parliaments and the codes of conduct in NSW and Tasmania. The notable exception is the statutory requirement in Victoria to declare not only 'any direct pecuniary interest', but also 'any other material interest whether of a pecuniary nature or not'.\(^{86}\) Non-pecuniary interests cover personal interests which arise in assisting or promoting

\(^{85}\) Committee on Standards in Public Life First Report at para 63.

\(^{86}\) Members of Parliament (Register of Interests) Act 1978 (Vic), s 3(1)(d).
the interests of a relative or friend, or the interests of an organisation or association such as a sporting, cultural or charitable body of which the member of parliament is a member. Also included would be the case where a member has made a complaint to the House of a breach of privilege. That member should not sit on any committee which investigates that complaint and should probably abstain in any vote in the House on that matter. There is a clear need for these interests to be disclosed.

A further aspect to consider is whether the interests of a member’s family should also be disclosed. This is likely to be a controversial issue in the same way that the obligation to disclose the interests of one’s immediate family to a register of interests has been controversial. Whatever view is taken on the one mechanism would presumably apply to the other. Despite the invasion of privacy suffered by a member’s family, there are sufficient examples in public life where at least an appearance of a conflict of interest has arisen to justify such an intrusion. Significantly, the now revoked fourth resolution of the House of Representatives also required a member to disclose any ‘relevant interests’ of the member’s spouse and dependent children. It is essential that this obligation to declare family interests be confined to those interests of which the member is aware.

It is, of course, necessary to maintain a sense of balance and proportion in judging whether the nature of the personal interest involved raises or even appears to raise a conflict of interest. If a member or a member’s spouse happens to be a member of the St Vincent de Paul Society, this is not to say that such an interest must be disclosed in a debate on homelessness in Australia; only if the member feels that their degree of involvement in the Society could be seen to influence their stance on the issue is disclosure of that interest necessary. If in doubt, disclosure is the preferable option. In many cases, a simple statement that one is a member or associate of a particular organisation is all that is required. Ultimately, the responsibility rests with the member.

87 See *Demicoli v Malta* (1992) 14 EHRR 47, where the proceedings of the Maltese House of Representatives which found the editor of a magazine guilty of contempt were held by the European Court of Human Rights to infringe art 6 of the European Convention on Human Rights because the two members of the House who had made the complaint of contempt had participated.


89 As above.

90 It was this same test which Lord Hoffman was held to have failed to apply correctly to himself which caused the setting aside of the decision of the House of Lords allowing the extradition of Senator Pinochet from the UK in 1999. It was held that Lord Hoffman ought to have disqualified himself from hearing the matter on account of his chairmanship of Amnesty International Charity Ltd which was connected with Amnesty International, an intervener in the proceedings: *R v Bow Street Metropolitan Stipendiary Magistrate; ex parte Pinochet Ugarte (No 2)* [1999] 1 All ER 577 (HL).
Consequences of disclosure

Mere disclosure of a personal interest reveals but does not necessarily resolve a conflict of interest. Further action may be necessary to ensure that the public interest is protected. However, in most situations it is sufficient for members to disclose their personal interest in the course of performing their official functions. The one obvious exception is when sitting on a parliamentary committee which is inquiring into a matter in which the member has a direct personal interest. In such cases, the member ought to disclose the interest and abstain from sitting on that committee. Otherwise, members who have made appropriate disclosure should be permitted to continue to perform their official functions, whether this be in parliamentary debates, committee proceedings, or in making representations to ministers or other individuals or bodies. To require members to abstain from performing these functions unnecessarily deprives their constituents of parliamentary representation, nor is it likely that their continued participation will confer improper benefits on themselves or others. At this point a distinction can be drawn between members and ministers. Ministers are usually required to abstain from exercising their executive powers in matters in which they are personally interested because of the risk of self-aggrandisement. On the other hand, the functions of members do not provide the same opportunity or risk.

A more robust approach is taken in Canada where certain Provinces go well beyond merely requiring members to declare their personal interests. They are required to disclose not only the nature of any direct or indirect pecuniary interest but must also withdraw from the proceedings and not attempt to influence their determinations. The Provinces which have adopted this approach are Manitoba, Nova Scotia, and Prince Edward Island. Of particular interest is the approach adopted in Manitoba where, by virtue of s 4 of The Legislative Assembly and Executive Council Conflict of Interest Act 1983, members are obliged:

(i) to disclose the general nature of any direct or indirect pecuniary interest or liability, which they or their dependents have in any matter which arises at a meeting of the Legislative Assembly, a committee thereof or a Crown agency;
(ii) to withdraw from the meeting immediately with no right to participate or vote; and
(iii) to refrain from influencing the determination of the matter in any way.

Even if a member misses one of these meetings at which they would have had to disclose their interest, they are still required to disclose that interest at any subsequent meeting and to refrain from influencing the determination of the matter.

90 Section 4 The Legislative Assembly and Executive Council Conflict of Interest Act 1983.
92 Section 2 Members' Integrity Act 1994, ss 7 and 10 Conflict of Interest Act 1986.
93 Section 9 The Legislative Assembly and Executive Council Conflict of Interest Act 1983.
Sanctions

The most potent sanction for members is that of adverse publicity. A failure to make an ad hoc disclosure within parliament or elsewhere, if discovered, will severely embarrass a member. Preferably, infringements of the obligation to disclose or to act afterwards in the prescribed manner should be dealt with as contempt of parliament by the House to which the member belongs. Consistent with the more stringent approach found in Manitoba, there enforcement lies with the Legislative Assembly95 and with the courts upon complaint from a voter.96

Members as 'public officers'

The position of a 'public officer' attracts certain duties and liabilities at common law and in equity.97 It would appear that in Australia,98 both members of parliament99 and ministers100 are public officers within the definition given in R v Whitaker:

an officer who discharges any duty in the discharge of which the public are interested, more clearly so if he is paid out of a fund provided by the public.101

Various common law offences and equitable remedies attach to misconduct by public officers. Of these, at least two rules of law may connect with a failure to disclose a personal interest in the execution of one's public duties. First, public contracts and any other official action may be set aside or avoided where they have been negotiated or decided upon by a public officer who fails to disclose a personal interest in the matter.102 This principle operates irrespective of any corrupt or wilful intent on the part of the officer. It is more likely to arise with ministers in administering their departments than with members of parliament. Parliamentary proceedings are not within the scope of this principle.103 Second, private contracts which tend to create a conflict of interest with a member's duty are illegal on grounds of public policy; Wilkinson v Osborne;104 Home v Barber.105

95 Section 23(5).
96 Section 20.
97 See P D Finn, 'Public officers: some personal liabilities' (1977) 51 ALJ 313.
98 In the United Kingdom, ministers but not members of parliament are regarded as 'public officers' — see the Report of the Royal Commission on Standards of Conduct in Public Life 1976 (the Salmon Report), Cmnd 6524, paras 307 and 308.
99 R v White (1875) 12 SCR (NSW) (L) 322; affirmed by a majority of the High Court in R v Boston (1923) 33 CLR 386 at 392-393, 401-402 and 408.
100 Smith v Christie (1920) 55 DLR 68.
101 [1914] 3 KB 1283 at 1296.
102 P D Finn, above note 97 at 316-317; see R v Hendon RDC; Ex parte Chorley [1933] 2 KB 969, and Dines v Grand Junction Canal (1852) 3 HLC 759; 10 ER 301.
103 P D Finn, above note 97 at 316 note 38.
104 (1915) 21 CLR 89.
105 (1920) 27 CLR 494.
Although reliance on the first of these rules in Australia appears to have been minimal, it is worth retaining. These rules do not make redundant the formal mechanisms of ad hoc disclosure which encourage the actual disclosure of personal interests. Hopefully, they set in place procedures whereby action can be taken untainted by any real or apparent conflicts of interest.

**Conclusion on ad hoc disclosure**

A fundamental standard of ethical behaviour of members is to disclose conflicts of interest whenever they arise in the performance of their official duties. A failure to do so at the critical moment when a member speaks or makes representations undermines the public trust which members must so jealously protect. It is an obligation which arises as much outside as inside the parliamentary chamber. In most situations, disclosure of the conflict is all that is needed, for this allows the persuasiveness of the member’s views to be more accurately assessed. The adoption of a register of interests, which is considered next, provides no justification for dispensing with an obligation of ad hoc disclosure. Both mechanisms are needed to ensure that all conflicts of interest are revealed.

**Register of interests**

A register of members’ interests has been adopted by every House in Australia at the Commonwealth, State and Territory level. The popularity of this mechanism of declaration is due in part to the ease with which it may be implemented and the clear message it sends of transparency in parliamentary affairs. Their adoption at the parliamentary level is generally matched at the executive level with ministers and public officials also declaring their personal interests to some form of register.

In the past, debate has waged over the merits of this mechanism. The arguments for and against a register were closely examined in both the Riordan Report\(^\text{106}\) and the subsequent Bowen Report.\(^\text{107}\) The principal arguments against a register are that it:

- constitutes an invasion of privacy;
- renders members vulnerable to political attack;
- deters people from entering public life;
- is too easy to avoid;
- denigrates parliament and impugns the integrity of members;
- is unnecessary, as it is sufficient to rely on the opposition and the media; and
- duplicates information already available from other sources.

On the other hand, a register of interests has been supported on several grounds including that it:

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• allows proper weight to be given to the views expressed by members;
• increases the likelihood of detection of conflicts of interest;
• consequently enhances public confidence; and
• avoids fabricated conflicts of interest.

The advantages on their face outweigh the disadvantages, especially if the latter are addressed in the specific requirements of the register. The invasion of privacy can be reduced by limiting public access to those details which relate to the member's family. Avoidance of the register's requirements may be thwarted by careful and specific prescriptions of interests to be declared.

Although the Riordan Report recommended the adoption of a register of interests for members of the Commonwealth Parliament, the Bowen Report preferred to rely on the mechanism of ad hoc declaration. However, in the end, the arguments in favour have obviously won through, as there is a register of interests in place in every Australian legislature. Yet to what extent their adoption has reinforced the integrity of members is difficult to assess. A cynical reviewer would argue that registers of interests provide an opportunity to undermine that integrity by exposing deficient declarations. On the other hand, declarations to a register are likely to remind members of their obligation to be constantly aware of potential and actual conflicts of interest. That deterrent effect is impossible to measure.

A comparison of the various Australian registers for members involves a consideration of several key aspects: the method of establishing the register; the declaration of family interests; access to the register; interests to be declared; frequency of declarations; and enforcement. Each of these is considered in turn.

Establishment of register

Various means have been adopted to establish a register of interests. The most prevalent is by legislation which was used in NSW,108 South Australia,109 Tasmania,110 Victoria,111 Western Australia112 and the Northern Territory.113 For the House of Representatives,114 the Senate,115 Queensland116 and the ACT,117 the

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108 Parliamentary (Disclosure of Interests) Act 1996 (Tas), made pursuant to s 14A Constitution Act 1902 (NSW).
110 Parliamentary (Disclosure of Interests) Act 1996 (Tas).
111 Members of Parliament (Register of Interests) Act 1978 (Vic).
113 Legislative Assembly (Register of Members' Interests) Act 1982 (NT).
114 Three resolutions adopted on 9 October 1984, amended on five occasions up to 1997.
115 Standing Orders 22A and resolution of 17 March 1994 (J 1421).
116 Resolution for Members’ Register of Interests (as of 1 July 1999).
registers were established by resolution.

The two most significant advantages of establishing a register by legislation are that it usually ensures a common regime for both Houses of a bicameral parliament and any change to or abandonment of a register requires the approval of both Houses. It is noted below that a statutory basis does not necessarily mean that the Houses lose control of the register.

Declaration of family interests

In Australia, four different approaches have been adopted to the declaration of family interests.

The first is the disclosure of family interests, so far as the member is aware, with full public access — the position in the Commonwealth House of Representatives, South Australia and the ACT (note that in South Australia that family interests need not be distinguished from those of the member). In the ACT, access is given through the Clerk's Office on request, provided the member concerned is advised of the name of the person seeking access and the reason for doing so.

The second approach is to require disclosure of family interests with limited access. This is the position for the Senate and in Queensland. The declaration of senators' family interests are kept separate, with public access only permitted on the direction of the Committee of Senators' Interests. In Queensland, members declare their own interests to a public register and those of their family to a 'Register of Related Persons' Interests' but only in so far as they are aware of such interests. Access to the latter register is limited to various officials for monitoring purposes.

Thirdly, there is partial disclosure of family interests to which full public access is given — the position in Victoria and the Northern Territory. In Victoria, the only family interest expressly required to be disclosed is that under the general catch-all category of any other substantial interest 'of a member of [the member's] family of which the member is aware' which may result in a conflict of interest. A similar provision exists in the Northern Territory in addition to the disclosure of any beneficial family interests in a trust.

Finally, no specific disclosure of family interests is required in NSW, Tasmania or Western Australia. In NSW, ICAC recommended the disclosure of family interests so far as the member is aware. At present it is within each member's discretion to

119 The Members' Ethics and Parliamentary Privileges Committee, above note 58, in the absence of any obvious problems, recommended no change to this position (rec 9) although it recommended fuller disclosure of family trusts (recs 19 and 20).
120 Section 6(2)(b) Members of Parliament (Register of Interests) Act 1978 (Vic).
121 Section 5(1)(b) and (e) Legislative Assembly (Register of Members' Interests) Act 1982 (NT).
122 See the First Report of the Legislative Assembly Standing Ethics Committee (October 1997) at 30; ICAC, Investigation into Parliamentary and Electorate Travel: Second Report — Analysis of administrative systems and recommendations for reform December 1998 which refers to a case where members of the NSW Parliament booked travel arrangements with a particular travel agent associated with a member's family.
disclose family interests under the general catch-all category of interests which might appear to raise a conflict of interest.\textsuperscript{123} Similarly, in Western Australia, the general catch-all category appears wide enough to include family interests.\textsuperscript{124} Less clear is the comparable category in Tasmania which appears to be confined to other such interests of the member.\textsuperscript{125}

Given the invasion of privacy, the declaration of family interests is the most controversial aspect of a register of interests. Critical in this debate is the definition of ‘family’ and whether public access is permitted. All registers requiring the declaration of family interests include those of the member’s spouse and dependent children. Others also include de facto spouse, children whether dependent or not, and other dependents. The widest definition is that given in Queensland\textsuperscript{126} to a ‘related person’:

> ‘related person’, in relation to a member, means —
>
> (a) the spouse of the member;
>
> (b) a child of the member who is wholly or substantially dependent on the member; or
>
> (c) any other person —
>
> (i) who is wholly or substantially dependent on the member; and
>
> (ii) whose affairs are so closely connected with the affairs of the member that a benefit derived by the person, or a substantial part of it, could pass to the member.\textsuperscript{127}

‘Spouse’ is defined to include a de facto spouse. ‘Child’ is defined to include ‘an adopted child, a step-child or an ex-nuptial child’.

The South Australian register uses the expression ‘a person related to a Member’ which, while not defined as widely in some respects as the Queensland definition, goes further by including family companies of members and trustees of family trusts.\textsuperscript{129}

The declaration of the interests of a member’s dependents is more easily justified than those of a financially independent spouse. In the latter case, some amelioration can be provided by confining the member’s obligation to declare only those interests

\textsuperscript{123} Clause 16 Constitution (Disclosures by Members) Regulation 1983 (NSW).

\textsuperscript{124} Section 15 Members of Parliament (Financial Interests) Act 1992 (WA). Note that the WA Commission on Government Report No 4 (July 1996) recommended in para 9.2.4.5 that there be a requirement to register the financial interests of the member’s family ‘in so far as they are part of the financial arrangements of the member’.

\textsuperscript{125} Section 9 Parliamentary (Disclosure of Interests) Act 1996 (Tas).

\textsuperscript{126} The ACT register is also widely drafted to include all ‘who are wholly or mainly dependent on the Member for support’.

\textsuperscript{127} Clause 1 Resolution for Members’ Register of Interests (Qld).

\textsuperscript{128} Section 2(1) Members of Parliament (Register of Interests) Act 1983 (SA).
of which the member is aware. Members are less likely to have any detailed knowledge of the business affairs of their spouses engaged in significant business undertakings or professional practices.

The arguments against the declaration of family interests are principally twofold: the invasion of privacy and the difficulty for a member in knowing of the relevant interests. On the other hand, their declaration can be justified on two grounds: first, that family interests are just as capable of raising an actual or apparent conflict of interest as the member’s own interests and second, that their exclusion would leave open an avenue of avoidance, the mere existence of which could undermine public confidence in the register.

Access to the register

Public access is available to all registers except in Victoria and in relation to the details of family interests in the Senate and in Queensland. Access is granted in two ways. First, the register may be inspected at the office of the Clerk of the House (or that of the appropriate official) during normal business hours. Secondly, the register is tabled in each House within 14 to 21 days of its compilation and published as a parliamentary paper. Any changes to the register are also tabled. Provision is usually made permitting at least parts of the register to be copied manually or by photocopying. Restrictions are often imposed on the publication of the details obtained to ensure that they are fair and accurate. In the Northern Territory, conditions are attached to public access: access is not given to the whole register but only in respect of a particular member and family, and the person inspecting must provide his or her name and address, which is recorded and publicly available. Similarly, access is given to the ACT register only through the Clerk’s Office on request provided the member concerned is advised of the name of the person seeking access and the reason for doing so.

The necessity for public access to the register is beyond question: it is essential if the register is to achieve its twin objectives of enhancing public confidence in the integrity of members and providing a means of monitoring any potential conflicts of interest. A closed register is incapable of achieving the first of those objectives, while the second would require an expensive monitoring authority which is unlikely to be as effective as public monitoring. It would seem to be only a matter of time before the registers are made available on the internet.

In Victoria, public access is confined to a summary of the register’s details published as a parliamentary paper. Access to the Senate register is confined to the members of the Committee of Senators’ Interests and the Registrar unless the Committee tables those details in the Parliament. In Queensland, the Register of Related Persons’ Interests may only be inspected by the Speaker, the Premier, other
parliamentary Leaders, the Chairman and members of the Members' Ethics and Parliamentary Privileges Committee, and the Criminal Justice Commission.\textsuperscript{132}

\textbf{Interests to be declared}

The prescription of the interests requiring declaration is both critical and difficult. Unless all interests capable of raising a conflict of interest are covered, public confidence is unlikely to improve. Yet prescribing all interests creates a list of such complexity and legality that it confuses both members and the public. In the end, members must comply within the spirit of the register, and correspondingly, the public must at times make allowances for the difficulties of compliance.

Significantly, none of the Australian registers requires a declaration of the value of the various interests disclosed. This endeavours to ensure that the register is not one of wealth but merely one of interests.\textsuperscript{133}

The emphasis of most registers is on the pecuniary interests of members (and of their families). However, conflicts of interest are capable of arising also with non-pecuniary interests.\textsuperscript{134} Therefore, it is desirable that there be a declaration of interests under four categories: assets; liabilities; sources of income and other benefits; and other interests. All the Australian registers cover these four categories except those in Victoria and the Northern Territory.\textsuperscript{135}

The most comprehensive list of interests was first prescribed for the House of Representatives. The following provides a mere outline of the various interests to be declared under those four categories:

- **assets** — shareholdings, company positions, beneficial interests in trusts, trusteeships, partnership interests, real estate, debentures and other investments;
- **liabilities**;
- **sources of income and other benefits** — for example, gifts and hospitality; and
- **other interests** — for example, memberships of organisations.

There is also a catch-all category which covers any other interests where a conflict of interest with a member's public duties could foreseeably arise or be seen to arise.

Three different approaches can be found at the State and Territory level for disclosing other interests which may appear to give rise to a conflict of interest. The

\textsuperscript{132} Clause 13.
\textsuperscript{133} The WA Commission on Government Report No 4 (July 1996) recommended that no value be disclosed: para 9.2.3.5.
\textsuperscript{135} Although liabilities not expressly included, the catch-all category in each (s 6(2)(i) Members of Parliament (Register of Interests) Act 1978 (Vic) and s 5(1)(c) Legislative Assembly (Register of Members' Interests) Act 1982 (NT)) would cover them if they are likely to raise a conflict of interest.
least demanding is that adopted in NSW, Tasmania and Western Australia, where a member has a discretion whether or not to disclose such an interest. Next is the approach in South Australia, Victoria, the ACT and the Northern Territory, where disclosure is required if a member forms the view that such an interest may appear to raise a conflict of interest. Finally, the most stringent requirement is that for the Senate and in Queensland, where a member must disclose an interest where objectively a conflict of interest arises, appears to arise or could foreseeably arise. The last of these is the most appropriate, particularly because it complements the optimum obligation of ad hoc disclosure.

Tracing interests

The disclosure of shareholdings often goes no further than disclosing the name of the company and the fact that shares are held by a member or by his or her family. However, the Resolution of the Legislative Assembly of Queensland of 1 July 1999 requires further disclosure where the disclosed shareholding constitutes a controlling interest or where it is in a private company. In the case of a controlling interest, that company's own shareholdings must be disclosed. With a private company shareholding, disclosure of that company's investments or beneficial interests is also required and, in the case of a holding company, its subsidiaries and their subsidiaries must also be disclosed along with their investments and beneficial interests. These details contrast with the meagre requirements of other registers which, for example, only require a description of the principal objects of a private company. Significantly, only the Victorian register sets a threshold minimum value of $500 before shareholdings need be disclosed.

The disclosure requirements of the Queensland register, effective from 1 July 1999, include for the first time the disclosure of details of the investments and beneficial interests of family and business trusts and private companies. This gives effect to the recommendation of the Members' Ethics and Parliamentary Privileges Committee to ensure that those trusts and private companies were not used to circumvent the disclosure requirements. The Committee's report noted that there was no evidence before it of such a practice but wished to provide for greater transparency.

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136 Clause 16 Constitution (Disclosures by Members) Regulation 1983 (NSW).
137 Section 9 Parliamentary (Disclosure of Interests) Act 1996 (Tas).
139 Section 4(3)(g) Members of Parliament (Register of Interests) Act 1983 (SA).
140 Section 6(2)(l) Members of Parliament (Register of Interests) Act 1978 (Vic).
142 Section 5(1)(e) Legislative Assembly (Register of Members' Interests) Act 1982 (NT).
143 Clause 7(c) Resolution for Members' Register of Interests (Qld).
144 See cl 7(a) and (b).
145 See for example cl 12(c) Constitution (Disclosures by Members) Regulation 1983 (NSW); s 6(e) Parliamentary (Disclosure of Interests) Act 1996 (Tas).
146 Section 6(2)(c) Members of Parliament (Register of Interests) Act 1978 (Vic).
147 Members' Ethics and Parliamentary Privileges Committee, above note 58.
Frequency of declarations

All registers require an initial declaration, usually to be made within the first month or so of subscribing the oath or making an affirmation on being sworn-in as a member. In Queensland, the initial declaration covers those interests held at the date of being elected.148

In relation to subsequent declarations, four different approaches are found in Australia:

(1) annual declarations of all relevant interests (required in NSW, South Australia and Tasmania);

(2) annual declarations only of changes to the initial declaration (required in Victoria and Western Australia);

(3) an initial declaration with all changes notified within a prescribed period of their occurrence (required in both federal Houses and the ACT); and

(4) full annual declarations with all changes notified within a prescribed period of their occurrence (required in Queensland149 and the Northern Territory).

For those registers which require the details to be updated, notification must be given of changes within a period of 28 days for the House of Representatives and Senate, one month for Queensland and 60 days for the Northern Territory. Updates of a register within a prescribed period seems the preferable approach since it allows the register to be as accurate as possible. However, this benefit comes at an administrative cost to the member who must remember to make the necessary notification. This becomes more onerous when there are changes to the declared interests of the member’s family. Appropriately, the obligation is confined to those changes of which the member is aware. The Queensland Members’ Ethics and Parliamentary Privileges Committee has adopted the practice of writing to the members of the Legislative Assembly twice a year to remind them of their obligation to update their declared interests within a month of their occurrence.150

This practice has also been implemented in the Senate.

None of the Australian registers requires a member, on ceasing to be a member, to file a declaration of those changes which occurred since the last declaration. Certain overseas registers require an annual declaration to be lodged for the year in which the member left parliament, or a declaration to be lodged within a prescribed period of leaving.151 This is an appropriate requirement which ought to be adopted in Australia.

148 See cl 5(1) of the Resolution of Members’ Register of Interests.

149 In requiring any changes to ‘the last statement of interests given by the Member’, cl 5(2) of the Resolution of Members’ Register of Interests is unclear as to whether it applies to both the statement of the member’s own interests and that of the member’s family.

150 Members’ Ethics and Parliamentary Committee, above note 57, s(d).

151 This was the position in British Columbia under the Financial Disclosure Act 1979. See also Integrity in Public Life Act 1987 (Trinidad and Tobago).
Enforcement

The nature of the enforcement regime of any register depends on the register's legal basis and the particularity of the register's requirements. It is clear that some enforcement regime is necessary to ensure public confidence in this mechanism of disclosure.

The enforcement regimes of the Australian registers regard a failure to comply with their respective requirements in the following ways:

1. A contempt of the parliament — House of Representatives,152 Senate,153 Queensland,154 Tasmania,155 Victoria,156 Western Australia157 and the Northern Territory;158

2. An offence — South Australia,159 and

3. If warranted, the member's seat is liable to be declared vacant by his or her House — NSW.160

In Victoria, each House is empowered by statute to impose a fine not exceeding $2000 for contempt of the House. Failure to pay the fine within the period ordered by the House renders the member's seat vacant.161 The resolution establishing a register in the ACT omits to refer to any consequence on failure to comply with its terms, but such a failure to comply with a resolution of the Legislative Assembly is still likely to constitute contempt of the Assembly.

The inherent defect of vesting the enforcement power of a register in the member's House is the danger of bipartisanship, whether in the protection of government members or in the pursuit of opposition members. This danger can be reduced in a number of ways. The first is to prescribe an infringement as a summary offence, as in South Australia.162 Another approach is to establish a procedure for public complaints to be considered by a parliamentary committee which supervises the register. At the federal level there is the House of Representatives Committee of Members' Interests163 and the Committee of Senators' Interests164 which has a majority of non-government members to reflect the composition of the Senate.

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153 Resolution of 17 March 1994, para 1(2) — a 'serious contempt'.
154 Clause 18 Resolution of Members' Register of Interests.
155 Section 24 Parliamentary (Disclosure of Interests) Act 1996 (Tas) which also empowers the relevant House to admonish, fine (up to $10,000) or suspend the member.
156 Section 9 Members of Parliament (Register of Interests) Act 1978 (Vic).
158 Section 10 Legislative Assembly (Register of Members' Interests) Act 1982 (NT).
159 Section 7 Members of Parliament (Register of Interests) Act 1983 (SA) — liable to a penalty not exceeding $5000 to be tried summarily.
160 Section 14A Constitution Act 1902 (NSW).
161 Section 10 Members of Parliament (Register of Interests) Act 1978 (Vic).
162 Section 7 Members of Parliament (Register of Interests) Act 1983 (SA).
163 Standing Order 28A.
164 Standing Order 22A.
In Queensland a detailed procedure is in place, similar to that prescribed by the House of Commons, whereby an allegation of infringement by a member may be made to the registrar by another member or by a member of the public. Complaints made by the former must be referred to the Members' Ethics and Parliamentary Privileges Committee, while those made by the public must be referred to the Committee only if the registrar believes on reasonable grounds that there is evidence to support the complaint. Public complainants are advised that their complaints do not attract parliamentary privilege. The Committee must investigate all complaints referred to it, affording the member concerned the opportunity to be heard. It appears to have a discretion whether to report to the Legislative Assembly on a complaint made by another member, but it is obliged to report on public complaints. The Committee must include in its report its recommendation as to what action the Legislative Assembly should take.

The administrative arrangements which develop within each House play a crucial role in members' compliance with the register's requirements. Rarely does a member of an Australian parliament or legislature fail to lodge a declaration within the prescribed time. In practice, advice is readily available from the registrar for completing the declaration. This practice has been formalised in Queensland, where the registrar must endeavour to advise a member who seeks a ruling on whether a matter should be declared or not. If the registrar is unable to determine the issue, the matter is referred to the Members' Ethics and Parliamentary Privileges Committee for a determination. The identity of the member is not revealed without the member's consent. The Committee is required to report the matter to the Legislative Assembly if the member disagrees with the Committee's determination.

Candidates and members' staff

None of the Australian registers requires candidates for parliamentary elections to make any declaration of personal or pecuniary interests. The benefit of being aware of potential conflicts of interest does not appear to outweigh the inevitable invasion of privacy. Nonetheless, it would seem prudent for candidates to declare significant potential conflicts of interest and how they propose to resolve them if elected. Otherwise, competing candidates may capitalise on any non-disclosure as a weakness in ethical standards.

Although it seems unnecessary for the staff of members to disclose their personal interests to a parliamentary register, it is prudent, as the Bowen Report

165 Clauses 14-17 Resolution for Members' Register of Interests (Qld).
166 The WA Commission on Government Report No 4 (July 1996) recommended at para 9.2.5.5 an approach similar to the Queensland one: that the Members of Parliament (Financial Interest) Act 1992 (WA) prescribe penalties (including forfeiture of one's seat) and establish a standing committee on privilege in each House to monitor and enforce the provisions of the Act.
167 Clause 8 Resolution for Members' Register of Interests (Qld).
168 Not recommended by the Bowen Report at para 7.29.
recognised, to require them to disclose to the member for whom they work those interests which are likely to create a conflict of interest. The Bowen Report also recommended that members instruct their staff to declare ad hoc such interests and those of the member whenever making representations on behalf of the member.

**Conclusion on registers of interests**

It is evident that a declaration of interests to a public register is an inadequate substitute for the fundamental obligation of members to make ad hoc disclosure of interests in the course of performing their official functions. This is so for several reasons. First, the crucial time at which the member should disclose a personal interest is when exercising or prior to exercising those public duties which may conflict with the member's personal interest. Ad hoc disclosure achieves this, unlike a public register which must be physically consulted. Second, there is the danger that the register will not be sufficiently up to date since alterations are usually notified, at the earliest, on a monthly basis. Third, the range of interests to be declared to a public register may not be sufficiently broad. Fourth, declaration to a public register does not resolve a conflict of interest when one arises. Finally, there is the danger that a member might be lulled into thinking that once a declaration has been made to a public register there is no longer any need to be concerned with conflicts of interest.

In Australia, the primary focus of both mechanisms of ad hoc disclosure and a register of interests is on the declaration of the member's pecuniary interests. The focus needs to shift, however, to include non-pecuniary interests and, in some jurisdictions, family interests. It was considered too difficult to define those non-pecuniary interests which might raise a conflict of interest, but this narrow focus appears to reflect a correspondingly narrow appreciation of the nature of a conflict of interest. Financial and proprietary benefits are not the only temptations to betray the public trust. Social and political ambitions are equally alluring. Recognising all these forms of conflict of interest needs to be encouraged not ignored. Otherwise, there is the danger, as John Uhr warns, that a one sided view of conflict of interest may emerge:

The vices of representation can encompass self-interested use of money but the basic ethical defect is not financial self-interest but the external purchase of a member's conscience to any number of causes, ranging from political parties to social movements. The preoccupation with conflict of interest schemes, such as registers of financial interests, threatens to distort our analysis of the ethics of political representation by making us believe that the primary role of the elected member derives from untied interests — when the real challenge is what one might call the problem of untied responsibilities.

169 At para 7.39.