Members of Parliament: law and ethics

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Further disqualifications; consequences of disqualification

Government contractors

The disqualification of government contractors has not attracted the same degree of concern in recent times as the disqualification of holders of offices of profit under the Crown. Yet it is a ground which is, both at the Commonwealth and State level, devoid of clear parameters and fraught with risk for members. At the Commonwealth level, fundamental difficulties arise in reading down s 44(v) to avoid disqualification in hard cases, while in some States, the position is practically incomprehensible because of the range of conflicting provisions. Fortunately, this state of affairs has not induced a rash of challenges.

In wading through these problems, one must focus on the purpose of this ground: namely, to avoid conflicts of interest created by executive preferment. Of course, that purpose links this ground clearly with that of holding a public office under the Crown.

Historical origins

The origin of this disqualification lies in the House of Commons (Disqualification) Act 1782 (Imp) (the 1782 Act). Significantly, the objective of this legislation, according to

1 22 Geo III c 45 s 1.
its preamble, was 'further securing the Freedom and Independence of Parliament'.

Section I comprised two limbs which disqualified those seeking election to the House of Commons:

[First] any person who shall, directly or indirectly, himself, or by any person whatsoever in trust for him, or for his use or benefit, or on his account, undertake, execute, hold, or enjoy, in the whole or in part, any contract, agreement, or commission made or entered into with, under, or from the Commissioners of His Majesty's Treasury, ... or with any other person or persons whatsoever, for or on account of the public service, or ...'

[Second] 'shall knowingly and willingly furnish or provide, in pursuance of any such agreement, contract, or commission which he or they shall have made or entered into as aforesaid, any money to be remitted abroad, or any wares or merchandise to be used or employed in the service of the public ... shall be incapable of being elected, or of sitting or voting as a Member of the House of Commons, during the time that he shall execute, hold, or enjoy any such contract, agreement, or commission, or any part or share thereof, or any benefit or emolument arising from the same [emphasis added].

Section II, in disqualifying members of the House of Commons who after their election engaged in government contracts, prescribed the equivalent of only the first limb of s I:

if any person, being a member of the House of Commons, shall, directly or indirectly, himself, or by any other person whatsoever in trust for him or for his use or benefit, or on his account, enter into, accept of, agree of, undertake, or execute in the whole or in part, any such contract, agreement, or commission as aforesaid; or if any person, being a member of the House of Commons, and having already entered into such contract, agreement, or commission, or part or share of any such contract, agreement, or commission, by himself or by any other person whatsoever in trust for him, or for his use or benefit, or upon his account, shall, after the commencement of the next session of Parliament continue to hold, execute, or enjoy the same or any part thereof, — the seat of every such person in the House of Commons shall be and is hereby declared to be void [emphasis added].

In 1801, the House of Commons (Disqualifications) Act\(^3\) was enacted to extend the 1782 Act to Ireland. Then in 1931 the House of Commons Disqualification (Declaration of Law) Act\(^4\) was enacted to resolve doubts which had arisen over the precise scope of

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2 Earlier Acts prohibited members of the House of Commons from sitting or voting while occupying the offices of farmers of excise (5 Will & Mary, c.7, s 57) and when acting as commissioners of customs (12 & 13 Will III, c 10, ss LXXXIX-XCII): see 'Members of Parliament and Government Contracts' (1948) 17 Journal of the Society of Clerks at the Table in Empire Parliaments 289, 289-290.
3 41 Geo III c 52.
4 21 Geo V c 13.
the 1782 and 1801 Acts. The effect of this 1931 Act is considered below. In the end, this ground of disqualification for both candidates and members was repealed in the United Kingdom in 1957\(^5\) on the basis that it was redundant — apparently there had been no abuse by members involving government contracts for over 100 years.\(^6\) But if abuse were to arise in the future, the House would discipline the member concerned.

In Australia, certain States\(^7\) retain this ground of disqualification in terms similar to s 1 of the 1782 Act. On the other hand, the Commonwealth provision in s 44(v) bears little resemblance to its English ancestor. A comparison of the two provisions helps to identify the peculiar requirements of s 44(v) which are examined below. The most obvious difference is the nature of the connection the candidate or member must have with the government contract. Under s 44(v), the connection is ‘any direct or indirect pecuniary interest’ in the government contract. This seems wider than ‘undertake, execute, hold, or enjoy’ a government contract under s 1 of the 1782 Act. It is arguable that no privity of contract is required under s 44(v) although it was probably required in most cases under the 1782 Act.\(^8\) Another apparent difference is that the contract under s 44(v) must be with ‘the Public Service of the Commonwealth’, whereas under s 1 of the 1782 Act the contract had to be with any person ‘for or on account of the public service’.

**Commonwealth**

\[s 44(v) \text{ Has any direct or indirect pecuniary interest in any agreement with the Public Service of the Commonwealth otherwise than as a member and in common with the other members of an incorporated company consisting of more than twenty-five persons.}\]

The only judicial interpretation of s 44(v) is the judgment of Barwick CJ in *In re* 5 House of Commons (Disqualification) Act 1957 (UK).

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5 *House of Commons (Disqualification) Act 1957* (UK).
6 See the Report from the House of Commons Select Committee on Members’ Interests (Declaration) 1969 (the Strauss Report) at para 14. Also see UK Attorney-General in the House of Commons Parliamentary Debates (5th Series 1956-57, vol 562, cols 1282-3) where he submitted to the Select Committee that the disqualification of government contractors was ‘in their present form, indefensible; their effect in law is obscure; and their effect in practice is both anomalous and absurd’.
7 New South Wales, Queensland, Tasmania and Victoria.
8 In contrast, G Evans, ‘Pecuniary Interests of Members of Parliament under the Australian Constitution’ (1975) 49 ALJ 464 at 466 suggests under s 44(v) the candidate or member must be party to the contract. His reliance on *Miles v Melwith* (1883) 8 AC 120 (PC) and *Proudfoot v Proctor* (1887) 8 NSWR 459 ignores the difference between s 44(v), which only requires an interest in a contract with the public service, and the provisions those cases were concerned with, which more clearly require privity of contract with the member.
Webster\(^9\) sitting alone\(^{10}\) as the Court of Disputed Returns.

**In re Webster**

The issue referred to the Court of Disputed Returns by the Senate\(^{11}\) was whether Senator James Webster (Country Party, Vic) was disqualified under s 44(v) at the time of his election to the Senate in May 1974, and subsequently, for having a pecuniary interest in agreements between his family company, J J Webster Pty Ltd, and two government departments: the Postmaster-General's Department and the Department of Housing and Construction. The Senator was one of nine shareholders in, as well as the managing director, secretary, and manager of, the company. His only remuneration was a fixed salary as manager, which was unrelated to the company's turnover or profits. The company tendered for contracts to supply timber to those government departments as and when specific orders were placed with it.

Barwick CJ accepted that the company's tenders constituted a standing offer but that no agreement arose with the two departments until an order was placed with the company.\(^{12}\) Upon receiving an order to supply, an executory contract existed until the timber was supplied. In these circumstances, his Honour concluded that no disqualification arose because s 44(v) required a contract which was of a continuing kind and exposed the member to Crown influence. Therefore, according to In re Webster, the nature of the government contract is critical for the operation of s 44(v).

**Nature of government contract**

The first issue is whether any contract or agreement with the Commonwealth Public Service may give rise to disqualification. Common sense indicates that this cannot have been intended — otherwise, a member would be disqualified for purchasing a copy of the Constitution from the government printer (assuming this remains part of the Commonwealth Public Service). Yet s 44(v) does not expressly exempt a range of contracts which is a common feature of State constitutions,\(^{13}\) nor is the subject matter of the contract expressly confined to any particular categories.

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9 (1975) 132 CLR 270.
10 The Chief Justice can be criticised for refusing an application to refer the matter, one involving the interpretation of the Constitution, to the Full Court -- a course later adopted by Mason CJ in Sykes v Cleary (1992) 176 CLR 77.
11 Pursuant to s 184 Commonwealth Electoral Act 1918 (now s 376).
12 See (1975) 132 CLR 270 at 283-5.
13 See for example s 13(4) Constitution Act 1902 (NSW).
Provision of goods and services?

It is not entirely surprising to find in Quick and Garran\(^{14}\) an interpretation of s 44(v) which confines it to contracts where the person must supply goods or provide a service to the Commonwealth Government.\(^{15}\) They, of course, point to the most obvious contractual arrangement in which members may be tempted to indulge for personal profit. Indeed, as noted earlier, the disqualification of government contractors in the United Kingdom was confined in 1932 to contracts where money or goods were being supplied for the service of the Crown.\(^{16}\) As will be seen, Queensland has similarly confined this ground of disqualification.

Although the contracts at issue in Webster's case were for the supply of timber to the Crown, the Chief Justice did not suggest that the paragraph was inapplicable where the goods are supplied or the service performed by the Commonwealth to the person in question. However, in that situation, it would be necessary to exclude those contracts where the Crown supplies goods and services on the same terms and conditions as they are supplied to the public. In such cases the risk of a conflict of interest arising is minimal. Indicative of the ill-defined parameters of this ground of disqualification, the Constitutional Commission noted that some uncertainty exists as to whether such contracts may incur disqualification.\(^{17}\)

To avoid the absurdity of disqualification arising for entering into those common transactions with Commonwealth departments, it is clearly necessary to confine the nature of the government contract required for disqualification under s 44(v). As Barwick CJ recognised in *In re Webster*, this can be achieved by resorting to the purpose of the ground. However, even on this issue there is debate. Two views, one wider than the other, have been advocated.

Narrow view

Barwick CJ in *In re Webster* relied on the preamble to the 1782 Act and judicial interpretation of ss I and II thereof\(^ {18}\) to confine the purpose of s 44(v) to protecting the independence of the Parliament from Executive or Crown influence.\(^ {19}\) The Chief


\(^{15}\) See G Evans, above note 8 at 467-8, who suggested that the agreements with the public service within s 44(v) be of a 'peculiarly public service character'; that is, be for the provision of goods and services to the Commonwealth.

\(^{16}\) *House of Commons (Disqualification) Act* 1931 (21 Geo V c 13).


\(^{18}\) In particular: *Re Samuel* [1913] AC 514; *Royse v Birley* (1869) LR 4 CP 296; *Tranton v Astor* (1917) 33 TLR 383.

\(^{19}\) Quick and Garran, above note 14 p 493, appear to endorse this purpose: 'The reason for the disqualification of Government contractors is that they are supposed to be liable to the influence of their employers.'
Justice referred to the opinion of Viscount Haldane LC in *In re Samuel* for the purpose behind the 1782 Act:

This Act of Parliament itself declares that it was made to preserve the freedom and independence of Parliament; and the mischief guarded against is the sapping of that freedom and independence by members being admitted to profitable contracts.\(^{20}\)

Accordingly, in his view, the contract had to be of a continuing or executory nature in order for the Crown to exert influence over the member:

[An] agreement to fall within the scope of s 44(v) must have a currency for a substantial period of time, and must be one under which the Crown could conceivably influence the contractor in relation to parliamentary affairs by the very existence of the agreement, or by something done or refrained from being done in relation to the contract or to its subject matter, whether or not that act or omission is within the terms of the contract.\(^{21}\)

On the facts, the Chief Justice concluded that all the agreements between the company and the Commonwealth departments were not of a continuing nature but were 'really casual and transient'. The company's tenders only resulted in binding contracts when a specific order was placed with the company for the supply of timber. These contracts were executed as soon as the timber was supplied. Further, any orders resulted from the usual public tender process conducted by government departments. Hence, his Honour concluded that it was not 'conceivable' that the Executive would be in a position to influence Senator Webster in relation to his parliamentary affairs.\(^{22}\) With respect, that conclusion is debatable. Nor are the English decisions on the 1782 Act relied upon, *Royse v Birley*\(^ {23} \) and *Tranton v Astor*,\(^ {24} \) sufficiently authoritative to confine s 44(v) to executory contracts.

In *Royse v Birley*, the election of a member to the House of Commons was

\[^{20}\text{[1913]}\text{ AC 514 at 524.}\]
\[^{21}\text{(1975)}\text{ 132 CLR 270 at 280.}\] Gareth Evans, above note 8 at 467 had earlier suggested that s 44(v) be confined to contracts 'the character of the agreement is such as to raise prima facie questions in the public mind about the exercise of improper influence on the part of either the government or the contractor'.
\[^{22}\text{(1975)}\text{ 132 CLR 270 at 286.}\] A similar conclusion was reached in the 1981 *Report of the Select Committee of the Legislative Council of Montserrat on a Minister*. The Committee interpreted the disqualification of a member who becomes a party to any government contract by s 10(3)(e) of the *Constitution and Elections Ordinance (Cap 153 Revised Laws of Montserrat)* as requiring a long standing relationship in order for a member to have the status of a 'government contractor' (pp 9-10 of the Report). A single contract for the supply of washing machines to a government hospital was insufficient to confer that status.
\[^{23}\text{(1869)}\text{ LR 4 CP 296.}\]
\[^{24}\text{(1917)}\text{ 33 TLR 383.}\]
challenged on the basis of two different contracts entered into by his firm as India-rubber manufacturers. The first was a contract for the supply of goods to the Secretary of State for India in Council which was performed prior to the election, but payment for which remained outstanding. Willes J (with whom Montague Smith J and Brett J agreed) relied on both the object and wording of the Act to hold that it did not apply to fully executed contracts where all that remained was a mere creditor-debtor relationship:

I think that the enactment refers to the case of a man having a contract under which he is to derive some future benefit from dealing with the government, in respect of which they might control him; as, for instance, by directing their officers not to look too closely to the sort of goods he sent in, or the like.28

Here, the member 'had ceased to be a person holding or enjoying a contract within the meaning of that statute, and had been converted into a mere creditor of the government'.29 A further factor was to avoid the injustice of disqualification arising simply as a result of the failure of the Government to make payment when due.

The second contract involved the supply of three dozen India-rubber chambers to the Broadmoor Asylum, the order for which was accepted by the member’s firm prior to the election but with delivery occurring after his election. Although there was an executory contract at the date of his election, the Court held that no disqualification arose because the firm was unaware that they were dealing with the Government.30

Royse v Birley was followed in Tranton v Astor31 where Tranton sought £29,000 in penalties from Major Waldorf Astor for sitting as a member of the House of Commons when disqualified. Major Astor was the sole proprietor of the Observer newspaper which had published advertisements on behalf of the British Government. Low J held that no disqualification arose for two reasons: first, the contracts were not of the type within the Act — they were executed on the insertion of the advertisements for which only payment by the Government was required; and secondly, there was no privity of contract between the Government and the Observer because all contracts were made with and through the Caxton Advertising Agency. His Honour expressly adopted the reasoning of the Court in Royse v Birley in holding that the acceptance by a newspaper of a government advertisement:

25 (1869) LR 4 CP 296 at 317: ‘only to contracts of a continuing nature, such as contracts for the building of works, and contracts for a recurring supply of goods’; but his Honour acknowledged that a contract for a single supply of goods might fall within the section if it was in an executory state (that is, the goods had still to be supplied).
26 At 321.
27 At 311: ‘disqualification is limited to the time during which the person contracting should “execute, hold, or enjoy any such contract, agreement, or commission”’.
28 At 311-312.
29 At 310-311.
30 Per Willes J at 315-6; per Montague Smith J at 318; per Brett J at 322.
31 (1917) 33 TLR 383.
is not a contract or agreement within the meaning of this legislation at all, and such casual or transient transactions are not the kind of contracts covered by these statutes, but that what are meant to be covered are contracts of a more permanent or continuing and lasting character, the holding and enjoying of which might improperly influence the action both of legislators and the Government. 32

How far do these cases really apply to s 44(v)? The 1782 Act referred to 'holding or enjoying' government contracts. That wording suggests contracts of a continuing or executory nature, whereas s 44(v), in requiring a direct or indirect pecuniary interest in an agreement with the Public Service, focuses on the existence of an interest rather than the agreement as such. Further, Willes J in Royse v Birley referred to a 'mere' creditor relationship and to a contract for the delivery of the goods where payment was due 'on the spot'. 33 There are many stages before these where a contract may be partly executed and the opportunity for executive influence remains.

Certainly the approach taken by Barwick CJ in In re Webster alleviates the possibility of absurd applications of s 44(v). 34 But even if the purpose of the disqualification is confined to averting executive influence of members of Parliament, executed contracts are not immune from that danger. In this respect, the Chief Justice's technical examination of the status of the contractual relationship contrasts with the cursory but critical conclusion that these contractual arrangements were unlikely to allow the executive to influence the senator.

Royse v Birley raises the interesting question of mens rea in holding that no disqualification was incurred as the member's firm was unaware that it was dealing with a government institution. There appears little scope for incorporating mens rea in s 44(v).

The 1981 Senate Report acknowledged the need to read down s 44(v) to avoid the absurdities which a literal interpretation would cause. While the Committee agreed with the restrictive approach taken in the Webster case, it was concerned that the paragraph might still apply to innocent transactions. However, it is unclear whether the Committee accepted Barwick CJ's view that the paragraph is not concerned with the avoidance of conflicts of interest. One of its conclusions seems inconsistent with his Honour's approach:

Whichever way the court approaches this question in the future, it seems apparent that they will continue to seek out ways of confining the operation of s 44(v) to the cases to which it was really intended to apply, namely, those where the character of the agreement is such as to raise prima facie questions in the public mind about the exercise of improper influence on the part of either the government or the contractor [emphasis added]. 35

32 At 386.
33 (1869) LR 4 CP 296 at 312.
34 Gareth Evans, above note 8 at 466 suggests that 'considerations of elementary justice' might persuade an Australian court to follow these cases.
35 At para 7.18.
chapter 4. further disqualifications; consequences of disqualification

A wider view, however, can be taken of the purpose of this ground of disqualification.

Wide view

It has been suggested that the wording of s 44(v) is deliberately different from the 1782 Act in order to indicate a wider purpose. In disqualifying those who 'execute, hold or enjoy' any contract with the Crown for or on account of the public service, the 1782 Act was designed to protect members of Parliament from Crown or Executive influence. The expression 'pecuniary interest' in s 44(v), it is suggested, indicates that the drafters of the Constitution were concerned with members abusing their positions for personal advantage rather than simply with the danger of executive influence.

Before Federation, this wider problem of a personal conflict of interest was addressed at the local government level by colonial legislation which referred to 'pecuniary interest'. Avoidance of a conflict of interest was also the purpose of Mr Speaker Abbott's ruling in 1811 which precluded members of the House of Commons from voting on matters in which they had a direct pecuniary interest. Further, the 1896 Report of the House of Commons Select Committee on Members of Parliament (Personal Interest) identified the potential for a conflict of interest arising between a member's personal interests and his or her public duty. This report may have been available to the drafters of the Constitution, as references to this wider concern of conflict of interest appear in the Convention Debates.

However, Barwick CJ in In re Webster refused to interpret s 44(v) as having this wider purpose; in his view, the paragraph was inserted solely to protect the independence of Parliament. In particular, he rejected the relevance of the colonial local government legislation on the ground that 'the obligations of a member of Parliament cannot be compared to the duties of local government or statutory officials. The member is in a significantly different situation.' With respect, this is not entirely so; nor does it refute a wider purpose for s 44(v). His Honour's readiness to allow executed contracts on the basis that they posed no vehicle for executive

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37 As above at 94 and following: the evolution of s 44(v) through the Convention Debates is outlined.
38 For example s 173 Local Government Act 1890 (Vic): 'No councillor shall vote upon or take part in the discussion of any matter in or before the council in which such councillor has directly or indirectly by himself or his partners any pecuniary interest...'. See J D Hammond, above note 36 at 94.
39 HC Debates (1811) 20, cc 1001-1012.
40 See the Official Record of the Debates of the Australasian Federal Convention (Second Session) Sydney 1897 at 1023.
41 (1975) 132 CLR 270 at 278-279.
42 At 279.
influence has also been questioned. Professor Hanks\textsuperscript{43} has argued that a series of short term contracts such as those in the \textit{Webster} case might still pose a threat to Parliament's independence, as well as give rise to conflicts of interest within the wider view of the paragraph.

The Chief Justice maintained the narrow purpose of s 44(v) despite the concerns expressed in the Convention Debates of members of colonial legislatures engaging in fraudulent activity behind the shield of private companies.\textsuperscript{44} For instance, Isaac Isaacs observed at the 1897 Sydney Convention Debates: 'The object of [cl 47] is to prevent individuals making personal profit out of their public positions.'\textsuperscript{45} Sir John Downer similarly remarked, 'I think it inexpedient to allow members of Parliament to have any contractual relations which might suggest to any one that their position might be impure.'\textsuperscript{46}

These comments suggest that the purpose of s 44(v) was to prevent members from benefiting from government contracts, rather than simply to protect the independence of Parliament.\textsuperscript{47} This view is supported by the terminology of 'pecuniary interest', which focuses on the benefit received by the member rather than on the benefit to be derived by the executive. For these reasons, the purpose of s 44(v) appears to be the avoidance of conflicts of interest between the parliamentary obligations of members and their private interests. Indeed, this purpose is simply a natural extension of the narrow view. Both views are designed to protect the independence of Parliament: the narrow view protects against executive influence, whereas the wide view expands the protection from all other sources of illegitimate influence.

\textit{A suggested test}

If the purpose of s 44(v) is to prevent members from using their positions to obtain, or appear to obtain, pecuniary advantage from government contracts (that is, if the wide view is correct), then it is that view which must confine the nature of the agreement. The relevant inquiry is not to define the agreement in terms of what is sold and to whom — rather, the test is:

\begin{quote}
Does the agreement, irrespective of its subject matter, create the impression
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\textsuperscript{44} The Chief Justice cited the Debates of the 1897 Adelaide Constitutional Convention at 736-738 and the Official Record of the Debates of the Australasian Federal Convention (Second Session) Sydney 1897 at 1022-1028.

\textsuperscript{45} Official Record of the Debates of the Australasian Federal Convention (Second Session) Sydney 1897 at 1023.

\textsuperscript{46} As above at 1025.

\textsuperscript{47} This wider view was taken of s 7 of \textit{Representation of the People Act 1951} (India) by the Supreme Court of India in \textit{Chatturblaj Vithaldas Jasani v Moreshwar Parasram} AIR 1954 SC 236 and \textit{Satyanathan v Subramaniam} AIR 1965 SC 459. Section 7 resembles s 44(v) as it refers to 'has any share, or interest in a contract for ...': see V K Agarwal, 'Government Contract — An Election Disqualification!' (1971) \textit{13 Journal of the Indian Law Institute} 497 at 502-3.
that the member has allowed his or her personal interests to benefit from the government contract to such an extent that it impairs public confidence in the member's capacity to act solely in the public interest?\textsuperscript{48}

In applying this suggested test, it ought to be kept in mind that the circumstances of the contractual interest, including the impact on public confidence, must warrant the penalty of disqualification from Parliament. It must not be forgotten that the other equally elusive element of s 44(v), a 'direct or indirect pecuniary interest', is required in this assessment.

\textit{Direct or indirect pecuniary interest}

Under s 44(v), the pecuniary interest in the government contract may be direct or indirect. Such an interest exists in all of those circumstances mentioned in ss I and II of the 1782 Act where a member directly or indirectly undertakes, executes, holds or enjoys a government contract. These circumstances require the member to be privy to the contract or be the \textit{cestui que} trust in relation to the contract. In each of these situations the member undoubtedly has a pecuniary interest in the contract. What is unclear is whether in other circumstances a member may have directly or indirectly a pecuniary interest in a contract. The answer to that inquiry depends on whether 'pecuniary interest' is accorded its technical legal meaning or whether it looks to the practical financial effect of the contract on the member.

Although Barwick CJ in \textit{In re Webster} seemed to adopt a technical legal meaning (see under 'Shareholders' below), there are at least two indications in s 44(v) that the appropriate test is the broader financial effect: the reference to 'indirect' pecuniary interest, and the exclusion of shareholders in companies of more than 25 members. Further support can be found in the parliamentary rules concerned with the disclosure of interests by members. Probably the earliest such rule is that from 1695 whereby a member cannot vote in the House of Commons on a matter in which the member has a direct pecuniary interest. The nature of this interest was later codified in 1811 by the ruling of Mr Speaker Abbott which specified that the interest had to belong to the member personally and not be in common with the general public nor be on a matter of state policy. While this ruling restricted the obligation of disclosure, it did not do so by any technical legal interpretation of a direct pecuniary interest. Further, the Riordan Report defined 'pecuniary interest' as:

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'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'. It is clear that pecuniary interest is such an exhaustive term as to exclude very little from its parameters.'\textsuperscript{49}
\end{quote}

\textsuperscript{48} The test proposed above by the Senate Standing Committee on Constitutional and Legal Affairs, \textit{The Constitutional Qualifications of Members of Parliament} (the 1981 Senate Report) bears a resemblance to that suggested here although it may be an attempt to confine s 44(v) to a narrower view.

A further factor is the need to give effect to the purpose of the disqualification. Artificial arrangements to avoid disqualification could not have been intended to escape the effect of s 44(v). Whether its purpose is only to prevent executive influence of members, or whether it is that wider purpose of avoiding conflicts of interest by using one's position to profit from government contracts, in neither case could it have been intended to allow avoidance of disqualification by artificial arrangements based upon a narrow technical interpretation of 'pecuniary interest'.

While the drafters of s 44(v) may have borrowed the terminology of pecuniary interest from local government legislation, care is required in relying on its case law. Disqualification of councillors from discussing and/or voting on matters was imposed for having a 'pecuniary interest' in respect of 'a matter' as well as a contract. Proof of a pecuniary interest in a matter is easier to establish than a pecuniary interest in a contract — although of course the latter interest will satisfy the former, as occurred in *The Attorney-General v The Mayor of Emerald-Hill*.50 In that case the relevant provision was s 122 of the *Boroughs Statute 1869* (No 359) which provided that 'No councillor shall vote upon or take part in the discussion of any matter in or before the council in which such councillor shall directly or indirectly, by himself or his partners, have any pecuniary interest' (emphasis added). Several councillors voted in favour of a resolution that the Council contract with a gas company of which they were shareholders or directors for lighting the public lamps of Melbourne. On appeal the Court affirmed that the resolution was vitiated by the incapacity of those councillors who as shareholders and directors in the company had a pecuniary interest in the contract.51

Some assistance may be gathered from statutory provisions which define the nature of an indirect pecuniary interest. For instance, s 95 of the *Local Government Act 1972* (UK) deems a member of a local authority to have an *indirect* pecuniary interest in a contract or 'other matter' if:

(a) he or any nominee of his is a member of a company or other body with which the contract was made or is proposed to be made or which has a direct pecuniary interest in the other matter under consideration.

(b) he is a partner, or is in the employment, of a person with whom the contract was made or is proposed to be made or who has a direct pecuniary interest in the other matter under consideration.

Notice that this provision regards as sufficient for an indirect interest: (a) membership of a company which has contracted; and (b) employment with a concern which has contracted. Precisely what constitutes a direct and indirect pecuniary interest in a contract for the purposes of s 44(v)? The following is offered as a guide: a direct pecuniary

50 (1873) 4 Australian Jurist Reports 135 (Vic).
51 See the English authorities on comparable provisions: *Lapish v Braithwaite* [1926] AC 275; *England v Inglis* [1920] 2 KB 636; *Brown v DPP* [1956] 2 QB 369; *Rands v Oldroyd* [1959] 1 QB 204.
interest in a contract arises in those cases where the member is a party to the contract and thereby has assumed liability in respect of the performance of the contract. An indirect interest arises where the member although not privy to the contract is entitled to some benefit from the contract.

A clear example of the latter is where A agrees to supply a government department with an item of furniture produced by C. Although C has no direct interest in that contract since A and the department have agreed that a purchase will be made from C, C has an indirect interest in the contract.

In Chapter 10, there is a suggestion that an indirect pecuniary interest may be found to exist where the member's spouse or family possesses or receives a direct pecuniary benefit. However, that suggestion is made in relation to the obligation to declare direct and indirect pecuniary interests to a register of interests or on an ad hoc basis. Although that view may be appropriate in relation to those mechanisms of disclosure, it would impose an intolerable burden on candidates and members if their qualification to be elected was dependent on the interests of their spouses or family of which they may have little knowledge.

Finally, it should be remembered that a pecuniary interest need not be beneficial — it may be 'a pecuniary advantage or disadvantage'.

Shareholders

Section 44(v) exempts from disqualification members of an incorporated company consisting of more than 25 persons. Agreements entered into by such companies are deemed therefore to have no impact on the qualification of their corporate members. Despite clarifying their position, it leaves members of companies of 25 or fewer members in an uncertain position. The exclusion of those who are shareholders in a company of more than 25 members infers that those who are shareholders in companies of 25 or fewer members have a direct or indirect pecuniary interest. The phrase used in s 44(v) to introduce the exemption — 'otherwise than' — supports that inference. However, such an inference cannot be conclusive.

The origin of this exemption also lies in the 1782 Act which by s III exempted contracts entered into by 'any incorporated trading company in its corporate capacity, [or] any company now existing and consisting of more than ten persons'. Note that the specification of a minimum number of members only applied to companies then existing, whereas all incorporated trading companies were exempted. This differs from the position in Australia where the

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52 Brown v Director of Public Prosecutions [1956] 2 QB 369 per Lord Goddard CJ at 375.

53 This view is supported by C W Williams (ed), Rogers on Elections Vol II (20th ed) London 1928 p 23.
exemption only arises in respect of companies comprising more than a prescribed number of members. The exemption in s III of the 1782 Act sits oddly with the requirement in ss I and II of that Act for the candidate or member to be privy to the government contract. The most obvious explanation is that the view was taken in 1782 that the interest which the candidate or member has in the contracting company as a shareholder was sufficient to incur disqualification under ss I and II.54

The limit imposed on this exemption by s 44(v) to incorporated companies comprising more than 25 members was intended to ensure that only legitimate companies were exempted and not those which were in reality ‘one man companies’.55

Whether a shareholder has the necessary pecuniary interest (direct or indirect) in a company was also considered by Barwick CJ in In re Webster.56 Although strictly unnecessary for the decision, the Chief Justice considered whether Senator Webster as one of nine shareholders, as well as being the managing director, a director and manager of the family company, had a pecuniary interest in the relevant agreements, assuming they were of the type which fell within the paragraph. Consistent with his strict interpretation of the other aspects of s 44(v), his Honour adopted the common law position on the rights of shareholders: they possess no legal or equitable interest in any of the company’s assets, including its contracts.57 Accordingly, his Honour concluded that ‘a person who is no more than a shareholder in a company does not, by reason of that circumstance alone, have a pecuniary interest in any agreement the company may have with the Public Service’.58

In his view, the purpose of the exception in s 44(v) was to exclude members who are shareholders in large ‘public’ companies from the disqualification, and ‘to ensure that shareholders in a company of small membership are not included in the exception’.59 It did not indicate that a shareholder in a small company has the necessary pecuniary interest. Some other factor is required in order to establish such an interest in the company’s contract. His Honour concluded in that case that there were no other circumstances which conferred on Senator Webster a pecuniary interest in those agreements. Being one of nine shareholders, and holding various positions with the company, were insufficient to give rise to such an interest.

55 See Isaac Isaacs at the Sydney Constitutional Convention; Official Record of the Debates of the Australasian Federal Convention (Second Session) Sydney 1897 at 1023. Note that the benchmark of 25 members was inserted to cover recent legislation in Victoria which allowed ‘proprietory companies’ with a maximum of 25 members — the limit in the other States was 20.
56 (1975) 132 CLR 270.
57 At 287; cites Macaura v Northern Assurance Co per Lord Buckmaster LC [1925] AC 619 at 626.
58 At 287.
59 At 287.
Although his Honour’s approach is not untenable, it does, with respect, ignore the wider picture. It is clear that shareholders possess no legal or equitable interest in the assets of the company.\(^{60}\) Their legal rights are confined to the right to a dividend if declared and the right to participate in the distribution of the assets of the company (if any remain) upon a dissolution of the company.\(^{61}\) But his Honour gave no consideration to the possibility of an ‘indirect’ interest or benefit which the member may derive from the contract.\(^{62}\) As for the exclusion of shareholders in companies of over 25 members, this most likely indicates that the nature of a shareholding interest is sufficient to constitute a direct or indirect pecuniary interest in those companies’ contracts.\(^{63}\) This would appear to have been the assumption of the participants in the Constitutional Convention debates.\(^{64}\) Their concern was to prevent public deception by those who contrive to avoid the disqualification of government contractors by incorporating their businesses in order to continue to contract with the government. Indeed, an amendment was proposed to tighten the exemption by prescribing a limit of 1/20 of the share capital\(^{65}\) — otherwise one could establish a company of more than 25 members but retain the bulk of the share capital and still contract with the government. This proposal was defeated because of the impossibility of creating a watertight exemption. During the debate, even the level of control over the management of the company was raised, since a large shareholding does not always mean a role in management.\(^{66}\)

Given the purpose of this ground of disqualification, which is to avoid conflicts of interest, the preferable position in relation to shareholders of companies contracting with the executive branch is to interpret the shareholder exemption as indicating that shareholders in companies of less than 25 members are deemed to have an indirect interest in such contracts and hence are disqualified. However, no disqualification ought to be imposed on those who are employees in those companies.

\(^{60}\) See *Macaura v Northern Assurance Co* [1925] AC 619 at 626 per Lord Buckmaster LC, at 630 per Lord Sumner; followed in *Commissioner of Stamp Duties (NSW) v Millar* (1932) 48 CLR 618 at 632 per Rich, Dixon & McTiernan JJ; and in *Suli v Suli (No 2)* (1975) 6 ALR 561 at 575 per Jenkyn J.

\(^{61}\) See cases cited above.

\(^{62}\) See P J Hanks, ‘Parliamentarians and the Electorate’ in Gareth Evans (ed), above note 43, pp 197-8. Hanks questions the view expressed by Barwick CJ that a shareholder in a company does not have, per se, a pecuniary interest in contracts engaged in by the company. He points out that it is sufficient that the interest is an ‘indirect’ interest.

\(^{63}\) Gareth Evans, above note 8 at 469, is more dogmatic on this issue, asserting that ‘there is no room for the argument that owning shares is, as such, insufficient to amount to having a pecuniary interest ...’. He suggests the interest of a debenture holder and certainly that of an employee would be too remote.

\(^{64}\) See the Official Record of the Debates of the Australasian Federal Convention. (Second Session) Sydney 1897 at 1022-1027; especially the comments of Mr Kingston at 1024-1025.

\(^{65}\) Proposed by Mr Glynn (SA) at the 1897 Sydney Constitutional Convention: Official Record of the Debates of the Australasian Federal Convention (Second Session) Sydney 1897 at 1022.

\(^{66}\) Raised by Fraser at the 1897 Sydney Constitutional Convention: Official Record of the Debates of the Australasian Federal Convention (Second Session) Sydney 1897 at 1026.
The Public Service

Section 44(v) requires the agreement to be with 'the Public Service of the Commonwealth'. Agreements with other governments are not covered by this disqualification, although disqualification may still arise where the agreement involves an office of profit under the Crown in right of a State (s 44(iv)), or involves payment for services rendered in the Commonwealth Parliament for a State (s 45(iii)).

The 'Public Service of the Commonwealth' clearly includes all Commonwealth government departments and their officers. There is the issue whether it also includes Commonwealth statutory authorities and instrumentalities as well as other entities related to the Commonwealth or within the shield of the Crown. The distinction drawn between the 'Crown' in para (iv) and the 'Public Service of the Commonwealth' in para (v) suggests that the latter is not as wide an expression as the Crown. Gareth Evans has suggested a restricted view of the 'Public Service' to its departments and authorised officers. Reinforcing this view is the comparison between para (v) and the expression used in the 1782 Act: 'for or on account of the public service'. As this expression was interpreted in In re Samuel to mean 'for or on account of the any service of the Crown anywhere', it was clearly not confined to the departments of state but would include all entities under the Crown. It is submitted that this is unlikely to be the position under s 44(v) which appears confined to the Departments of State, collectively recognised by the Public Service Act 1922 (Cth) as the Australian Public Service. According to s 10 of that Act, the Australian Public Service is constituted by the Secretaries, Senior Executive Service officers, other officers and employees of the Departments of State.

Invalid contracts

As a matter of principle, in the absence of any judicial indication, it would seem that no disqualification arises unless there is a valid agreement or contract. An invalid or unenforceable contract confers no benefit to which a member is legally entitled. On the other hand, where a member of the Commonwealth Parliament actually receives a benefit under an invalid contract, the receipt of that benefit will be caught by either limb of s 45(iii) of the Constitution if it is received in return for a service provided to the Commonwealth or provided for anyone else within the Parliament.

Reform proposals

It is evident from the above analysis that s 44(v) should not be left in its current form. Although the 1782 Act may have been narrower in scope, at least in requiring

67 G Evans, above note 8 at 465-6.
68 [1913] AC 514 at 525.
privity of contract with the member, the comments of Smith J in *Royse v Birley* in 1869 seem just as apposite today in relation to s 44(v):

I cannot help thinking that it would be very desirable that this Act should be revised, because it certainly appears to me to be totally inapplicable to the present state of commerce, and that it really provides a pitfall into which men who wish to walk uprightly and according to law may unwittingly tumble.\(^69\)

There appear to be three options. The first is to amend s 44(v) to clarify its scope. The second is to replace it with a provision which allows the Commonwealth Parliament to prescribe in ordinary legislation those contractual relationships which warrant disqualification. The final option is simply to repeal this ground of disqualification altogether. Each of these options is considered in turn.

(i) amend s 44(v)

This option provides the opportunity to clarify, along the lines already discussed, the uncertainties as to the scope of the paragraph, in particular:

- the nature of the agreement;
- the nature of the pecuniary interest; and
- the position of shareholders.

Amending s 44(v) also provides the opportunity to confer on each House the power to override disqualification in appropriate cases.\(^70\)

(ii) replace s 44(v)

The recommendation of the 1981 Senate Report,\(^71\) which appears to have been followed by the Constitutional Commission,\(^72\) was to retain this basic ground of disqualification but to vest in the Parliament the power to prescribe more carefully the circumstances in which disqualification arises.

Consequently, the Senate Report recommended the repeal of ss 44(v) and 45(iii) and conferral upon the Commonwealth Parliament of power to make laws with respect to:
(a) the interests, direct or indirect, pecuniary or otherwise, which shall not be held by a senator or member of the House of Representatives;

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\(^69\) (1869) LR 4 CP 297 at 319.

\(^70\) These points were canvassed in the submissions of the Solicitor-General and of the Chief Parliamentary Counsel to the 1972-3 Victorian Joint Select Qualifications Committee, *Interim Report upon the Law relating to Parliamentary Disqualification in respect of Conflicts of Interest*, April 1973, Appendix A and B.

\(^71\) At para 7.37.

(b) the circumstances which constitute the exercise of improper influence by or in relation to a senator or member of the House of Representatives and the action which shall be taken with respect to such an exercise; and
(c) the procedures by which any matters arising under such laws may be resolved.

Significantly, the Senate Report\textsuperscript{73} affirmed the need to retain this ground of disqualification to provide a mechanism for avoiding actual or apparent conflicts of interest. They saw this as helping to restore the confidence of the electorate in the integrity of members. For these reasons, they disagreed with the repeal of this disqualification in the United Kingdom.

Also, the Senate Report\textsuperscript{74} accepted the list of exceptions originally compiled by Gareth Evans and adopted by the Riordan Report,\textsuperscript{75} but added two of its own ((h) and (i)):

(a) Agreements performed, goods supplied or services rendered of which the person in question had no knowledge, and of which he could not reasonably have been expected to know.
(b) Agreements with the Public Service to which the person in question is, or was, not a direct party.
(c) Agreements not originally made directly with the person in question, but the benefit of which he takes by way of assignment, devise or similar means, and of which he divests himself within a reasonable time.
(d) Agreements for the provision by the Crown of goods, services or other benefits on the same terms and conditions as they are made available to the public generally.
(e) Loans made to the Crown.
(f) Compensation settlements, including payments for property compulsorily acquired.
(g) Agreements performed or services rendered of a casual and transient kind where the value of the transaction or the amount of the fee involved is relatively small.
(h) Agreements entered into by corporations in which the member has a less than substantial interest, where substantial interest is designated as control of not less than (one fifth) of the voting rights in the company.
(i) Agreements fully executed by the person in question at the relevant time.

The Constitutional Commission arrived at a similar conclusion to that of the Senate Report. It recommended the retention of this disqualification subject to a power in the Parliament to enact laws ‘to disqualify members of the Parliament who hold interests which might constitute a material risk of conflict between their public duty and private interests’.\textsuperscript{76} The Final Report\textsuperscript{77} noted the

\textsuperscript{73} At para 7.27.
\textsuperscript{74} At para 7.40.
\textsuperscript{75} At 14.
\textsuperscript{77} At para 4.878.
uncertainty as to the application of this disqualification to short term agreements, indirect interests of a shareholder, and contracts which are often entered into between the Crown and the public on the same terms as those made with the public.

(iii) repeal s 44(v)

As noted earlier, the similar ground of disqualification for members of the House of Commons in the United Kingdom was repealed in 1957. The basis for this decision was the apparent lack of any abuse on the part of members.

Support in Australia for the outright repeal of this disqualification is found in the 1971 Report of the Western Australia Law Reform Committee (Project No 14). The Committee's main reason was the difficulty in drafting this ground of disqualification. Alternative mechanisms were cited which could be used to deal with members abusing their position, such as contempt and the Criminal Code. Similar views were expressed by the Attorney-General of Victoria, Mr B L Murray, in his submission to the Victorian Joint Select Committee on Qualifications.

Conclusion on the Commonwealth position

Despite the attractiveness of repealing this ground of disqualification to avoid the difficulties of defining its precise scope, it is needed. The capacity of the executive to influence members of parliament and the temptation to do so should never be underestimated. To repeal this ground would remove a safeguard of parliamentary independence which is already sorely tested by the executive's stranglehold on the House of Representatives. The fact that few controversies have emerged under this paragraph at the Commonwealth level may have been due in part to the very existence of s 44(v)—it is difficult to know what the position would have been if this ground were never included. Nevertheless, given the potential for quite serious conflicts of interest to arise from agreements with the executive, disqualification is clearly warranted.

So, in choosing between the remaining two options of amending or replacing s 44(v), the latter provides a flexibility which in theory at least allows the House concerned to deliver the most appropriate response. The risk is that political considerations might distort that process.

States and Territories

Only in four States (NSW, Queensland, Tasmania and Victoria) are government contractors disqualified from parliament. Western Australia repealed this ground of disqualification in 1984. South Australia replaced a similar ground of

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79 See Appendix A at 4-5 of the Interim Report from the Qualifications Committee upon the Law relating to Parliamentary Disqualification in respect of Conflicts of Interest, April 1973.
disqualification in 1994 with an obligation of disclosure. In both the Northern Territory and the ACT, members are disqualified only from sitting and voting as government contractors — their seats are not actually vacated.

Due to the complexity of the relevant State legislation, the position in each of the States is outlined separately.

**NSW**

Section 13 of the *Constitution Act 1902* (NSW) closely follows the 1782 Act. The first four subsections prescribe this disqualification in the following manner: subs (1) only applies to candidates for election and not sitting members; subs (2) applies to members who enter into contracts while a member (their seat only becomes vacant when declared so by the House); subs (3) exempts from the operation of subss (1) and (2) contracts with corporations comprised of more than 20 members; and subs (4) paras (a) to (f) exempt a range of contracts from subss (1) and (2).

The first three subsections of s 13 provide as follows:

1. Any person who directly, or indirectly, himself, or by any person whatsoever in trust for him or for his use or benefit or on his account, undertakes, executes, holds, or enjoys in the whole or in part any contract or agreement for or on account of the Public Service of NSW shall be incapable of being elected or of sitting or voting as a Member of the Legislative Council or Legislative Assembly during the time he executes, holds or enjoys any such contract or any part or share thereof or any benefit or emolument arising from the same.
2. If any person being a Member of such Council or Assembly enters into any such contract or agreement, or, having entered into it, continues to hold it, his seat shall be declared by the said Legislative Council or Legislative Assembly, as the case may require, to be vacant, and thereupon the same shall become and be vacant accordingly.
3. Provided that nothing in subsection (1) or (2) contained shall extend to any contract or agreement made, entered into, or accepted by any incorporated company, or any trading company consisting of more than twenty persons, where such contract or agreement is made, entered into, or accepted, for the general benefit of such incorporated or trading company.

**Queensland**

The position in Queensland was very similar to that in NSW until amendments in 1959 restricted the nature of the government contracts to those for the supply of 'wares and merchandise' for the service of the public.

The principal provision is s 6 of the *Constitution Act 1867* (Qld), which is equivalent to s 13 (1) to (3) of the NSW Constitution:

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80 Section 7A inserted into the *Constitution Act 1867* (Qld).
Disqualifying contractors and persons interested in contracts

(1) Any person who shall directly or indirectly himself or by any person whatsoever in trust for him or for his use or benefit or on his account undertake execute hold or enjoy in the whole or in part any contract or agreement for or on account of the public service shall be incapable of being elected or of sitting or voting as a member of the Legislative Assembly during the time he shall execute hold or enjoy any such contract or any part or share thereof or any benefit or emolument arising from the same.

(2) And if any person being a member of such Assembly shall enter into any such contract or agreement or having entered into it shall continue to hold it his seat shall be declared by the said Legislative Assembly to be void and thereupon the same shall become and be void accordingly.

Proviso exempting from disqualification members of companies exceeding twenty in number

(3) Provided always that nothing herein contained shall extend to any contract or agreement made entered into or accepted by any incorporated company or any trading company consisting of more than twenty persons where such contract or agreement shall be made entered into or accepted for the general benefit of such incorporated or trading company.

Section 7 concerns the re-election of disqualified members and provision for a common informer action:

Election of disqualified persons void

(1) If any person by this Act disabled or declared to be incapable to sit or vote in the Legislative Assembly shall nevertheless be elected and returned as a member to serve in the said Assembly for any electoral district such election and return shall and may be declared by the said Assembly to be void and thereupon the same shall become and be void to all intents and purposes whatsoever.

Penalty for sitting or voting

(2) And if any person under any of the disqualifications mentioned in the last preceding section shall whilst so disqualified presume to sit or vote as a member of the said Assembly such person shall forfeit the sum of one thousand dollars to be recovered by any person who shall sue for the same in the Supreme Court of Queensland.

Finally, s 7A was inserted into the Constitution Act 1867 (Qld) in 1959 to restrict the types of contracts within the scope of the disqualification after the Queensland Supreme Court decision in Hobler v Jones\(^81\) (discussed further below). Most

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\(^{81}\) [1959] Qld R 609.
importantly, subs (1) confines the disqualification to ‘contracts or agreements for the furnishing or providing of wares and merchandise to be used or employed in the service of the public’. Subsection (2) expressly excludes from the disqualification four types of contracts within paras (a) to (d). These exclusions appear to have little effect in view of the narrow scope given to the disqualification by subs (1).

Section 7A of the Constitution Act 1867 (Qld) provides as follows:

**Scope of ss 6 and 7**

(1) Sections six and seven of this Act and the provisions relating to a public contractor of section seven of ‘The Legislative Assembly Acts, 1867 to 1946’ extend, and it is hereby declared have always extended, only to contracts or agreements for the furnishing or providing of wares and merchandise to be used or employed in the service of the public.

(2) Without limit to the generality of subsection one of this section, sections six and seven of this Act and the provisions relating to a public contractor of section seven of ‘The Legislative Assembly Acts, 1867 to 1946’ do not extend, and it is hereby declared never have extended, —

(a) To any lease, license to occupy, or other contract or agreement whereby any estate or interest in land is held under the Crown pursuant to ‘The Land Acts, 1910 to 1958’, or pursuant to those Acts and any other Act relating to the alienation of Crown land within Queensland, or pursuant to any other Act or Acts relating to the alienation of Crown land within Queensland, or whereby the right to hold under the Crown any such estate or interest is acquired, or agreed to be acquired, from any other person;

(b) To any lease, license, authority, permit or other contract or agreement relating to mining, dredging, searching, or prospecting for, or the obtaining of, petroleum, coal, gold or any other mineral in or on any Crown land in Queensland;

(c) To any contract or agreement with the Insurance Commissioner under and within the meaning of ‘The Workers’ Compensation Acts, 1916 to 1959’, and ‘The Insurance Acts, 1916 to 1940’, in relation to any class of insurance business carried on by the said Commissioner as representing the Crown;

(d) To any contract or agreement securing the repayment of the principal, or the payment of interest on, or both the repayment of principal and the payment of interest on, moneys lent to the Crown or to any Crown corporation or instrumentality or corporation or instrumentality representing the Crown.

Reference also needs to be made to ss 7 and 7B of the Legislative Assembly Act 1867 (Qld). Section 7 vacates the seat of any member who ‘become[s] a public contractor or defaulter...’. The nature of a ‘public defaulter’ was briefly raised in Chapter 2 in relation to the ground of bankruptcy.\(^{82}\) As for ‘public contractor’, in:

\(^{82}\) This may mean someone who has absconded or defaulted in payment of tax or on a government contract.

116
the absence of clear authority, it appears to mean a person who has contracted with the government.  

Section 7B restricts members from transacting any business or performing any duty or service for the Crown by denying them any fees, and empowers the Legislative Assembly by resolution to decide whether he or she should remain a member. Subsection (3) of s 7B prescribes various exemptions. Section 7A of the Constitution Act 1867 also restricts s 7 of the Legislative Assembly Act in relation to a public contractor in the same manner that it restricts s 6 of the Constitution Act. But as s 7B of the Legislative Assembly Act 1867 is not affected, being enacted later in 1978, members are prevented from receiving any fees for performing any service for the Crown and risk being expelled from the House. Reform is proposed to this ground of disqualification by cl 70 and 71 of LCARC's draft Parliament of Queensland Bill. The key provision is cl 71(1), which provides:

A member must not transact business, directly or indirectly, with an entity of the State.

'Transact business' is defined by cl 70 to mean (a) has a direct or indirect interest in a contract with an entity of the State or (b) performs a duty or service for reward for an entity of the State. Exceptions are prescribed. The consequences of so transacting are to render the contract invalid to the extent of the contravention and to preclude the member from receiving any reward or expenses in relation to the contract or the duty or service provided (cl 71(2) and (3)). In addition, the member's seat becomes vacant under cl 72(1)(g) if the Legislative Assembly decides by resolution that the member has contravened cl 71(1) and decides not to excuse the contravention under cl 73. An elected candidate is not disqualified from being elected if, within six months of the election, the member disposes of the interest in the contract or discharges any obligation arising from the service or duty. For the avoidance of doubt, the Bill expressly exempts insurance contracts with Workcover Queensland, loans to the State, and contracts for legal aid (cl 71(7)).

Tasmania

Section 33 (1) of the Constitution Act 1934 (Tas) follows the 1782 Act but contains only the first of the NSW and Queensland provisions in the expectation that it is sufficient to deal with both newly elected and sitting members. In other words, there is no separate provision which deals only with sitting members.

s 33 (1) Subject to this section, any person who shall directly or indirectly himself or by any person whatsoever in trust for him or for his use or benefit or on his account, undertake, execute, hold, or enjoy in the whole or in part, any contract or agreement

83 This expression is used in Lord Campion and T G B Cocks (eds), Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament (15th ed) Butterworths London 1950, p 214 to describe the effect of s 2 of the House of Commons (Disqualification) Acts 1782 and 1801 where a member enters into a government contract.
with the Government of the State shall be incapable of being elected or of sitting or voting as a Member of either House during the time he shall execute, hold, or enjoy any such contract or any part or share thereof or any benefit or emolument arising from the same, and if any Member shall enter into any such contract or agreement or having entered into it shall continue to hold it, his seat shall be vacant.

While subs (3) lists the common exemptions, subs (2) and (4) prescribe exemptions notably different from those in the other States.

The exemption in relation to contracts with corporations in subs (2) differs in that the number of members needs to be more than 30, and the extent of the member's interest (including that of his or her family) must be no more than one-fifth of either the issued shares or the voting rights in that corporation or in a related corporation. Subsection (4) exempts from disqualification a member who enters into a government contract prior to nomination for election, and the contract is 'effectually terminated or rescinded' within six months of the date of the election.

Victoria

Sections 54 and 55 of the Constitution Act 1975 (Vic) differentiate in the same way as the NSW and Queensland provisions between a candidate for election (s 54) and a sitting member (s 55). The circumstances which incur disqualification under these provisions appear broader in scope and are more simply and clearly expressed than the equivalent NSW and Queensland provisions. The exemptions are little different from those in NSW and Queensland.

54 Contractors not to be elected

A person who is either directly or indirectly concerned or interested in any bargain or contract entered into by or on behalf of Her Majesty in right of the State of Victoria, or who participates or claims or is entitled to participate either directly or indirectly in the profit thereof or in any benefit or emolument arising from the same, shall not sit or vote in the Council or the Assembly; and the election of any such person to be a member of either the Council or the Assembly shall be void.

84 Clause 70(2) exempts, inter alia, contracts for the supply to the member of goods or services on usual public terms; lawful compensation payments; contracts with listed or non-aligned corporations — the latter is defined as a corporation with more than 20 shareholders where the member does not control the Board or possess more than 5 per cent of the shares.

85 This power to excuse the grounds of disqualification only arises if the Assembly considers that the ground no longer is effective, was trifling and arose without the knowledge or consent of the member or was inadvertent or accidental: cl 73(3).

86 'Family' is defined to mean spouse and children including stepchildren: s 33(2B).

87 Subsections (2A) and (2B).

88 Section 56(2) paras (a)-(d) and s 57.
55 Seats to become vacant in certain cases

If any member of the Council or the Assembly —

(a) either directly or indirectly becomes concerned or interested in any bargain or contract entered into by or on behalf of Her Majesty in right of the State of Victoria;

(b) participates or claims or is entitled to participate either directly or indirectly in the profit of any such bargain or contract or in any benefit or emolument arising therefrom; ... —

his seat shall thereupon become vacant.

South Australia

Provisions corresponding with those of NSW were repealed in 1994. Instead, members are now required to disclose pursuant to s 4(2)(a) of the Members of Parliament (Register of Interests) Act 1983 (SA) particulars of contracts made by them (or a related person) with the Crown where the monetary consideration is $7500 or more. It is sufficient if only the class of contract is disclosed in the case of an ‘ordinary commercial or arm’s length contract’.

Western Australia

Section 35 of the Constitution Acts Amendment Act 1899 (WA) which closely followed the NSW provisions, was repealed in 1984.

Notably, the State’s sparse population was reflected in a unique exemption — exempted were contracts for the supply of goods and services to the Crown by candidates or members from an area where no other person carries on the same kind of business and where it was necessary for the Crown to contract with that person in order to avoid delay and inconvenience.

Northern Territory

Significantly different from the grounds prescribed in the States is that provided by s 21(3) of the Northern Territory (Self Government) Act 1978 (Cth). Disqualification is limited to not discussing or voting on matters directly or indirectly related to contracts which are for the supply of goods or services to the Territory. The member must be either a party to or directly or indirectly interested in the contract.

89 Section 6 Statutes Amendment (Constitution and Members’ Register of Interests) Act 1994 (SA) repealed ss 49 to 54 of the Constitution Act 1934 (SA).
90 Section 4(4a) Members of Parliament (Register of Interests) Act 1983 (SA).
ACT

A similar but wider provision to that in the Northern Territory is prescribed by s 15(1) of the *Australian Capital Territory (Self-Government) Act 1988* (Cth). It is wider in that the disqualification from discussing and voting applies to any type of contract made with the Territory or one of its authorities.

### Analysis of State (NSW, Qld, Vic, Tas) and Territory provisions

The NSW and Queensland provisions are poorly drafted and difficult to interpret. They urgently require re-writing in plain English. In both those States, several problems emerge in relation to the effect and timing of this ground, the nature of the contract required and the requisite connection of the member and candidate with the contract. Each of these issues is considered in turn.

**(1) Do sitting members lose their seats immediately upon entering into a government contract?**

Section 13(2) of the *Constitution Act 1902* (NSW) provides:

> [H]is seat shall be declared by the said Legislative Council or Legislative Assembly ... to be vacant, and thereupon the same shall become and be vacant accordingly [emphasis added].

The second paragraph of s 6 of the *Constitution Act 1867* (Qld) is to the same effect. These provisions appear to require a declaration from the House before the member loses his or her seat. Further, it seems to oblige the House to make such a declaration. If none is made, judicial relief seems unlikely, lest the Court interfere impermissibly with parliamentary affairs. However, Innes J in *Proudfoot v Proctor* seemed to assume in obiter that s 28 of the *Constitution Act* (18 and 19 Vic, cap 54) (the predecessor in the same terms to s 13(2) of the NSW Constitution) rendered the member’s seat ‘void immediately’.

In contrast, s 11 of the 1782 Act actually declared the member’s seat to be void. Similar provision is made in Victoria and Tasmania. In Tasmania, however, this...
automatic effect may be avoided if the contract is entered into prior to nomination for election and is terminated or rescinded within six months of being elected.  

Another puzzling reference in the NSW, Queensland and Tasmanian Constitutions is to the member being liable to disqualification if ‘having entered into [the agreement], continues to hold it’. This was probably a transitional measure to apply to those members at the time of the provision’s enactment who had previously entered into such a contract and now were required to terminate their contractual relationship or else be liable to disqualification. Section II of the 1782 Act used a similar phrase as a transitional provision but expressly allowed sitting members until the next session of the Parliament to terminate their contractual relationships.

(2) Do s 13(1) of the NSW Constitution and the first paragraph of s 6 of the Qld Constitution concern only candidates for election or do they also apply to sitting members?

Both provisions render ‘any person ... incapable of being elected or of sitting or voting as a Member’. If they solely apply to candidates, then the only basis for disqualification of sitting members is found in the provisions referred to above, which depend on a declaration of the House. Innes J (with whom Deffell and Owen JJ concurred) in Proudfoot v Proctor99 regarded the two limbs of s 28 of the Constitution Act (18 and 19 Vic, cap 54) (the predecessor to s 13(1) and (2) of the Constitution Act 1902 (NSW)), as dealing distinctly with two classes of persons: candidates and members.100 This was clearly the case with the 1782 Act. Section I (the first limb of which was in the same form as s 13(1) of the NSW Constitution and s 6(1) of the Queensland Constitution) applied to candidates, rendering them incapable of being elected or of voting or sitting in Parliament. Section II, which was in substantially similar terms to s I, actually vacated the seat of any member who engaged in a government contract.

The position in Tasmania with s 33(1) of the Constitution Act 1934 follows more closely the 1782 Act in that the seats of members are automatically vacated rather than being dependent upon any declaration of the House. Victoria provides similarly in s 55 of the Constitution Act 1975.

On the other hand, if the proscription against ‘sitting or voting’ applies also to sitting members, they are effectively hampered in performing their parliamentary duties but are not removed from their seat unless declared vacant. Consequently, a common informer action may be available under s 14(2) of the NSW Constitution for sitting or voting ‘while disqualified’.

The problem may not be so acute for Queensland because s 7 of the Legislative Assembly Act 1867 (Qld) renders vacant the seat of a member who becomes a ‘public contractor’.

So far as candidates are concerned, there remains the issue: at what point in time is this ground judged? The similarity between the phrase used in the State Constitutions, ‘incapable of being elected’, and that used in s 44 of the

98 Section 33(4) Constitution Act 1934 (Tas).
99 (1887) 8 NSWR 459 at 462-3.
100 Proudfoot v Proctor (1887) 8 NSWR 459 at 462-3.
Commonwealth Constitution, 'incapable of being chosen', points to the same time for both which, according to Sykes v Cleary,\textsuperscript{101} is the date of nomination. This issue was discussed in Chapter 2.

(3) What connection must the member or candidate have with the government contract to fall within the disqualification?

in NSW, Queensland and Tasmania, the difficulties discussed above with their respective provisions continue to hamper the formulation of a clear response to this issue. In each State, the connection required of a candidate for election and that required of a member for vacating his or her seat is differently described. Whether this difference in wording is significant is debatable.

A member is only liable to lose his or her seat if he or she 'enters into' a contract, whereas a candidate is disqualified if the candidate 'directly or indirectly himself, or by any other person whatsoever in trust for him or for his use or benefit or on his account, undertakes, executes, holds, or enjoys in the whole or in part, any contract ...'.\textsuperscript{102}

This discrepancy in the description of the connection may have been a drafting error — it arose from transcribing s II of the 1782 Act which dealt with two situations. First, it applied the same test as that prescribed by s I for candidates to members who engage in government contracts after their election. Second, it addressed those members who at the enactment of the section 'had already entered into' a government contract and disqualified those who 'continue to hold, execute, or enjoy' that contract after the commencement of the next session of Parliament. In the transcription, the same two situations are covered but the test for the first situation has been rewritten as simply 'enter into' a government contract, instead of repeating the longer test applied to candidates.

The better view should be that, except in one respect, there is little difference between these two connections. The candidate or member must be a party to the contract either by directly contracting on one's behalf or through an agent. The exception is that a candidate is also disqualified if he or she 'enjoys' the benefit of the contract as a cestui que trust.\textsuperscript{103} There is no reason why candidates and members should be discriminated in this respect.

Brett J in Royse v Birley\textsuperscript{104} interpreted the phrase 'undertake, execute, hold, or enjoy' as follows:

To undertake a contract would seem to be to enter into it; the word 'execute' would seem to refer to the case of a person who takes on himself the execution of a contract not originally made with him; the word 'hold' to the case of a possible transfer of a contract which had been made already with some other person; and

\textsuperscript{101} (1992) 176 CLR 77.

\textsuperscript{102} Section 13(1) Constitution Act 1902 (NSW).

\textsuperscript{103} See Royse v Birley (1869) LR 4 CP 296 per Brett J at 320.

\textsuperscript{104} At 320.
the word 'enjoy' to the case of a person with whom the contract was not made, but
who as cestui que trust is to enjoy the benefit of it. 105

It could be argued that in order to enter into a contract it is insufficient to 'hold'
a contract by way of an assignment, yet there is judicial support from NSW and
Queensland as well as from Canada for the view that there is little difference
between the two connections.

In Proudfoot v Proctor, 106 Innes J (with whom Deffell and Owen JJ concurred) read
the predecessor of the current NSW provision, s 28 of the Constitution Act (18 and 19
Vic, cap 54), as dealing with two classes of persons: candidates for election and
members. 107 While acknowledging that the words describing the necessary
connection in each case were not the same, his Honour interpreted them to have the
same meaning:

even persons in the first branch of the section must be persons who, either
personally or by someone on their behalf, have entered into a contract and who are
really contractors — and that it is not enough that they are ... persons who were
indirectly interested in a contract, the interest being so remote and so indirect that
it really would include a creditor of a contractor with the government. 108

That case concerned a railway contract between the NSW Government and a
partnership of Logan and Proudfoot. Proudfoot became insolvent and, in order to
maintain the contract, Logan obtained three guarantors. One of these guarantors
was Proctor, a member of the NSW Legislative Assembly. As security for his
guarantee, Proctor took an assignment of the railway contract from Logan.
Proudfoot then commenced this action as a common informer against Proctor
claiming a penalty of £500 on the basis that Proctor fell within the first branch of s
28. The argument seemed to be that Proctor had an interest in the railway contract
by virtue of the assignment and had therefore become disqualified. This argument
was rejected by Innes J on the basis outlined above: there was no privity of contract
between the Government and Proctor and therefore it could not be said that he had
entered into the railway contract as required by the second 109 branch of s 28 which
applies to the disqualification of sitting members. Further, the Government's
consent was required for any assignment of the railway contract and this had not
been obtained. Innes J summed up the position as follows:

105 At 320.
106 (1887) 8 NSWR 459.
107 At 462-3.
108 At 463.
109 Innes J at 464 noted that the claim was based upon the first branch when it should have
been based on the second branch of s 28.
In one sense, no doubt, as I have already said, the defendant has become interested in this contract, but for the reasons which I have given I do not think that he can be looked upon as having become either directly or indirectly, either by himself or by any other person whatsoever, in trust for him or for his use or benefit or on his account, a contractor with the Government for or on account of the public service, and still less can it be contended that originally he, being a member of the Assembly, entered into the contract.\textsuperscript{110}

In so far as Proctor did enter into a contract by providing the guarantee, this was held not to be one ‘for or on account of the public service’ since the Government was not party to that contract.

In \textit{Miles v Mcllwraith}\textsuperscript{111} the Privy Council affirmed the decision of the Queensland Supreme Court that no disqualification arose as a result of a charterparty between the Queensland Government and a member’s agents in respect of a ship partly owned by the member. The member had given strict instructions to his agents that no contracts were to be negotiated on his behalf with the Government. Since there was no privity of contract between the Government and the member, no disqualification was incurred. But Lord Blackburn,\textsuperscript{112} delivering the opinion of the Privy Council, considered that had the Government known of the general authority of the agents to act for the member, the member would have been under a duty to notify anyone dealing with the agents of the restriction imposed upon their authority. The Privy Council made no reference to any difference between candidates and members in terms of the connection with the contract.

Finally, in \textit{Hackett v Perry},\textsuperscript{113} the Supreme Court of Canada held that a member of the House of Assembly of Prince Edward Island was disqualified from that House under 39 Vic ch 3 s 8 (PEI) for ‘becoming a party’ to a government contract on the basis of having purchased a quarter share in a ferry contract from the original contractor from the Crown. While the language of s 8 (which applied to members) differed from that in s 4 (which applied to candidates), a majority of the the Court refused to draw any substantive distinction between the effect of both provisions.\textsuperscript{114} Section 4 was in the same wide terms as the 1782 Act in referring to any person who ‘holds, enjoys, undertakes or executes, directly or indirectly any contract ...’. This case involved an interesting twist because the member argued in favour of his own disqualification as a government contractor. He did this to avoid being disqualified as a recently elected member of the Canadian House of Commons on the basis of his membership of a provincial legislature.\textsuperscript{115} As his resignation from that legislature was held ineffective, he was fortunate to be able to rely on the government contractor ground in order to

\begin{itemize}
\item \textsuperscript{110} At 467. This passage may be of relevance to s 44(v) of the Commonwealth Constitution as regards what is a pecuniary interest in a government contract.
\item \textsuperscript{111} (1883) 8 AC 120.
\item \textsuperscript{112} At 133-4.
\item \textsuperscript{113} (1887) 14 SCR 265.
\item \textsuperscript{114} See for example Ritchie CJ at 275, Strong J at 282; contrast Taschereau J at 287.
\item \textsuperscript{115} Then under the Canada Revised Statutes ch 13 s 1.
\end{itemize}
avoid his disqualification from the House of Commons.

In Victoria, the two basic forms of connection are applied to both candidates and members, but they are expressed in quite different and potentially wider terms to those just discussed in the other States:

... directly or indirectly concerned or interested in any bargain or contract ... participates or claims or is entitled to participate either directly or indirectly in the profit thereof or in any benefit or emolument arising from the same [emphasis added]...

Similarly, the connection in both the Northern Territory and the ACT is being a party to the contract or being directly or indirectly interested in the contract.

These connections are similar to the requirement of a ‘pecuniary interest’ in s 44(v) of the Commonwealth Constitution.

(4) With whom must the contract be formed?

In all four States, the disqualification arises in respect of a contract with the executive government of the State. Whether disqualification extends to contracts with other manifestations of the Crown or even other entities depends on the precise wording of the statutory provision. Only in Tasmania\(^1\) and Victoria\(^2\) are State instrumentalities expressly included and defined, while statutory authorities are expressly included in the ACT.\(^3\)

In Tasmania, the ground is generally confined to ‘the Government of the State’,\(^4\) whereas in Victoria it extends to contracts ‘entered into by or on behalf of Her Majesty in right of the State of Victoria’. More problematic is the position in the other two States: in NSW, the contract must be ‘for or on account of the Public Service of New South Wales’;\(^5\) and in Queensland, a slightly different expression is used — ‘for or on account of the public service’.\(^6\)

The ‘Public Service of New South Wales’ must bear a similar meaning to that given to the ‘Public Service of the Commonwealth’ in s 44(v). Essentially, it refers to all the government departments of that State and their officers. It is unlikely that it includes all those entities, including statutory authorities, within the shield of the Crown in right of NSW.

The Queensland formulation — ‘for or on account of the public service’ — follows that used in the 1782 Act. As noted earlier, that expression was interpreted in *In re Samuel*\(^7\) to mean ‘for or on account of any service of the Crown anywhere’

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116 Section 33(5) and (6) Constitution Act 1934 (Tas).
117 Section 56 Constitution Act 1975 (Vic).
119 Section 33(1) Constitution Act 1934 (Tas).
120 Section 13(1) Constitution Act 1902 (NSW).
121 Section 6 Constitution Act 1867 (Qld).
122 [1913] AC 515.
(emphasis added) and that the money need not be voted for by Parliament.123 In that case, the Judicial Committee of the Privy Council gave an advisory opinion (as a command paper)124 that Sir Stuart Samuel125 was disqualified from sitting and voting in the House of Commons by virtue of contracts entered into between his firm and the Secretary of State for India in Council. These contracts were described as 'for borrowing money upon short loans, for purchasing Indian Council bills and Indian Treasury bills, for subscribing to Indian Government loans, and for purchasing silver for the purposes of the Indian currency'.126

Following this decision, it could be argued in Queensland that a contract between a candidate or member with the government of the Commonwealth, another State or a Territory is within the disqualification as one 'for or on account of the public service'. No such point could be taken in the other three States. On the other hand, the more appropriate interpretation is to confine the expression as it appears in the Queensland Constitution to the public service of Queensland. This accords with the presumption, in the absence of a clear indication to the contrary, that a legislature refers only to the Crown in right of that State.127 The same presumption should logically apply to references to the public service.128 Moreover, this approach accords with the chief objective of the disqualification: — to prevent members being influenced by the Queensland Executive.

An alternative interpretation of this Queensland expression, 'for or on account of the public service', is that it refers to contracts made with all entities which provide a public service — in other words, there is no need to contract with the Crown. Sheehy J in Hobler v Jones129 focused not on the parties to the contract but on the nature of the contract, that is, whether it provided some public service. His Honour appears to have agreed with this statement of the argument:

> The other contracting party need not be a public servant at all. It may happen that the other party has nothing whatever to do with the Crown but if the subject matter relates to service to the public, such contract falls within the section.130

Such contracts might include, for example, the contract between a local council and a waste disposal operator, or between a private railway operator and its customers.

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123 Per Viscount Haldane LC, at 525.
124 Cd 6748.
125 Subsequent common informer actions were brought: Forbes v Samuel [1913] 3 KB 706; Burnett v Samuel [1913] 3 KB 742; Bird v Samuel (1914) 30 TLR 323.
126 [1913] AC 514 at 524.
128 It also accords with the limited extraterritorial competence of the States: s 2(1) Australia Acts 1986 (Cth & UK).
129 [1959] Qd R 609. The judgment of Sheehy J was affirmed by the Full Court of Queensland at 616-620.
130 At 613-4.
Compared with 'the Public Service' as used in s 44(v), the expression used in the 1782 Act and the Queensland provision might be wider in at least two respects: first, by extending to contracts with all entities of the Crown engaged in its service and second, by extending to any non-government entity engaged in the service of the public. Both avoid a conflict of interest but the latter can hardly be concerned with the risk of Queensland executive influence.

(S) What is the nature of the contract to which the candidate or member must be a party?

Probably the most significant issue in relation to this ground of disqualification is whether any contract with the government gives rise to disqualification or whether this occurs only with contracts of a particular nature.

This issue has already been discussed in relation to s 44(v) of the Commonwealth Constitution where it was noted that English authority on the 1782 Act supports a restrictive approach here. For instance, Low J in *Tranton v Astor* expressedly adopted the reasoning of the Court in *Royse v Birley* in holding that the acceptance by a newspaper of a government advertisement:

> is not a contract or agreement within the meaning of this legislation at all, and such casual or transient transactions are not the kind of contracts covered by these statutes, but that what are meant to be covered are contracts of a more permanent or continuing and lasting character, the holding and enjoying of which might improperly influence the action both of legislators and the Government [emphasis added].

In the absence of judicial authority (other than in Queensland), the approach of Low J would hopefully be followed at the State and Territory level to avoid quite innocent transactions incurring disqualification. Reliance on the purpose of disqualifying government contractors facilitates the implication drawn by Low J that the contract be one which might enable the executive to influence members in the performance of their parliamentary duties.

Such an implication was drawn by the House of Assembly in South Australia in 1872 when the House rejected an opinion of that State's Crown Solicitor that three members of the House were disqualified for accepting government advertising in their newspapers. The resolution of the House regarded the advertisements as not 'agreements or contracts within the spirit' of the predecessor of s 49 of the *Constitution Act 1934*. In Tasmania, special legislative protection was afforded to Francis Madill by the *Constitution (Doubts Removal) Act 1988* (Tas) to prevent his disqualification under s 33(1) of the

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131 (1917) 33 TLR 383 at 386.
132 (1917) 33 TLR 383 at 386.
135 See 'Members of Parliament and Government Contracts' (1948) 17 *Journal of the Society of Clerks at the Table in Empire Parliaments* 289 at 306.
Constitution Act 1934. Prior to his election to the House of Assembly, he had, in partnership, leased premises from the Crown for a surgery.

So long as uncertainty remains as to the nature of the government contract which incurs disqualification, special legislative protection from disqualification may at times be necessary. This is most likely to arise, in the absence of an express exemption, where a government benefit or service is received on the same terms and conditions as other members of the public. For example, in Western Australia in the 1940s, before the repeal of the government contractor disqualification, concern arose over the position of members of the Western Australian Parliament who as doctors and chemists received payments pursuant to the *Pharmaceutical Benefits Act 1947* (Cth) by way of reimbursement for the provision of free medicines. These concerns were resolved in 1948 by retrospectively exempting these payments from the government contractor disqualification in ss 37 and 38 of the *Constitution Acts Amendment Act 1899* (WA).

Queensland: provision of a public service

The Queensland formulation in s 6 of the *Constitution Act 1867* (Qld) requires the provision of a public service. It has already been suggested that such a service might be provided by the Government or one of its entities, or else it might be provided by a non-government entity or individual. Hence, a candidate or member who is a party to such a contract may be receiving or providing the public service. If this is so, the Queensland formulation still catches a whole range of innocent transactions, such as the purchase of a railway ticket. In fact, it will tend to catch a wider category of contracts since the government need not be privy to them provided they deliver a public service.

In *Hobler v Jones*, Sheehy J interpreted the phrase 'for or on account of the public service' to require that the subject matter of the contract 'deal with some service to the public' and later said that 'the subject matter of the contract is to do or supply something in relation to the service of the public' — for example, the supply of food to a state institution, or a charter of a ship to the government (no doubt a reference to *Miles v Mcllwraith*). In his view, it was not sufficient simply to establish a contract with the Government. Excluded were contracts which did not provide a public service, such as a member arranging personal insurance with the SGIO, or using the services of the public curator's office. Accordingly, in that case Jones was not disqualified as a member for holding two prickly pear leases from the Queensland Government.

136 *Constitution Acts Amendment Act (No 1) 1948* (WA); see above note 135 at 307-8.
137 [1959] Qd R 609.
138 At 614.
139 At 615.
140 (1883) 8 AC 120.
142 Reliance was placed on a decision of a committee of the House of Commons, *City of Londonderry* [1860] Wolferstan & Bristow Election Cases at 206, which accepted without discussion that holding a Crown lease did not incur disqualification.
On appeal this judgment was affirmed, although no reasoning in support was offered by the Full Court. However, two interesting points were raised in counsels’ argument. The first was the appellant’s argument that as the leases in question contained obligations on the part of the lessee (for example to clear and preserve the land) which would improve the land for the national benefit, they were for the public service. Indeed, the argument went so far as to say that any immediate contract with the Government was one for the public service. The second was the argument put by the respondent’s counsel that as the leases were regulated by the Land Court no Crown influence was possible. Each of these arguments raised issues which unfortunately were not considered in the Full Court’s judgment.

The circumstances which gave rise to the proceedings in Hobler v Jones led to the insertion of s 7A into the Constitution Act 1867 (Qld) although the case was decided solely on the basis of s 6. Section 7A limits the operation of the disqualification to contracts for the supply of ‘wares and merchandise to be used or employed in the service of the public’. This amendment was intended to ensure that s 6 could not be used to challenge members on the basis of contracts which they enter as ordinary members of the public. It resembles the interpretation of s 6 given in Hobler v Jones, although it is narrower, confining the ground to the supply of ‘wares and merchandise’. That outdated expression refers to commodities such as raw materials and office equipment. At common law, it does not include fixtures (like heavy equipment) or the provision of services or intangibles. Accordingly, s 7A narrows the ground of disqualification in Queensland too far and thereby undermines the protection of this disqualification — nor does it resolve the issue as to whether the contract must be with the government itself.

The Hobler v Jones problem had previously arisen in the United Kingdom in 1931 over the assignment of the lease of the Hatfield Post Office by Lord Salisbury to his son, Viscount Cranbourne, then the member for Dorset in the House of Commons. Amid conflicting opinions as to whether such a contract with the Postmasters General’s Department fell within the first limb of s 11 of the 1782 Act, both the 1782 and 1801 Acts were amended by the House of Commons Disqualification (Declaration of Law) Act 1931 to confine their scope to ‘contracts, agreements or commissions for the furnishing or providing of money to be remitted abroad or wares and merchandise to be used or employed in the service of the public’ (s 1). Apparently, this legislation was designed to overcome other fears such that members with telephone contracts would be disqualified. Hence, it confined the ground to its original intent, namely, to prevent those supplying goods to the Crown from becoming members while susceptible to Crown influence.

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143 [1959] Qd R 609; Stanley J delivered the judgment with whom Mack and Wanstall JJ agreed.
144 At 619.
145 At 620.
146 See for example Chanter v Dickenson 12 LJCP 147; Humble v Mitchell 9 LJQB 29.
147 21 Geo V c 13.
148 Lord Campion and TG B Cocks (eds), above note 83 p 212 citing H C Deb (1930-31) 250, c 364.
This legislation also allayed concerns which were originally raised in the 19th century over the provision of loans from members to the government. Despite a select committee of the House of Commons holding in 1855 that Baron Rothschild was not disqualified as a member for making a loan to the government, Erskine May cites a range of statutes enacted to safeguard from disqualification members who provided loans to the United Kingdom Government.

Express exemption of certain contracts

All of the four States exempt various contracts, no doubt on the basis that they involve minimal risk of government influence over members or minimal risk to the integrity of members. Many are contracts which are entered into by the public on a regular basis and for which the member ought not to have received any preferential treatment. If some preference were given, this is more appropriately addressed by some other integrity mechanism, such as a code of conduct.

These exemptions indicate that a general ground of disqualification of government contractors is incapable of precise operation. The difficulty in both curtailing the ground and prescribing its exemptions does cast doubt on the efficacy of the ground and its justification.

The most extensive list of exemptions is found in NSW. Included are the following:

(a) investment in government bonds;
(b) contractual interests arising under a deceased estate or trust: for one or three years;
(c) compensation agreements (to be notified in Gazette);
(d) real property contracts, including leases;
(e) contracts for the sale to or from the Crown of goods, merchandise or services if supplied on ordinary public terms;
(f) secured loans by the Crown to members on ordinary terms.

A similar list of exemptions is found in Tasmania (s 33(3)(a)-(f) of the Constitution Act 1934 (Tas)), notable among which is the exemption of educational contracts in para (cb).

In Victoria, s 56(2)(a)-(d) and s 57(b)-(d) of the Constitution Act 1975 (Vic) limit the exemption in respect of contracts for goods and services to isolated or casual contracts of sale to the Crown which the member did not know nor could reasonably have known were sales to the Crown (s 56(2)(c)).

In Queensland, s 7A(2)(a)-(d) of the Constitution Act 1867 (Qld) exempts leases over Crown leasehold land, conferral of mining rights, insurance contracts and securities in respect of Crown loans. Of course, these exemptions are unnecessary

149 See CJ (1854-5) 325; HC 401 (1854-5) quoted in Lord Campion and T G B Cocks (eds) above note 83, p 215.
150 Lord Campion and T G B Cocks (eds), above note 83, cites, for example, s 14(2) Finance Act 1914 (Session 2) and s 1(2) War Loan Act 1915.
151 Section 13(4) Constitution Act 1902 (NSW).
since s 7A(1) deems the disqualification provisions only to apply to contracts or agreements for the supply of ‘wares and merchandise to be used or employed in the service of the public’.

Shareholder exemption

An exemption is provided in the four States but not in the Territories for contracts entered into by a corporation consisting of more than a certain number of members. It will be remembered that s 44(v) of the Commonwealth Constitution provides for a similar exemption in respect of agreements with an incorporated company of more than 25 members.

Nature of the corporation

In Tasmania, the exemption is simply limited to ‘a corporation’. However in NSW and Queensland two types of corporation are referred to: ‘an incorporated company, or any trading company consisting of more than twenty members, ...’. The Queensland provision is identical but for the omission of the two commas. Consequently, the Queensland provision, more clearly than its NSW counterpart, requires both types of corporation to comprise more than 20 members. This would appear not to be so under the NSW provision. Furthermore, there is no practical difference today between these two types of corporation. It follows that a shareholding in any corporation in NSW is exempted irrespective of the size of the membership, whereas in Queensland membership must exceed 20 persons.

In Victoria, the exemption refers broadly to ‘any company partnership or association’.

Size of the corporation

The requirement in Queensland and Victoria is that the corporation must be comprised of more than 20 members. In Tasmania, this is increased to more than 30 members and, most significantly, the member and his family cannot hold more than one-fifth of either the issued shares or voting rights in that or a related corporation. Reference has already been made to the position in NSW, where it appears any incorporated company — whatever its size — is exempted.

Privity of contract

It will be remembered that in NSW, Queensland and Tasmania, no disqualification
arises on this ground unless a member 'enters' into the contract or a candidate 'directly or indirectly himself, or by any other person whatsoever in trust for him or for his use or benefit or on his account, undertakes, executes, holds, or enjoys in the whole or in part, any contract ...'. It is difficult to imagine a case where a shareholder could satisfy these tests simply because his or her company has contracted with the Crown.

In contrast, in Victoria and under the Commonwealth Constitution, the connection with the government contract need only be one of being 'interested' in or of having a 'pecuniary interest' in the contract. With these broader connections, this exemption for shareholders may have some operative effect. Of course, if privity of contract is not essential in those other States, there may well be scope for this exemption.

This exemption ought to be retained, but only if disqualification arises for having a pecuniary interest in a government contract. A requirement of privity of contract renders this exemption otiose. Ideally, the exemption should be limited to those who lack the capacity to exercise any control over the activities of the company. Hence, the exemption should prescribe not only the size of the company but also the degree of control which the candidate or member has over the company's affairs. The Tasmanian provision is a useful model to follow. Supplementary to this exemption would be an obligation to disclose shareholdings in any company to a register of interests and/or to the House on an ad hoc basis.

An alternative approach is not to disqualify those shareholders with a pecuniary interest in a government contract, but to require them to declare their interest whenever it arises in the performance of their parliamentary duties. After various concerns over the efficacy of disqualifying local councillors on a similar ground, this mechanism of ad hoc disclosure was recommended for them in 1929 by the United Kingdom Royal Commission on Local Government and subsequently implemented.

Conclusion on government contractor disqualification

If this ground of disqualification were to be repealed, stringent requirements for disclosure of pecuniary interests would be necessary. The Salmon Report in 1976 recommended against the prescription of this ground of disqualification in any new fields of public life, including local government, approving instead the disclosure of pecuniary interests.

156 This was also the view of the Attorney-General of Victoria, Mr B L Murray, in his submission to the Qualifications Committee (a Victorian Joint Select Committee), See Appendix A at 4-5 of the Interim Report from the Qualifications Committee upon the Law relating to Parliamentary Disqualification in respect of Conflicts of Interest April 1973. Note that the AG's view assumed the disqualification would be retained (which the AG opposed).

157 See the 1974 Report of the Committee on Local Government Rules of Conduct Cmnd 5636 (Redcliffe-Maud Committee); Report of the Royal Commission on Standards of Conduct in Public Life 1976 (the Salmon Report), Cmnd 6524, ch 6 para 115-123.

158 Cmnd 3436.

159 See s 94 Local Government Act 1972 (UK).

160 Report of the Royal Commission on Standards of Conduct in Public Life Cmnd 6524, ch 6 para 122-123.
Receipt of fees and honoraria

This section examines those situations in which a member of parliament is disqualified for receiving benefits over and above those received by way of parliamentary salary and reimbursement of expenses. Section 45(iii) of the Commonwealth Constitution disqualifies members who receive pecuniary benefits in two distinct situations: for services rendered to the Commonwealth and for services rendered in Parliament for anyone. Only in Victoria and the Territories is there a comparable ground of disqualification, but none impose both limbs of s 45(iii).

Despite the absence of this ground of disqualification in the other States, members of parliament who accept payments in return for parliamentary services nevertheless engage in unethical conduct and are liable to be sanctioned by their own House (see Chapter 11). Such conduct undermines the integrity of the House and hence falls within the privilege of each House to regulate the conduct of its members. Interestingly, known instances of that conduct have been less prevalent in Australia than in the UK House of Commons. Nonetheless, the various responses of the House of Commons to the problems which have arisen there may provide useful models for Australian parliaments.

The first limb of s 45(iii) has a wider impact, applying to the receipt of pecuniary benefits from the Commonwealth for any service whatsoever, even if unconnected with parliamentary duties. There is obviously a close relationship between this first limb and the previous two grounds of disqualification: holding an office of profit under the Crown and being a government contractor. All three grounds involve the receipt of a benefit from the Crown, but the first limb of s 45(iii) catches benefits which fall outside the other two grounds.

Commonwealth

Section 45(iii) [vacates the seat of a Member who] directly or indirectly takes or agrees to take any fee or honorarium for services rendered to the Commonwealth, or for services rendered in the Parliament to any person or State.

This paragraph deals with two separate situations: (i) services rendered by a member to the Commonwealth; and (ii) services rendered by a member in the Commonwealth Parliament for any person or State. These are referred to respectively as the first and second limbs.

161 Reliance could be made on the various resolutions of the House of Commons which apply at the State level as part of the privileges of that House. In particular, see the resolution of 22 June 1858 which declares: 'It is contrary to the usage and derogatory to the dignity of this House, that any of its Members should bring forward, promote or advocate, in this House, any proceeding or measure in which he may have acted or been concerned for or in consideration of any pecuniary fee or reward.'
The purpose of the first limb of this paragraph was to prevent members who were barristers and other professionals, such as valuers, engineers and arbitrators, from being engaged by the Commonwealth.\textsuperscript{162} The drafters considered that their engagement was not covered by the disqualification of government contractors but clearly ought to be.\textsuperscript{163} Reliance was placed on a similar provision in Victoria.\textsuperscript{164}

The second limb was added later at the Melbourne Convention in 1898 to prevent the abuses which had emerged in the United States and in some colonies, of members lobbying on behalf of others, especially for the passage of legislation.\textsuperscript{165} By deterring members from being lobbyists at the federal level, this limb has proved to be a significant mechanism in maintaining the integrity of the parliamentary process. The drafters of the Commonwealth Constitution were indeed wise to rely on an express ground of disqualification in the Constitution rather than rely on the new federal Parliament adopting, as and when required, the various resolutions of the House of Commons which concerned the receipt of benefits by members.\textsuperscript{166}

Prior to Federation, the House of Commons had adopted two principal resolutions of this kind: members were prevented from receiving any benefit for promoting any matter within Parliament (Resolution of 2 May 1695) and they were also prevented from advocating any matter in the Parliament for which they had previously acted for reward (Resolution of 22 June 1858). This second resolution particularly affected barristers who as members were unable to appear before the House or its committees in matters on which they had previously been engaged in a professional capacity.\textsuperscript{167} These resolutions have proved insufficient to prevent or deter the undesirable practices which emerged in that House, especially members lobbying on behalf of foreign and other interests. While the House of Commons has recently adopted a comprehensive code of conduct to regulate lobbying,\textsuperscript{168} fortunately the Commonwealth Parliament has not suffered from these difficulties due in large measure to the presence of s 45(iii).\textsuperscript{169}

\textsuperscript{162} Introduced by Mr Carruthers at the 1897 Adelaide Constitutional Convention: fn 82 Ch 2.
\textsuperscript{163} As above at 1034 and following.
\textsuperscript{164} Section 19 Constitution Amendment Act 1890 (Vic).
\textsuperscript{165} Introduced by Mr Reid: Official Record of the Debates of the Australasian Federal Convention, Melbourne, 1898 at 1945.
\textsuperscript{166} See Official Record of the Debates of the Australasian Federal Convention, Melbourne, 1898 at 1945-1947 during which extensive reference is made by Edmund Barton to the resolutions of the House of Commons as covered by Erskine May's (10th ed) at 81 and following.
\textsuperscript{167} Resolution of the House of Commons 22 June 1858. This was criticised as too narrow by the Strauss Report, above note 6, at para 25.
\textsuperscript{169} See the Bowen Report at para 7.13 and the 1981 Senate Report at para 7.20. Recent problems in the UK can be gathered from the various reports in 1997 from the House of Commons Committee on Standards and Privileges on Complaints from Mr Mohamed Al Fayed, The Guardian and Others against 25 Members and Former Members.
First limb: services rendered to the Commonwealth

The first limb encompasses services performed by a member both inside and outside Parliament. The services must be rendered to the 'Commonwealth' which primarily refers to the executive branch including the plethora of statutory authorities and other entities under the Crown. It is capable of also referring to the judiciary, although obviously not to the Parliament. Consequently, 'Commonwealth' is wider than the 'Public Service of the Commonwealth' in s 44(v). As mentioned above, there is an obvious overlap between this first limb and the previous two grounds of disqualification in s 44. However, this limb catches situations which escape the other two grounds — for instance, a contract with a government entity other than a department of state is not caught by s 44(v), and a member appointed to a position which is not an ‘office’ as such would fall outside s 44(iv). Both of these cases are likely to be caught by this limb.

Like s 44(v), the first limb of this paragraph has the potential to cast a wide net over arrangements of an innocent nature, especially outside the Parliament. While it clearly precludes members from acting as legal advisers to the Commonwealth or receiving fees for sitting on government boards, there are certain services outside Parliament which may be unnecessarily precluded:

- member doctors and pharmacists who receive payments under Commonwealth legislation;
- members who receive payment for interviews with, for example, ABC Television; and
- member solicitors who accept State and Territory legal aid commission work.

To preclude the paragraph’s application to these situations, Gareth Evans suggested it may need to be restricted to payments ‘such as could conceivably raise prima facie questions in the public mind as to the possibility of improper influence being exercised by either the government, on the one hand, or the employee-payee, on the other’.

Services rendered inside Parliament on behalf of the Commonwealth would include members appearing as counsel for the Executive either before the House or one of its committees. Such a situation is, however, only precluded under the first limb of the paragraph where the member receives a fee from the Commonwealth for the service. Consequently, members can serve on parliamentary committees and on government boards without fear of disqualification provided no fee or honorarium is received. However, it appears that they may receive out of pocket expenses because these payments are not regarded as ‘fees’.

170 G Evans, above note 8 at 470 is of similar opinion, except he limits it to the Crown.
172 G Evans, above note 8 at 470.
Second Limb: services rendered in Parliament for others

The second limb of the paragraph prevents members from accepting any fee or honorarium ‘for services rendered in the Parliament to any person or State’. Although the range of conduct on the part of a member within the scope of this limb is very wide so as to include bribery\(^{174}\) and lobbying activities, disqualification is only incurred in such cases where this conduct is in return for a fee or honorarium. Acting as counsel for a fee before a parliamentary committee, as well as before a House, would seem to be precluded. It is a matter of concern, though, that other benefits may be received with impunity.

The services must, however, be rendered to ‘any person or State’. The former, according to the 1981 Senate Report\(^{175}\), includes corporations, while the latter is confined to the States of Australia. Foreign states might come within ‘any person’ along with corporations.

Timing

Both limbs of s 45(iii) involve two events: taking or agreeing to take a fee or honorarium; and rendering a service. The issue arises as to whether both events must occur while one is a member.

It seems clear from the very nature of para (iii) as a ground of disqualification that under both limbs the taking or agreeing to take a fee or honorarium must occur while a member. This is the critical event which incurs disqualification. The inclusion of ‘agreeing to take’ closes a potential loophole where the fee or honorarium is received after leaving Parliament.

As to when the service must be provided, the second limb (service in the Parliament) clearly requires this to occur while a member. However, the position is not so clear under the first limb where the service is rendered to the Commonwealth. It becomes a critical issue in two distinct situations: when a service is performed for the Commonwealth before being elected to Parliament and payment is received after assuming the seat, and when a member agrees to undertake paid work for the Commonwealth to be performed after leaving Parliament. If it is irrelevant when the service is rendered, then disqualification occurs in both situations. If the service must be rendered while a member, neither situation incurs disqualification. In each case, both situations must be subject to the same rule.

The first limb is most likely to be read as requiring the service to be provided while a member. This ensures that no penalty is imposed on a member who is paid for services provided before being elected. It is consistent with the requirement that the fee or honorarium be taken or agreed to while a member. Also, it reflects the draft at the Sydney session in 1897 which contained only a version of the first limb: ‘Directly or indirectly accepts or receives any fee or honorarium for work done or services rendered by him for


\(^{175}\) 1981 Senate Report at para 7.23.
or on behalf of the Commonwealth whilst sitting as such member' (emphasis added).\textsuperscript{176} Unfortunately, that view allows members to arrange profitable contracts with the Commonwealth for services to be provided after leaving Parliament. This hardly promotes the avoidance of a conflict of interest as the member prepares to leave Parliament.\textsuperscript{177} To deter that conduct, the paragraph would need to be construed to apply to services rendered while a member or thereafter. It is difficult to justify such a pragmatic interpretation.\textsuperscript{178}

\textit{\textbf{\textit{\textit{\textbf{Any fee or honorarium}}}}}

The reference to 'any fee' covers monetary payments made pursuant to a contract or arrangement, although Professor Sawer suggested that an agreement to take a fee may not require the formation of a binding contractual arrangement.\textsuperscript{179} An 'honorarium' is a voluntary payment not made pursuant to any contractual obligation,\textsuperscript{180} for example, barrister's fees and retainers.\textsuperscript{181} Given that these are both forms of monetary payment, rewards for services rendered in the form of gifts and sponsored travel have been identified as outside the scope of this disqualification.\textsuperscript{182} The Constitutional Commission considered these forms of rewards to be more serious than the payment of fees or honoraria.\textsuperscript{183}

A further exception to this limb appears to be a monetary tribute awarded to a member of Parliament for past services to the nation. In November 1920, over £25,000 was raised by public subscription as a tribute for Prime Minister Hughes in recognition of his wartime leadership.\textsuperscript{184} Acceptance of this tribute was later queried under s 45(iii) by a member of the House of Representatives, Mr Frank Brennan. Mr Hughes rejected any suggestion that he was disqualified under that paragraph on the ground that the

\textsuperscript{176} See the Official Record of the Debates of the Australasian Federal Convention (Second Session) Sydney 1897 at 1028.

\textsuperscript{177} Senator Gair's appointment as Ambassador to Ireland in 1974 generated opinions from the Solicitor-General and the General Counsel to the Commonwealth Attorney-General that by accepting the appointment he was disqualified as from 14 March even though he did not take up his appointment until after leaving Parliament: see P J Hanks, in G Evans (ed) above note 43, p 193.

\textsuperscript{178} However, this view was given by the General Counsel to the Attorney-General and by the Solicitor-General over the Gair appointment to ensure that the paragraph could not be easily avoided by an agreement to provide future services: see G Evans, above note 8 at 470.


\textsuperscript{181} G Evans, above note 8 at 470.

\textsuperscript{182} See Bowen Committee Report para 7.13; 1981 Senate Report para 7.23: need 'a direct cash advantage'.

\textsuperscript{183} Final Report of the Constitutional Commission, 1988 para 4.881

\textsuperscript{184} HR Debates 1921 vol 95 at 7698-7710; G Sawer, above note 73, p 215; G Sawer, above note 79, p 215; 1981 Senate Report at 90 fn 42.
service had to be rendered to the Commonwealth Government or to the Commonwealth as a constitutional entity, not as in this case, for services to the people of Australia.  

There followed in the parliamentary debate a discussion of the propriety of accepting honorariums with concern expressed by Mr Ryan for the apparent conflict of interest which their acceptance by ministers engenders:

There is an impression abroad that the money came from those who have large financial interests, and had big business transactions, possibly with the Commonwealth, during the period of war. After all, most people think that gratitude is a lively sense of favours to come, and that whether or not a presentation comes within the embargo imposed by the Constitution, it is not desirable that responsible Ministers, while still in charge of the affairs of the country, should accept large gifts from persons who may subsequently have business dealings with the Government. I do not suggest that the Prime Minister would be influenced by the presentation; I would be sorry, indeed, to suggest that he would do anything corrupt, but I do suggest that there is a possibility that he might have a kindly feeling — he could not help it — towards those who were good enough to make the presentation.

Although Mr Hughes remarked proudly in the course of the debate, with no hint of embarrassment, that he had accepted numerous ‘articles of value’ as tributes on account of his parliamentary service over the years, valuable gifts to ministers are no longer tolerated. The ethical climate has clearly changed since the 1920s.

**Reform proposals**

Both the 1981 Senate Report and the Constitutional Commission recommended that Parliament be given power to prescribe the interests, ‘pecuniary or otherwise’, which disqualify members. The former, however, recommended that s 44(v) and s 45(iii) be replaced with the general power, whereas the Commission recommended they be retained and supplemented by the general power.

**States and Territories**

Only in Victoria and the Territories is there a ground of disqualification comparable to that in s 45(iii) of the Commonwealth Constitution. In Victoria, there is incorporated in the government contractor ground of

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185 Professor Sawer agreed with this narrow interpretation: above note 73, p 215.
186 HR Debates 1921 vol 95 at 7709.
187 HR Debates 1921 vol 95 at 7706.
188 At para 7.37.
disqualification, disqualification of a member who 'in any character or capacity for or in expectation of any fee gain or reward performs any duty or transacts any business whatsoever for or on behalf of the Crown'. Under this provision it is clear that the service must be provided when a member and may be given both inside and outside Parliament. However, as it must be 'for or on behalf of the Crown', it is confined to the member acting as an agent for the Crown in some matter.

The Northern Territory and the ACT have adopted in part the Commonwealth's formulation of this ground by disqualifying a member who 'takes or agrees to take, directly or indirectly, any remuneration, allowance or honorarium [or reward, in the ACT] for services rendered in the Legislative Assembly'. Unlike s 45(iii) of the Commonwealth Constitution, services rendered outside the Legislative Assembly are not covered by this ground. The Northern Territory provision might also be narrower in not expressly referring to the receipt of any fee or reward, which is covered by the Commonwealth and ACT provisions.

A different approach is taken in Queensland where s 7B of the Legislative Assembly Act 1867 (Qld) deters members from performing any duty or service or transacting any business for the Crown by denying them any fee, reward or expenses for that service. In addition, the Assembly determines whether they should remain a member. Excluded from this provision are services as a court witness, those expressly allowed by statute, and services provided by ministers and parliamentary secretaries. Also excluded since 1999 are appointments to Crown positions to which there is no right to a fee or where that right has been waived by the member.

In South Australia, only an exemption is provided to ensure no disqualification arises (presumably under s 45 for holding an office of profit under the Crown) where a member is appointed to a parliamentary committee by a House or the Parliament, or is appointed to a royal commission and receives a salary, fees or other emoluments.

Until 1984, a similar exemption was provided in Western Australia by s 41A of the Constitution Acts Amendment Act 1899 (WA) for receiving reasonable expenses for sitting on a select committee, royal commission or when acting as a representative of the Parliament or of the Commonwealth Parliamentary Association. That provision was repealed along with the government contractor ground of disqualification and the re-arrangement of the office of profit ground into specific lists of offices.

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190 Section 55 Constitution Act 1975 (Vic).
192 Section 7B(3) Legislative Assembly Act 1867 (Qld).
193 Section 3 of the Officials in Parliament Act 1896 (Qld).
194 Parliamentary Members (Office of Profit) Amendment Act 1999 (Qld). This ground is covered by cl 70(1)(b) LCARC's draft Parliament of Queensland Bill which disqualifies a member who performs a duty or service for reward for an entity of the State but exempts those situations covered by the 1999 Amendment (that is, where no right to a reward, or the reward is waived). Reasonable expenses may be given. An entity of the State is defined in the dictionary of the Act to mean any body established for a government purpose.
195 Section 54A Constitution Act 1934 (SA).
Conclusion on the fees and honoraria disqualification

This ground of disqualification plays a significant role in assisting members to avoid conflicts of interest. Yet serious infringements of this ground may constitute bribery, while those of a minor nature may amount to no more than unethical conduct.196 This suggests that the penalty of disqualification may be disproportionate in certain cases. One approach is to dispense with this ground in s 45(iii) and substitute rules, reinforced by appropriate penalties, which regulate the circumstances in which members can receive pecuniary benefits in connection with their parliamentary services. These rules would need to be contained in a code of conduct or in the standing orders or resolutions of the House. They would also need to be enforced by each House.

Absence from Parliament

A failure by a member to attend the sittings of his or her House is a standard ground of disqualification. The basis for this ground is simply the dereliction of duty on the part of members in not adequately representing the interests of their constituents. That dereliction of duty is measured by a prescribed period of absence. Although provision is usually made for the House to permit the absence of a member, it is unclear whether this must be granted before the period of absence commences or whether it may be granted later. As will be seen, the period of absence varies markedly between the Commonwealth, the States and the Territories. This suggests that a review of their fairness is required.

Commonwealth

In respect of both Houses of the Commonwealth Parliament, ss 20 and 38 of the Constitution respectively provide that a failure to attend for two consecutive months in the same session without the permission of the House renders the member's seat vacant.197 The absence must be for two consecutive months in the same session.198 Presumably this refers to two calendar months, although it is unclear whether it must be for the whole of each month. The decision of the Privy Council in Attorney-General of Queensland v Gibbon199 supports the view that this need not be so and that absence across parts of two consecutive months will suffice. This absence must also

196 Both of these aspects are considered separately in Chapters 8 and 11.
197 Sections 20 and 38 Commonwealth Constitution. Senator Ferguson (Qld) is the only senator to have lost a seat under s 20 (on 6 October 1903); Harry Evans (ed), Odlers' Australian Senate Practice (9th ed) Department of Senate Canberra 1999 at 157.
198 During the life of the Sixth Parliament 1914-1917, all members of the Commonwealth Parliament were given formal leave of absence during adjournments because there was one long session extending beyond two and a half years (HR Debates 75:1566): G Sawer, above note 73, p 150.
199 (1886) 12 App Cas 442.
By which date must the House grant its permission? A literal reading of the relevant provisions suggests that this may be granted at any time prior to the expiration of the prescribed period of absence. Often permission is granted in advance. If not granted, disqualification takes effect once that period has expired.

**States and Territories**

Similar provisions operate in all the States and the Territories, differing only in respect of the period of absence which incurs disqualification. This period ranges from three consecutive sitting days to one whole session of the House.

One whole session of the House is prescribed in NSW, Queensland, Tasmania, Victoria and Western Australia. In South Australia, the period is twelve consecutive sitting days. Three consecutive sitting days is prescribed in the Northern Territory and four consecutive ‘meetings’ in the ACT.

Where permission is given for a particular period of absence, it is necessary to ensure that the period specified is sufficient to avoid disqualification. In Attorney-General of Queensland v Gibbon permission was given by the former Legislative Council for a period of 12 months which expired during a session. However, the subsequent absence during the remainder of that session and the whole of the following session incurred disqualification under s 23 of the Constitution Act 1867 (Qld). The Privy Council interpreted absence for ‘two successive sessions’ as meaning absence for parts of two sessions — a view which seems open to challenge.

It is evident that the present formulation of this ground of disqualification is in need of clarification, especially the precise period of absence required. Further, the time by which permission for any absence must be granted should be expressly stated.

**Mental illness**

According to Erskine May, mental illness in the form of 'lunacy and idiocy' is a
disqualification for members of the House of Commons at common law. It is clearly based on the incapacity of the candidate or member to discharge the duties of a member of Parliament. As such this ground, once certified, needs to operate as a disqualification for both candidates and members. However, this is not the case for all Australian parliaments.

Commonwealth

The Commonwealth Constitution does not expressly include mental illness as a ground of disqualification, although it is a common ground for members of State Parliaments. Nevertheless, it has effectively been prescribed as a disqualifying ground for members of the Commonwealth Parliament by s 163 of the Commonwealth Electoral Act 1918 (Cth).

Section 163 requires for nomination that a candidate be an elector or qualified to be one. Section 93(8)(a) disqualifies an elector if of unsound mind or incapable of understanding the nature and significance of enrolment and voting. These provisions therefore disqualify candidates on the basis of insanity. However, they do not disqualify a sitting member so afflicted — at least not until the member nominates for the next election.

To disqualify a sitting member as soon as he or she is afflicted would require a constitutional amendment. On the other hand, candidates are disqualified on the basis that s 163 prescribes a qualification for election pursuant to s 34 of the Constitution.

There is clearly a need to amend the Constitution to add mental illness or insanity as a further ground of disqualification for sitting members as well as candidates. Such an amendment would protect the interests of constituents to ensure that any member who is mentally incapable of continuing to represent their interests is replaced with a capable member. The Constitutional Commission in recommending such an amendment stipulated that disqualification should only arise once the ‘unsoundness of mind’ was certified according to a procedure prescribed by Parliament.

States and Territories

In South Australia, Tasmania, Victoria, Western Australia and the

210 C J Bolton, Erskine May’s Treatise on the Law, Privileges, Proceedings and Usage of Parliament (21st ed) Butterworths London 1989, p 41. See for example Mr Pene’s Case 1566, CJ (1547-1628) 75; Mr Alcock’s Case 1811, C (1810-11) 226, 265, 687. A statutory procedure for verifying this ground is now provided in the Mental Health Act 1981 (UK).


212 Sections 14(2) and 34(f) Constitution Act 1934 (Tas).


214 Sections 7, 20 and 38(e) Constitution Acts Amendment Act 1899 (WA) as a legal incapacity: s 18(a) Electoral Act 1907 (WA) disqualifies any person of ‘unsound mind’ to be exalted as an elector or to vote.
ACT, both candidates and sitting members are disqualified if they are 'of unsound mind'.

In contrast, candidates but not sitting members are disqualified in NSW and Queensland — in NSW, a person who is a patient under the Mental Health Act 1958 (NSW) is incapable of being elected, while Queensland adopts the Commonwealth position under s 93(8)(a) of the Commonwealth Electoral Act 1918 which affects only candidates.

It is not a ground of disqualification in the Northern Territory.

Consequences and enforcement of disqualification

This section examines the consequences of disqualification and the procedures by which the grounds of disqualification are enforced. For a successful candidate, the consequence of disqualification is that his or her election is void. This is also the case where the candidate fails to comply with the basic qualifications for nomination as outlined in Chapter 2. For a sitting member who incurs disqualification after taking his or her seat, the seat becomes vacant. In addition, the conduct of a disqualified candidate or member may be the subject of a common informer action or even a penalty. In only a few instances in Australia is the member's House empowered to override the disqualification and save the member's seat.

In relation to the enforcement of the grounds of disqualification, two principal procedures are available: (i) by way of a challenge to an election result, normally brought by an election petition to a court of disputed returns; or (ii) later by the issue being raised in the member's House. A common informer action might also be available.

It will be evident from the following analysis of these various procedures that improvements are needed to ensure that the grounds of disqualification are sufficiently enforced. Any reform must occur along with a rationalisation of all the grounds of disqualification to ensure that candidates and members are only challenged on grounds which serve to protect the integrity of Parliament and for which disqualification is the proportionate response.

Commonwealth

The respective positions of candidates and of sitting members need to be considered separately.

216 Sections 17(1)(i) 'insane mind' and 31(1)(i) 'unsound mind' Constitution Act 1934 (SA) and ss 29(1)(d) and 52(i) Electoral Act 1985 (SA).
217 Sections 21(a), 79(1), 81B(1) Parliamentary Electorates and Elections Act 1912 (NSW).
218 Sections 64(1) and 83(1) Electoral Act 1992 (Qld).
220 This is considered below under 'Provision for relief'.

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Candidates

Where an elected candidate is disqualified on any of the grounds in ss 43 or 44 of the Constitution, the election of that person is void. Where this is determined by the High Court sitting as the Court of Disputed Returns on an election petition (see below on this jurisdiction), the relief granted depends on whether the candidate stood for a seat in the House of Representatives or the Senate. In the case of a seat in the House, the relief is likely to be a by-election, at least where the electorate was unaware of the candidate's disability. For a Senate seat, the relief is likely to be a recount of the votes cast for that seat as if the disqualified candidate had died. This difference arises from the different voting systems used for each House. But the same test is applied to both situations: which relief gives effect to 'the voters' true legal intent'? After referring to In re Wood and Sykes v Cleary, Brennan CJ in Free v Kelly summed up the position as follows:

The principle to be derived from both cases is that an election in which a person who is incapable of being chosen is purportedly returned as a member of the Senate or as a member of the House of Representatives will not warrant an order for a special count unless a special count would reflect the voters' true legal intent or, conversely, would not result in a distortion of the voters' real intentions.

Hence, in relation to the Senate, a recount of votes disregarding the preferences for the disqualified candidate will usually reveal the voters' real intention given the nature of the Senate's proportional system of voting. On the other hand, the single member preferential voting system for House of Representatives seats will not usually reveal the voters' real intentions on a recount. In such cases, a by-election will be necessary. However, Free v Kelly suggests the position may be different where there are only two candidates and the voters were aware of the facts which establish the disqualification. In such a case, the votes cast for the disqualified candidate may be thrown away, resulting in the election of the other candidate.

Note that where a successful Senate candidate is disqualified on an election petition, whether for failing the qualifications prescribed by the Commonwealth Electoral Act 1918 (Cth) or under ss 43 or 44 of the Constitution, this does not create a Senate casual vacancy within s 15 of the Constitution pursuant to which the Senate may appoint a replacement. This is because, in each case, no place is filled which is later made vacant by a supervening event. On the other hand, a Senate vacancy does arise where a Senator only incurs disqualification after taking his or her
seat, for then the place has become ‘vacant’.\textsuperscript{228}

As for candidates who are not elected, whether they were qualified or disqualified appears to be irrelevant to the outcome of the election. This is so even when their preferences are distributed to determine the successful candidate.\textsuperscript{229} A different view was adopted in \textit{Hickey v Tuxworth}\textsuperscript{230} where the disqualification of an unsuccessful candidate in a Northern Territory election (for lacking Australian citizenship) was held to invalidate the election of the successful candidate who had won only after distribution of preferences. Nader \textit{j}, sitting as the Election Tribunal for the Northern Territory, declared the election void since it was unclear how the distribution of preferences would have gone if the disqualified candidate had not stood. Fortunately, this conclusion was disapproved of by the High Court in \textit{In re Wood}\textsuperscript{231} for it ‘would play havoc with the electoral process’ if disqualified candidates were deliberately nominated to void an election.\textsuperscript{232}

Where a nominated candidate is discovered to be disqualified before the election poll is held, clear statutory authority is required to authorise the removal of that candidate’s name from the ballot paper.\textsuperscript{233} Where this authority is lacking, notice may be given of the candidate’s disqualification to the electorate.

\textit{Sitting members}

Where a sitting member incurs a ground of disqualification within s 45 of the Constitution subsequent to being elected, the member’s seat becomes vacant immediately, as s 45 provides that the ‘place shall thereupon become vacant’. The primary responsibility for monitoring the qualifications of members is each member’s House. But if a House decides not to act on a member for political reasons, provision is made for any person to sue a disqualified member by way of a common informer action. Both of these procedures are provided for in ss 46 and 47 of the Constitution.

Section 46 allows a common informer action to be brought against a member for sitting in Parliament while disqualified. Section 47 enables each House to determine three issues: any question respecting the qualifications of its members; a vacancy in the House; and a disputed election. Each section empowers the Parliament to otherwise provide, which it has done.

\textit{Common informer actions}

Section 46 of the Constitution prescribes:

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\textsuperscript{228} \textit{In re Wood} (1988) 167 CLR 145 at 168. The Court at 168 noted that the phrase ‘becomes vacant’ appears in ss 19, 20, 37, 38 and 45 of the Constitution. This point was left open in \textit{R v Governor of South Australia} (1907) 4 CLR 1497.

\textsuperscript{229} \textit{In re Wood} (1988) 167 CLR 145 at 167.

\textsuperscript{230} (1987) 47 NTR 39.

\textsuperscript{231} (1988) 167 CLR 145 at 167.

\textsuperscript{232} At 167.

\textsuperscript{233} \textit{Ex parte Craswell} [1985] 2 Qd R 259.
Until the Parliament otherwise provides, any person declared by this Constitution to be incapable of sitting as a senator or as a member of the House of Representatives shall, for every day on which he so sits, be liable to pay the sum of one hundred pounds to any person who sues for it in any court of competent jurisdiction.

Pursuant to this section, the Common Informers (Parliamentary Disqualifications) Act 1975 (Cth) was enacted to reduce the penalty to $200 for sitting prior to the instigation of any proceedings under that Act. The Act also imposes a further penalty of $200 for each day the member continues to sit after receipt of the originating process. As well, a limitation period of 12 months applies with only one action permitted in respect of sitting while disqualified during the relevant period.

The High Court is vested with exclusive jurisdiction to deal with these common informer actions. It is unclear whether a common informer action can proceed against a member where the relevant House is already investigating the member's disqualification or has referred the matter to the Court of Disputed Returns. A successful common informer action will confirm that the election of a disqualified candidate is void under s 44 or that the seat of a disqualified sitting member is vacant under s 45. It is prudent for a member against whom a common informer action is brought not to sit or vote in the House until resolution of the matter to avoid the possibility of the daily penalty of $200. However, until such an action is initiated, a member whose qualification is in doubt only runs the risk of a $200 penalty if he or she continues to sit. This is also the case even when the member's qualifications are challenged in the Court of Disputed Returns. The daily penalty only applies from the date a common informer action is instigated.

The issue today is whether a common informer action is an appropriate enforcement mechanism. Few actions have ever been brought. In the United Kingdom, the penalty for sitting or voting in Parliament when disqualified was repealed by the House of Commons Disqualification Act 1957 (UK). One criticism of this form of action is that it attracts the accusation of the 'greedy informer'. On the other hand, its rationale is to overcome any refusal on the part of a House to act

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234 This Act was enacted in one evening in response to the Webster case: L M Barlin (ed), House of Representatives Practice (3rd ed) AGPS Canberra 1997 at 157; HR Debates 22 April 1975 at 1978-1986, Senate Debates 22 April 1975 at 1236-1239.
235 Section 3(2) Common Informers (Parliamentary Disqualifications) Act 1975 (Cth).
236 Section 3(3).
237 Section 5.
238 See G Evans, above note 8 at 473 where he suggests that concurrent proceedings are not excluded given that ss 46 and 47 provide two entirely distinct procedures.
239 Evans, above note 8 at 473 suggests that a successful common informer action does not vacate the seat; but this occurs simply by virtue of s 45.
240 Apparently, Senator Webster absented himself from the Senate while his matter was before Barwick CJ, whereas Senator Wood did not: H Evans (ed), above note 197, p 152.
241 G Evans, above note 8 at 472. Note fn 65 which refers to a writ issued against Dr Cairns in respect of occupancy of a government flat in Canberra; report in The Age (Melbourne) 24 May 1975.
242 G Evans, above note 8 at 473.
against one of its members where this is necessary.243 The paucity of actions suggests that a House is rarely seen to be dilatory in this respect.

An alternative mechanism to a common informer action is to permit any person to initiate proceedings for a declaration of disqualification without the inducement of a monetary benefit. The Western Australian Law Reform Committee's report Disqualification for Membership of Parliament: Offices of Profit under the Crown and Government Contracts (Project 14, 1971) recommended replacing the common informer action with a right to seek a declaration as to disqualification, subject to providing security for costs.244 This appears to be an eminently appropriate measure which has been implemented in Western Australia.245 In that State, any elector has the right to apply to the Supreme Court to decide whether the election of a person is void,246 or the seat has become vacant,247 or an office or place under the Crown is vacated.248 This provides a model enforcement regime for the other Australian parliaments.

Determination of qualifications

Section 47 of the Constitution provides:

Until the Parliament otherwise provides, any question respecting the qualification of a senator or of a member of the House of Representatives, or respecting a vacancy in either House of the Parliament, and any question of a disputed election to either House, shall be determined by the House in which the question arises.

This section initially vests in each House — until the Parliament otherwise provides — the power to determine three distinct matters: the qualification of a member; a vacancy; and any challenge to an election. The Parliament has otherwise provided pursuant to ss 47 and 51(xxxvi) in respect of all three matters in Pt XXII of the Commonwealth Electoral Act 1918 (Cth).

Qualification and vacancy

The first two matters are covered by Div 2 of Pt XXII. Section 376 provides that either House 'may' by resolution refer to the Court of Disputed Returns any question respecting the qualification of one of its members or a vacancy.249 The Court of

243 G Evans, above note 8 at 473.
244 At paras 37-38.
245 Section 41 Constitution Acts Amendment Act 1899 (WA).
246 Section 35.
247 Sections 36 or 38.
248 Section 37.
249 It must be intended by s 47 that where the qualification of a member is raised, it is only that member's House which is empowered to determine the issue, being 'the House in which the question arises'. This phrase should not be interpreted to mean the House in which the issue is raised.
250 In R v Governor of South Australia (1907) 4 CLR 1497 the High Court held that it had no
Disputed Returns is the High Court.\textsuperscript{251} Since Federation, relatively few matters have been referred to the Court.\textsuperscript{252} Whether each House retains its power to deal with these two matters under s 47 concurrent with that of the Court of Disputed Returns has been the subject of debate.\textsuperscript{253} However, it seems fairly clear that the Houses retain their jurisdiction under s 47 in respect of those matters — but, it is submitted, that this can only be so until they refer a matter to the Court of Disputed Returns. Once referred, the jurisdiction should lie with the Court for final determination. This minimises the risk of any conflict arising between the Court and a House. Where a House decides not to refer an issue of disqualification to the Court of Disputed Returns, it appears to have the power to determine the matter itself, as it did with Mr Warren Entsch MP in 1999.\textsuperscript{254} In such a case, however, a common informer action remains available in the High Court. The potential for conflicting decisions between a House and the High Court is obvious in such a situation.

\textit{Election challenge}

The third matter referred to in s 47, an election challenge, is covered by Div 1 of Pt XXII. Section 353(1) provides that the validity of any election or return can \textit{only} be challenged by petition to the Court of Disputed Returns. The petition must be lodged by another candidate or an elector within 40 days of the return of the writ. No extension of this mandatory period can be granted by the Court of Disputed Returns.\textsuperscript{255} By s 355 it must include:

\begin{quote}
\begin{itemize}
\item jurisdiction to decide whether a casual Senate vacancy had been validly filled, this being a vacancy to be determined by the Senate under s 47. Thereafter the \textit{Disputed Elections and Qualifications Act 1907} (Cth) was enacted to allow referral of such issues by a House to the High Court as the Court of Disputed Returns; see also \textit{Blundell v Vardon} (1907) 4 CLR 1463.
\item \textsuperscript{251} Section 354 \textit{Commonwealth Electoral Act 1918} (Cth).
\item \textsuperscript{252} References from the Senate were made: in April 1975 in \textit{In re Webster} (1975) 132 CLR 270; on 16 February 1988 in \textit{In re Wood} (1988) 167 CLR 145.
\item \textsuperscript{253} Senator Murphy's opinion was that the power of each House under s 47 was ousted Debates 4 April 1974 at 681). The Senate disagreed, as did the 1981 Senate Report (para 8.10 see fn 17) relying upon 'may refer' and that s 203 does not unequivocally prohibit the House.
\item \textsuperscript{254} See HR Debates 10 June 1999 when a motion in the House of Representatives to refer the issue whether Mr Entsch was disqualified under s 44(v) to the Court of Disputed Returns was amended to determine that 'the member for Leichhardt does not have any direct or indirect pecuniary interest with the Public Service of the Commonwealth within the meaning of section 44(v) of the Constitution by reason of any contract entered into by Cape York Concrete Pty Ltd since 3 October 1998, and the member for Leichhardt is therefore not incapable of sitting as a member of this House.'
\item \textsuperscript{255} \textit{Rudolphy v Lightfoot} (1999) 197 CLR 500. The joint judgment of the High Court held that the 40 day period for lodgment of the petition is an essential condition to the jurisdiction of the Court of Disputed Returns. In that case the petitioner failed to lodge the petition pursuant to s 355(e) against the filling of a casual Senate vacancy by the Western Australian Houses within 40 days of the State Governor's certification to the Governor-General under s 15 of the Constitution.
\end{itemize}
\end{quote}
(a) the facts relied on to invalidate the petition or return;
(ba) stated with ‘sufficient particularity’ to identify the specific matters to justify relief;
(b) a prayer for relief.

Unless the requirements for a petition are rigidly complied with, s 358 prohibits any proceedings on the petition. The Court is given by that section only a limited power to relieve compliance with para (aa) of the petition, on the petition. The Court is given by that section only a limited power to relieve compliance with para (aa). It has no power to allow an amendment of the petition in order to comply with the other requirements of s 355 — at least once the time for lodgment of the petition has expired. For instance, in Nile v Wood the petition was dismissed for omitting to include a prayer for relief. In order for para (aa) to be complied with, the specific grounds of disqualification must be clearly formulated in accordance with the terms of ss 43, 44 or 45 of the Constitution to enable the facts to be pleaded with sufficient particularity. So unless a petition is carefully drafted there is the risk that it will be dismissed and, as this usually occurs outside the 40 day period for lodgment, the opportunity for another candidate or an elector to challenge the election of the member will be lost.

In the absence of a valid petition, any challenge to a member’s election on the basis of a disqualification can only be raised by the member’s own House or by way of a common informer action. The House can either deal with the matter itself or may refer it to the Court of Disputed Returns under s 376 of the Commonwealth Electoral Act 1918. Any person may institute a common informer action in the High Court pursuant to the Common Informers (Parliamentary Disqualifications) Act 1975. It is clear that the referral of a matter to the Court of Disputed Returns by a House as to the qualification of a member allows the Court to determine whether the member was validly elected despite the fact that the time has expired for filing an election petition.

This has implications for the Commonwealth Electoral Commissioner’s power under s 393A of the Commonwealth Electoral Act 1918 to order the destruction of electoral documents. The Commissioner may order their destruction six months after the declaration of the poll provided they are no longer needed for the performance of the Commission’s functions. Given the potential for the qualifications of members to be raised at anytime during their parliamentary term, the Commissioner would appear to be unable to destroy those documents until the end of that term.

There is some potential for conflicting determinations arising from the various procedures which occur pursuant to ss 46 and 47 of the Constitution. For instance, the High Court might arrive at a different conclusion in a common informer action to that reached by a House as to the qualification of a member. This would be

256 Nile v Wood (1988) 167 CLR 133 at 137.
257 At 137.
259 Section 355 Commonwealth Electoral Act 1918 (Cth).
members of parliament: law and ethics

particularly awkward if the House determined the issue first. There is support for the view that the determinations of the High Court or of the Court of Disputed Returns prevail over those of a House. 261

A related issue is whether the jurisdiction of the High Court as the Court of Disputed Returns conforms with Ch III of the Constitution. 262 A challenge to this jurisdiction on the basis that it impermissibly conferred on the High Court a non-judicial power was rejected by a slim majority in Sue v Hill. 263

Finally, it should be noted that the High Court has held that the presence of a disqualified member in the Senate does not affect the validity of the Senate's proceedings. 264 No doubt the same principle applies to the House of Representatives.

States and Territories

Procedures similar to those available at the Commonwealth level are found at the State and Territory level. One exception is that in only two States is there similar provision for a common informer action.

Common informer actions

At the State level, a common informer action is available in NSW and Queensland, essentially in relation to one ground of disqualification, that of a government contractor. 265 Under their respective Constitutions, any person may bring an action in the relevant State Supreme Court to recover from a member a penalty of $1000 for sitting or voting in Parliament when disqualified on that ground. 266

South Australia provides for a similar common informer action in respect of any ground of disqualification in relation to a newly elected member 267 and also for sitting members who incur disqualification as a government contractor. 268

Of the other States which do not provide for a common informer action, only Victoria prescribes offences for certain infringements. Section 58 of the Constitution

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261 See 1981 Senate Report, para 8.15 citing Bradlaugh v Gossett (1884) 12 QBD 271 at 281-2.
262 See K. Walker, ‘Disputed Returns and Parliamentary Qualifications: Is the High Court’s Jurisdiction Constitutional?’ (1997) 20 UNSWLJ 251. This article concludes that the High Court’s jurisdiction as the Court of Disputed Returns is not invalid as an exercise of non-judicial power but is more of an indeterminate nature, that is, capable of being judicially vested in a court and non-judicial if left with the Parliament or some other body. Early High Court authority suggesting that it is non-judicial ought to be overruled: see Holmes v Angwin (1906) 4 CLR 297; Webb v Hanlon (1939) 61 CLR 323.
263 (1999) 163 ALR 648 per Gleeson CJ, Gummow and Hayne JJ and Gaudron J; contra McHugh, Kirby and Callinan J.
265 See s 13 Constitution Act 1902 (NSW); s 6 Constitution Act 1867 (Qld).
266 Section 14(2) Constitution Act 1902 (NSW); s 7(2) Constitution Act 1867 (Qld).
267 Section 46(2) Constitution Act 1934 (SA).
268 Section 53.
Act 1975 (Vic) renders it an offence for a member to accept any office or place of profit under the Crown unless expressly permitted. Such a member is liable for a penalty of $100 for each week the office is held. A more general offence with a penalty of $500 is prescribed by s 59 where any person wilfully contravenes or fails to comply with the provisions of Div 8, ‘Offices and Places of Profit’. Not all of the provisions in Div 8 contain obligations for which there can be a ‘contravention’ or ‘failure to comply’. While ss 49, 51 and 52 can be enforced in this way, it is unlikely that s 54, which disqualifies government contractors, and s 55, which prescribes four other grounds of disqualification, fall within the scope of s 59. Those sections simply declare respectively that the election is void or the seat is vacant.

Validity of election

There is a remarkable degree of uniformity between the States and Territories on the procedure for challenging the election or return of a member.269 Basically a petition or application is filed in the State Supreme Court, usually designated as the Court of Disputed Returns. This court is vested with exclusive jurisdiction to determine the validity of the election or return, from which there is no right of appeal.270 A petition must be filed usually within 40 days of the return of the writ. After the expiration of that period, any challenge to a member’s qualification must be brought by the member’s House or by a common informer or equivalent action (if available).

The denial of a right of appeal from the Court of Disputed Returns is to avoid protacted legislation which leaves constituents unrepresented. Although suggestions are made at times to confer a right of appeal, the preferable approach seems to be to enable the Court of Disputed Returns to seek clarification on questions of law by case stated to an appellate court. Since Courts of Disputed Returns are usually constituted by one or more State Supreme Court judges, the issue arises of whether there is a right of appeal to the High Court pursuant to s 73 of the Commonwealth Constitution. The High Court in two early decisions rejected this possibility on the ground that the jurisdiction of the Courts of Disputed Returns was vested in State Supreme Courts persona designata.271

Jurisdiction to challenge qualification of sitting members

Where a question arises as to the qualification of a sitting member of a State Parliament or Territory Assembly (or a vacancy), the issue is one initially for the relevant

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269 Sections 155 and 156 Parliamentary Electorates and Elections Act 1912 (NSW); ss 127 and 128 Electoral Act 1992 (Qld); ss 102 and 103 Electoral Act 1985 (SA); s 214 Electoral Act 1985 (Tas); ss 279 and 280 The Constitution Act Amendment Act 1958 (Vic), s 157 Electoral Act 1907 (WA); s 108 Northern Territory Electoral Act 1995 (NT); s 252 Electoral Act 1992 (ACT).

270 In Tasmania, a special case may be stated to the Full Court: s 220 Electoral Act 1985 (Tas).

271 See Holmes v Angwin (1906) 4 CLR 297; Webb v Hanlon (1939) 61 CLR 313. Note the argument that these cases on this issue ought to be overruled: K Walker, above note 262 at 269-270 and 273.
House. In four States — NSW, Queensland, Tasmania and Victoria — and in the Northern Territory and the ACT, each House may by resolution refer the question to the Court of Disputed Returns which may declare that the member is not qualified or is incapable of sitting. No provision for referral to a court is made in South Australia where s 43 of the Constitution Act 1934 (SA) leaves any question respecting a possible vacancy to the relevant House.

A potential difficulty with the referral process where a member's qualifications are doubtful is that there is no guarantee this will be authoritatively determined either by the House or by a court. The referral depends entirely on the wishes of the House. As already seen, this is not the case in Western Australia where any elector has the right to apply to the Supreme Court to decide whether the election of a person is void, or the seat has become vacant, or an office or place under the Crown is vacated. If grounds of disqualification are to remain justified, they must be enforced. It is clearly unsatisfactory for this responsibility to be vested entirely in each House. While the approach adopted in Western Australia runs the risk of political manipulation and interference with members, the benefits of judicial enforcement outweigh that risk.

Alternatives to disqualification

In assessing the various grounds of disqualification, consideration ought to be given to what, if any, alternatives exist which achieve the same objectives of disqualification. Those objectives are twofold: the prevention of an appearance of a conflict of interest and maintenance of the moral standing of members. Both of those objectives serve to protect the integrity and authority of the Parliament. The prescription of grounds of disqualification produces an immediate impact of devastating effect: the loss of one's seat or a void election. Virtually no flexibility is permitted on those occasions when their impact seems unnecessarily harsh, and this problem is exacerbated by the difficulties in drafting these grounds with sufficient precision. Are there other mechanisms, then, which equally achieve these objectives by more proportionate means?

The obvious alternative is to confer on the House a discretionary power to decide in each case whether the circumstances warrant the disqualification of one of its members. The penalty is no longer immediate. Grounds may be interpreted more

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272 Sections 175B and 175H Parliamentary Electorates and Elections Act 1912 (NSW).
273 Sections 143 and 146 Electoral Act 1992 (Qld).
274 Section 234 Electoral Act 1985 (Tas).
275 Section 300 The Constitution Act Amendment Act 1958 (Vic).
276 Section 124 Northern Territory Electoral Act 1995 (NT).
277 Section 252 Electoral Act 1992 (ACT).
278 Section 41 Constitution Acts Amendment Act 1899 (WA).
279 Section 35.
280 Sections 36 or 38.
281 Section 37.
flexibly so that precision of drafting is not as critical. Particularly suited to this alternative mechanism are those grounds which purport to protect the moral standing of members: conviction of a criminal offence and bankruptcy. In such cases, the responsibility could be left with the House to decide what action is necessary to preserve the integrity of the parliamentary process.

Such a parliamentary jurisdiction is not novel. Each House (except in NSW) has at common law the power to punish its members and has done so for criminal convictions in the United Kingdom\(^{282}\) and Canada.\(^{283}\) Even so, a member may be disciplined by his or her House without a criminal conviction by being expelled\(^{284}\) or suspended. While the immediate impact of expulsion and disqualification of a sitting member is the same (the seat becomes vacant), their consequential effects differ. Expulsion allows the former member to be re-elected subject to the judgment of the electorate, whereas disqualification usually precludes a re-election.

Of course, the radical option is to dispense with all the grounds of disqualification and rely on the electoral process, together with a code of conduct and other mechanisms designed to deal with conflicts of interest.

**Provision for relief**

At various times, legislation has been specifically enacted to protect sitting members from disqualification and/or common informer actions. That legislation has either been solely directed to the members concerned,\(^{285}\) or has amended the law generally.\(^{286}\) This form of relief is clearly dependent on the level of political support for the member. An alternative and possibly no less partisan form of relief is to vest in each House the power to relieve its members from disqualification. In this case, the approval of both Houses is not required.

At present, only in two States is there provision for a House to relieve a member of disqualification in appropriate circumstances. The Victorian provision is wider in scope than that found in Western Australia. Each House of the Victorian Parliament can exempt their members from disqualification if three prerequisites are satisfied:

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282 For example the expulsion of Wilkes in 1764 by the House of Commons for uttering a seditious libel (see Bourinot, *Parliamentary Procedure & Practice* (2nd ed) London 1892, p 197); other expulsions were of O'Donovan Rossa in 1870 and of John Mitchell in 1875 (see Bourinot at 194-5).

283 Bourinot, above note 282 at 195-199.

284 Both Houses of the Commonwealth Parliament are denied this power: s 8 *Parliamentary Privileges Act 1987* (Cth).

285 See for example *Constitution (Disqualification Removal) Act 1980* (Tas) to save the Legislative Council seat of Mr R T Hope on account of becoming a member of the Fire Service Advisory Council in Tasmania; and *Constitution (Doubts Removal) Act 1988* (Tas) to remove doubts over the election of Dr F L Madill whose medical partnership leased premises from the Crown.

286 In Queensland, several changes occurred in 1977-8 on account of at least four members whose seats became doubtful by accepting certain appointments: see fn 166 of ch 3 of this work.
(a) the disqualifying event has ceased to have effect;
(b) it was of a trifling nature; and
(c) it occurred without the actual knowledge or consent of the member, or was accidental or inadvertent. 287

In Western Australia, relief can only be given by a resolution passed by both Houses of Parliament if 'it is otherwise proper so to do' and then only in relation to the public office ground of disqualification. A member who has accepted one of the specified offices under the Crown may avoid disqualification by relinquishing the office and obtaining a resolution from both Houses. 288 The UK House of Commons is similarly empowered by resolution to direct that disqualification for holding a prescribed public office be ignored if the ground of disqualification under that Act no longer exists and it is proper to so order. 289

In Queensland, LCARC's draft Parliament of Queensland Bill permits the Legislative Assembly to declare by resolution that a disqualifying ground has no effect provided the same three prerequisites noted above for Victoria are satisfied. 290

Role of the Electoral Commissions

It is evident from cases such as Sykes v Cleary 291 and Free v Kelly 292 that candidates require guidance to avoid inadvertently incurring a ground of disqualification. This need becomes more pronounced as the number of 'independents' who stand for election increases, as they may lack the experience and guidance available to candidates from the established political parties.

Limited guidance on the grounds of disqualification is available from the electoral commissions and offices at the Commonwealth, State and Territory level. In addition to a Candidates Handbook, the Australian Electoral Commission has published an Electoral backgrounder 293 which provides an outline of the various grounds of disqualification under s 44 of the Constitution. 294 Electoral Commissions, obviously, are unable to provide detailed legal advice to candidates. 295

To assist candidates avoid disqualification under s 44(j) by virtue of some foreign allegiance, the Department of Immigration and Multicultural Affairs maintains a database on the procedure for renouncing foreign citizenship in those 10 countries

287 Section 61A Constitution Act 1975 (Vic).
288 Section 39 Constitution Acts Amendment Act 1899 (WA).
289 Section 6(2) House of Commons Disqualification Act 1975 (UK).
290 Clause 73.
294 The 1997 House of Representatives Report recommended (rec 8) that the Australian Electoral Commission improve the level of guidance provided potential candidates and to do so earlier. The Electoral backgrounder No 4 does this.
295 See the Australian Electoral Commission submission to the House of Representatives Committee which is referred to in the Committee's report at paras 4.8-4.11.
most likely to concern Australian parliamentary candidates. Brief details of those procedures are included in the AEC’s Electoral backgrounder.

Conclusion

The critical inquiry is: how effective are these grounds of disqualification in preventing actual and apparent conflicts of interest or more generally in preserving the integrity of members of Parliament? It is clear that they alone are insufficient to avoid all conflicts of interest. This was one of the important conclusions of the Bowen Report which recommended the adoption of a code of conduct for members of Parliament. But is there a bolder response called for? Might the preferable course be to dispense with all the grounds of disqualification and substitute a range of integrity mechanisms instead?

Those mechanisms are explored in Pt III of this work. Their weakness is, however, that in the absence of judicial review they generally depend in large measure on self-regulation whereas, with the constitutionally entrenched grounds of disqualification in the Commonwealth Constitution, minimum standards are guaranteed. Nonetheless, this Part has indicated that those grounds require rebalancing with care taken to retain those which prevent the resurrection of ‘old’ problems while jettisoning those which respond to circumstances never to arise again. Only the disqualification of those who hold pensions payable at the pleasure of the Crown appears to fall within this latter category.

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