

Pecuniary Interests of Members of Parliament under the Australian Constitution

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Sections 44 and 45 of the Australian Constitution provide for the disqualification of members of Parliament in a variety of specified circumstances. This article focuses on s. 44 (v), which disqualifies certain government contractors, and s. 45 (iii), which disqualifies any member who "directly or indirectly takes or agrees to take any fee or honorarium for services rendered to the Commonwealth". After lying more or less unnoticed for seventy-five years,¹ being never applied by either Parliament or the courts, these two provisions have now become the subject of a flurry of activity, and the cause of considerable concern not only to members of the Commonwealth Parliament but also to all those anxious to see protected the integrity and viability of the Parliamentary institution itself. A Joint Committee of the Parliament² is scrutinising the implications of the sections for the question of a register of members' interests; a question as to the qualifications of a particular senator³ has been referred by the Senate for determination by the High Court sitting as a Court of

Disputed Returns;⁴ a common informer writ alleging Constitutional breach has been issued against a senior Cabinet Minister;⁵ and the Government has agreed to establish a Royal Commission to inquire into and report upon the meaning, implications and present-day appropriateness of ss. 44 and 45.⁶

This article explores the meaning and likely interpretation of ss. 44 (v) and 45 (iii), the consequences of a breach of these provisions as provided for in ss. 44 to 47 of the Constitution and legislation thereunder, and the implications of their existence for the question of a register of members' interests. It is argued that although the sections in question are at first sight extremely far-reaching, they are capable of being read down to apply to a relatively narrow, and arguably acceptable, range of situations. Whether the courts will in fact take this path must remain to be seen. In any event, there is clearly a case for moving, otherwise than through reliance on the courts, to clarify and limit the potential scope of the sections. Claims of

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¹ In April 1974, the application to a special case of s. 45 (iii) was raised in connection with the approval by the Governor-General on 21st March, 1974, of the appointment of Senator Gair as Ambassador to Ireland. The Commonwealth Solicitor-General advised that, by reason of the words in s. 45 (iii), and of Senator Gair's acceptance of the emoluments which the post of Ambassador conferred on him, his place as Senator had become vacant, "certainly as from 21st March, 1974"; see note in 48 A.L.J. 221, at 223.

² Joint Committee on Pecuniary Interests of Members of Parliament, established late in 1974 and scheduled to report back to Parliament not later than 30th September, 1975. The present article is a revised version of a submission made to this Committee on 15th April, 1975.

³ Senator J. J. Webster of Victoria: see Cth Parl. Debs., (Senate) 15th-16th, 21st-22nd April, 1975, at pp. 981-984, 1027-1028, 1139-1142, 1198-1223. The terms of reference are as follows:

"That the following questions respecting the qualifications of Senator James Joseph Webster be referred to the Court of Disputed Returns—

(a) whether Senator Webster was incapable of being chosen or of sitting as a senator; and
(b) whether Senator Webster has become incapable of sitting as a senator."

⁴ The matter was heard by Barwick C.J. on 2nd and 3rd June, and judgment delivered on 24th June, 1975, after this article was completed. The effect of the *Webster* case is briefly noted in a Postscript.

⁵ See n. 65, post.

⁶ Cabinet decision 23rd May, 1975 as reported in the *Melbourne Age*, 24th May, 1975. This followed an earlier Senate resolution to establish a Judicial Committee of Enquiry: see Cth Parl. Debs., (Senate) 22nd April, 1975, at p. 1198, wherein the Leader of the Government in the Senate accepted an amendment to this effect moved by the Opposition. The proposed terms of reference for the Committee, according to the Senate resolution, are for it to report upon:

"(i) the types of circumstances in which the receipt by Members of Parliament of moneys, fees and other benefits might constitute a breach of section 44 (v) and/or 45 (iii) of the Constitution;

(ii) any other questions relating to Members of the Parliament which, in the opinion of the Judicial Committee, as a result of its considerations under paragraph (i) above, could properly be referred to the Court of Disputed Returns; and

(iii) whether sections 44 and 45 of the Constitution are appropriate provisions in present day circumstances and conditions."

breach will continue to arise, and are likely to multiply if a register of members' interests is introduced. One way of clarifying and limiting the sections, already foreshadowed by a Prime Minister forever optimistic in these matters, is through a formal Constitutional amendment.⁷ Another way, suggested at the conclusion of this article, is for both Houses of Parliament to resolve upon certain interpretive guidelines for their own future use, designed to filter out trivial and unmeritorious claims while none the less giving effect to the spirit and intent of the basic provisions.

THE MEANING OF S. 44 (V)

Section 44 (v) provides that:

"Any person who . . .

(v) Has any direct or indirect pecuniary interest in any agreement with the Public Service of the Commonwealth otherwise than as a member and in common with the other members of an incorporated company consisting of more than twenty-five persons:

shall be incapable of being chosen or of sitting as a senator or a member of the House of Representatives."

At first sight s. 44 (v) seems extremely far-reaching, capable—if read strictly literally—of disqualifying members for engaging in quite trivial or everyday transactions with government departments. The examples are familiar—buying stamps, renting a telephone, subscribing to a Commonwealth loan, settling a compensation claim, leasing small plots of Crown land or residential premises, and so on. The provision has never been subjected to any direct judicial interpretation. Some commentators have argued that so many possible applications of the section are patently absurd to such an extent that the courts would end up denying it any practical application at all. Others have suggested that it would be confined merely to extreme cases of obvious corruption. It may well be that doubts of one kind or another about the scope of the section have in the past discouraged the taking of action in reliance on it.

The writer's view is that s. 44 (v) is capable of relatively precise, narrow and acceptable application. The courts would not be entirely without guidance in interpreting it. The section is merely another in a long line of similar legislative provisions in various Commonwealth jurisdictions, including statutory provisions in every Australian State, all of which may be traced in origin to the earlier *House of Commons (Disqualification) Act*

⁷ Cth Parl. Debs. (H.R.) 16th April, 1975, at pp. 1661-1662, Mr. Whitlam.

1782.⁸ Around these various provisions a reasonably well-defined body of case-law has developed. Although it must be applied to the Australian Constitution with considerable caution, since there are significant differences in the language of the various provisions, this case-law should be regarded as highly persuasive.

The meaning, and limitations, of s. 44 (v) can best be explained by treating its three component parts separately: first, the requirement that there be a transaction "with the Public Service of the Commonwealth"; second, the requirement that this transaction be an "agreement"; and third, the requirement that the person have a "direct or indirect pecuniary interest" in such agreement "otherwise than as a member and in common with the other members of an incorporated company consisting of more than twenty-five persons".

The definition of "the Public Service of the Commonwealth" causes few difficulties. The *Public Service Act 1922-1973* (Cth) states in s. 10 that the Australian Public Service, as the Public Service of the Commonwealth is now to be known, is "constituted" by the officers of the departments itemised in Sched. 2 of that Act. The Constitution itself is inexplicit about the meaning of "Public Service", but clearly envisages the term being used—as it is in the *Public Service Act*—to stand for the totality of departments, and officers within them, which may either be transferred from the States (Constitution, ss. 52, 69) or created by the Governor-General in Council from time to time (Constitution s. 64). If the argument is put that "Public Service" as used in s. 44 (v) refers only to this collective totality, and accordingly that agreements with particular public servants, albeit acting in an official capacity, or particular departments, are excluded from its ambit, the answer must be that if this is so then the whole section would be nugatory, since no agreements of any kind are ever, or could ever, be entered into with the public service as a whole. The framers of the section must have meant it to have some effect, and its natural meaning relates to agreements with the public service of the Commonwealth in the sense of departments of the Commonwealth, or duly authorised officers of such departments.⁹ The only questions that may cause difficulty from time to time so far as contracts with departments, and public servants acting

⁸ 22 Geo. 3 c. 45, ss. 1 and 2. For similar provisions in Australian State Constitutions, see n. 67, post. For commentary on the provisions of the 1782 Act, see *Halsbury's Laws of England* (2nd (Hailsham) ed., 1937) Vol. XXIV, p. 223 r. (l).

⁹ Compare the wide meaning given to "public service" by the Privy Council in an analogous context: *Re Samuel* [1913] A.C. 514, P.C.

on their behalf, are concerned, are questions as to whether a particular public servant is in fact acting within the scope of his statutory or other authority in engaging in a particular transaction, or whether a particular contract is ultra vires that department or the executive power of the Commonwealth as a whole. It should perhaps be added that it is just not credible that a court would construe an over-the-counter purchase by a public servant of some items for his private use as involving the shopkeeper in an "agreement with the Public Service": at the very least, it would be necessary for the public servant to be acting within the course of his authority.

It is probably necessary, to be caught by s. 44 (v), that the transaction in question be *directly* with the public service, and not with some essentially non-public service intermediary.¹⁰ A further, associated, way in which the courts may well be tempted to limit the provision is to regard "Public Service of the Commonwealth" as not being coterminous with "Crown in right of the Commonwealth", but rather as having a more limited scope. This would mean exclusion from the operation of s. 44 (v) of transactions with a variety of non-departmental servants, agents, and instrumentalities—for example, the Australian Broadcasting Commission—which might for other purposes conceivably be regarded as coming within the "shield" or "umbrella" of the Crown in right of the Commonwealth.

The requirement that there be an "agreement" with the public service is subject to a number of glosses. The first, and most obvious, is that for the section to operate there must be an agreement of some kind, probably a contract for valuable consideration. It is not enough that the person whose qualifications are in question should merely have received some apparent or real pecuniary advantage from the government.¹¹ Second, it seems necessary that the agreement be directly with the person whose qualifications are in issue (or, in the case of a corporation of which the person is a member, directly with that corporation). It is not enough that the person has taken the benefit of the government contract as an assignee or, probably, devisee.¹²

¹⁰ *Thompson v. Pearce* (1819) 1 Brod. & Bing 25; 129 E.R. 632 (Dallas C.J.); *Tranton v. Astor* (1917) 33 T.L.R. 383 (K.B.D., Low J.).

¹¹ Compare the opinion of the Attorney-General, Sir Littleton Groom, in the matter of Messrs Killen and Manning, Cth Parl. Debs., (H.R.) (1924) Vol. 109, pp. 1353 et seq.; also *Cox v. Truscott* (1905) 69 J.P. 174, at 175.

¹² *Miles v. McIlwraith* (1883) 8 A.C. 120 (P.C.), *Proudfoot v. Proctor* (1887) 8 N.S.W.R. 459; but cf. *Hackett v. Perry* (1887) 14 S.C.R. 265 (Sup. Ct. Can.). This is another application of the rule of direct contractual relations, i.e. "privity", noted in the text, ante; see n. 10, supra.

A third consideration possibly limiting the scope of agreements caught by s. 44 (v) is a requirement that they be *executory*, that is to say, that something remains to be done in performance of the contract by the non-government supplier of goods or services. The English cases deciding this point, *Royse v. Birley*¹³ and *Tranton v. Astor*,¹⁴ may be thought to depend on the specific language of the *House of Commons (Disqualification) Act 1782*, which speaks of persons "*holding or enjoying*" government contracts, but it could well be argued that considerations of elementary justice would lead an Australian court similarly to construe s. 44 (v), which speaks simply of "having an agreement": it would be manifestly unfair if a government contractor was barred from standing for Parliament by virtue of a contract fully executed on his part, but not yet paid out by the government. A fourth factor emerging from the cases which may go to limit liability in particular situations is the rule in *Royse v. Birley*,¹⁵ stated with respect to the 1782 English Act, but persuasively applicable to the equally penal s. 44 (v) of the Australian Constitution, that disqualification will not be ordered where there is no personal knowledge on the part of the defendant of the contract in question, or the relevant features of it. In *Royse v. Birley*, ante, the Member of Parliament in question, a partner in a rubber goods firm, had sold a small quantity of rubber chamber pots for use in a lunatic asylum, in ignorance that he was dealing with a governmental institution. He kept his seat.

The most difficult of the questions with respect to the meaning of "agreement", is the question as to whether it is any agreement at all with the Public Service that will disqualify a senator, or whether there are rather some implied limitations confining such dire consequences to agreements of a particular scale or character. A strictly literal reading of the section could give rise to manifest absurdities, as has already been noted, but it is not an unfamiliar problem in statutory interpretation to find a literal construction giving rise to manifest absurdities. The solution which the courts have usually adopted—particularly, it may be added in respect of Constitutional provisions, which cannot simply be amended by the legislature—is not to deny such a provision any effect at all, but rather to construe it more flexibly, and in such a way as to prevent absurdity: the so-called "golden rule". Reinforcing this tendency in the present case would be the fact that s. 44 (v) is severely penal in its consequences, and such pro-

¹³ (1869) L.R. 4 C.P. 296.

¹⁴ (1917) 33 T.L.R. 383.

¹⁵ (1869) L.R. 4 C.P. 296.

visions are always construed so far as possible in favour of those whom they might adversely affect. The logical accompaniment to the golden rule of statutory interpretation is the so-called mischief rule, namely, that one should construe a doubtful provision in the light of the mischief it was intended to remedy, and in such a way as to suppress the mischief and advance the remedy.

The mischief which s. 44 (v) and its counterparts elsewhere was designed to remedy is in fact readily ascertainable. Perfectly admissible evidence is to be found in the preamble of their statutory ancestor, the earlier *House of Commons (Disqualification) Act 1782*, which states its object as being "For further securing the freedom and independence of Parliament". The original rationale for disqualifying government contractors was the need to limit the influence of Executive over Parliament, which it was felt would be served by the award of contracts, particularly lucrative ones, to members.¹⁶ In more modern parliamentary times there has been a tendency to develop a different view of the basic rationale: that which runs through the arguments of the delegates to the Federal Constitutional Conventions, and that which tends to lie behind most of the current debate about members' pecuniary interests, is a concern primarily with members using their position to their personal profit or advantage, or, what is at least as important, being in a situation where they appear to be so using their position.¹⁷

There are considerable difficulties, however, in the way of admitting evidence of the founders' intent as a guide to the construction of Constitutional provisions,¹⁸ and it may well be that if the matter now went to court, the original, and perhaps now less relevant, rationale is the one that would have to be argued. In any event, the main consideration for present purposes is that, whichever way one approaches it, there is a purpose served by s. 44 (v), and one that could be expected to be perceived readily enough by the courts. In the opinion of the writer, the courts may be expected to seek out ways of confining the operation of the provision 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.

¹⁶ Cp. Erskine May's *Parliamentary Practice* (10th ed., 1893), p. 30; see also Sir Littleton Groom in Cth Parl. Debs., (H.R.) (1924) Vol. 109, pp. 1353 et seq.

¹⁷ Cp. Convention Debates, Adelaide, 1897, at pp. 736 et seq. and Sydney, 1897, at pp. 1022 et seq.

¹⁸ Cf. *Tasmania v. Commonwealth of Australia and Victoria* (1904) 1 C.L.R. 329, at 333, per Griffith C.J.

The decided cases give some support to the view just expressed, and suggest at least two additional limitations to the meaning of "agreement" to be added to the list above.

In the first place, in *Tranton v. Astor*,¹⁹ which concerned the placing of a government advertisement in a newspaper whose proprietor was a Member of Parliament, Low J. held that: "such a transaction is not a contract or agreement within the meaning of this legislation at all, and such casual and 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 or lasting character, the holding and enjoying of which might improperly influence the action both of legislators and the Government". Low J. based his rejection of "casual and transient transactions" partly on the phrases "continue to hold" and "hold and enjoy" which appear in the 1782 English Act but not the Australian Constitution, but it may not be impossible for Australian judges to read the phrase "has any interest in any agreement" as implying some degree of protracted execution.

Again, and very importantly, it is possible that the agreements to which s. 44 (v) will be construed to refer will be confined to those of a "public service character", or, putting it another way, those where what is in issue is the provision of goods or services by the contractor to the public service for use by the latter in the service of the public.²⁰ Such agreements are to be distinguished from those where what is in issue is the provision by the government of some service or other benefit to the individual. The case suggesting this result is *Hobler v. Jones*.²¹ Here the Full Court of the Supreme Court of Queensland upheld the opinion of Sheehy J. at first instance that the defendant Member of the Legislative Assembly was not disqualified under s. 6 of the *Constitution Act 1867* by reason of the fact that at the date of his election he was the lessee of two prickly pear selections. Placing particular

¹⁹ (1917) 33 T.L.R. 383, at 387.

²⁰ Contracts with the government for the supply of goods to that government for use "in the public service" were always taken to be the paradigm cases of prohibited conduct under the 1782 English Act, on which the Australian Constitutional provision is squarely based: this was put beyond doubt by the *House of Commons Disqualification (Declaration of Law) Act 1931* (21 Geo. 5 c. 13) which provided that:

"1. It is hereby declared that the *House of Commons (Disqualification) Act 1782* . . . extend(s) only 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." (Emphasis added.)

²¹ [1959] Qd. R. 609.

emphasis on the role of the mischief rule in circumscribing the scope of the section, the judges agreed that one had to look at the character of the contract as well as simply the parties to it. Their task was, again, easier than may be the case for judges construing s. 44 (v), in that s. 6 of the Queensland Constitution, like its 1782 predecessor, refers to agreements not "with" but rather "for and on account of" the public service; the Queensland judges were able to hold that this meant that the contracts caught were not those of an essentially private or personal-service character (such as would, for example, be a contract with the State Government Insurance Office for a life or vehicle policy), but rather contracts dealing with some "service to the public" involving "work to be done, or money or goods supplied, for the benefit of the public".²² The prickly pear leases here in question contained no special conditions to distinguish them in any way from ordinary Crown leases, and they accordingly fell within the former category. Although the task of narrowing the scope of the more specific language of s. 44 (v) is, as just stated, more difficult, it is in the writer's view by no means beyond the resources of the courts to insist that an "agreement with the Public Service", within the meaning of this section, must be of a "peculiarly public service character".

The preceding paragraphs have listed six ways in which, to a greater or lesser extent, the courts might reasonably be expected to limit the scope of agreements caught by s. 44 (v): namely, there must be an agreement, the agreement must have been entered into directly with the member or potential member in question, the agreement must be executory, the member must have some knowledge of its terms, the transaction must have been more than simply casual or transient, and it must be of a public service character. It should not be thought, however, that that leaves no work for s. 44 (v) to do. The 1782 Act and its descendants have not always been distinguished into impotence whenever sought to be used: there are several examples of successful application both in Parliaments and in the courts. Erskine May²³ gives several examples of House of Commons resignations induced by the English Act, and an article in the *Journal of the Society of Clerks-at-Table in Empire Parliaments*²⁴ gives a comprehensive survey of more recent examples in all Commonwealth jurisdictions, including the Australian States. The most recent Australian example appears to be the case of the

²² *Ibid.*, at 613-615, 619-620.

²³ *Parliamentary Practice* (10th ed., 1893), at p. 605.

²⁴ Vol. 17, 1948, at pp. 289-316.

Tasmanian M.L.C. Mr. John Orchard.²⁵ Successful court cases have included *Bird v. Samuel*,²⁶ *Hackett v. Perry*,²⁷ and also a number of cases involving analogous local government legislation. With the exception of *Samuel's* case which involved very large sums earned by Sir Stuart Samuel M.P. in dealing in silver with the Secretary of State for India, all of the amounts in issue have been relatively small, indicating that what is at stake is not so much the reality of any influence, but rather the principle that everything possible ought to be done to avoid any chance or appearance of it.

The third and last of the components of s. 44 (v) which needs to be considered is the requirement that the person have a "direct or indirect pecuniary interest" in the government contract "otherwise than as a member and in common with the other members of an incorporated company consisting of more than twenty-five persons". It might be thought that the expression "pecuniary interest" could be construed relatively narrowly, and confined, for example, to situations where there is some identifiable and measurable advantage flowing immediately from the contract in question, but both the case-law on the question, and the context in which the phrase appears, point the other way. As to the cases, it was decided in *Brown v. Director of Public Prosecutions*²⁸ that the defendant members of the council of a local authority, who were tenants of houses owned and let to them by the authority, had a pecuniary interest in a matter on which they had voted, contrary to s. 76 (1) of the *Local Government Act 1933* (U.K.) notwithstanding that on the occasion in question, in rejecting a move to abolish special fees paid by council-tenants who were councillors, they had voted manifestly against their own financial interests. Donovan J. said:²⁹ "No narrow construction ought to be put upon the words 'pecuniary interest' in their context in s. 76 (1); in particular they ought not to be construed . . . as meaning 'pecuniary advantage' and nothing else." It is true that in local government cases, such as this one was, the courts appear to have been somewhat readier than in other contexts to penalise or disqualify members for conflict of interest reasons,³⁰ and *Brown's* case ought for that

²⁵ Reported in the *Melbourne Age*, 26th September, 1968; see also Cth Parl. Debs. (Senate) 22nd April, 1975, at p. 1200 (Senator Milliner).

²⁶ (1914) T.L.R. 323.

²⁷ (1887) 14 S.C.R. 265 (Sup. Ct. Can.).

²⁸ [1956] 2 Q.B. 369.

²⁹ *Ibid.*, at 378.

³⁰ *Cp. R. v. York* (1842) 2 Q.B. 847; 114 E.R. 329 (Q.B.); *Ford v. Newth* [1901] 1 K.B. 683.

reason be applied only with the greatest of caution to the s. 44 (v) context, but it is none the less an awkward obstacle for those who would argue for a very narrow reading of s. 44 (v).

The context in which the phrase "pecuniary interest" appears in s. 44 (v) also suggests that a wide reading is likely. It is clear from the specific exclusion of companies with over twenty-five³¹ members, that the interests of a shareholder—indirect as they may be—in the government contracts into which smaller companies enter are manifestly within the ambit of the section. In the case of a member of a company with less than twenty-five shareholders, there is no room for the argument that owning shares is, as such, insufficient to amount to having a pecuniary interest, and that there must be some more direct nexus between the agreement with the public service and the expected return. (The interest of a person who is merely a debenture holder may well be, on the other hand, too remote. Certainly that of a mere employee would be.) Nor does there seem to be any room for the argument that the person's shareholding must, in order that he should be caught by the section, represent a significant or substantial proportion of the company's issued capital. Attempts were made during the Federal Constitutional Conventions to confine shareholder liability to "one-man" companies, but such attempts failed.³² It may be true as a policy matter that the size of one's interest is of more significance than the number of one's fellow shareholders, but the inescapable fact is that no such criterion was built into the terms of s. 44 (v) as it now stands, and one would be hard put to argue that the mischief or any other rule required something other than a literal interpretation.³³

³¹ The original draft specified *twenty* members, presumably on the precedent of most of the existing Colonial Constitutions: see also n. 33, post. The figure, twenty-five, was arrived at on the motion of Mr. Isaacs, who had recently steered companies legislation through the Victorian Parliament, fixing this number as the cut-off point for private, as distinct from public, companies: *Convention Debates*, Sydney 1897, at p. 1023.

³² *Convention Debates*, Adelaide, 1897, at pp. 736 et seq., Sydney, 1897, at pp. 1022 et seq.

³³ It may be noted that in all State Constitutions, except one, shareholder liability in these cases is limited to companies of less than twenty members, without any further conditions as to size of interest: N.S.W.: *Constitution Act* 1902, s. 13 (3); Vic.: *Constitution Act Amendment Act* 1958, s. 26; Qld.: *Constitution Acts* 1867-1961, s. 6; S.A.: *Constitution Act* 1934-1971, s. 51 (c); W.A.: *Constitution Act Amendment Act* 1899-1969, s. 35. The exception is the *Tasmanian Constitution Act* 1934, s. 33 (2), where the basic provision relates to companies of up to thirty members, and where liability is extended to *any* company in which the person in question has a share of one-fifth or more.

THE MEANING OF S. 45 (iii)

There is much less material available on the basis of which one can usefully speculate as to the likely interpretation of s. 45 (iii), which states that the place of a senator or member shall "thereupon become vacant" if he "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". Neither of the parts of this provision seem to have legislative forebears elsewhere in the Commonwealth, and none of it has been the subject of judicial scrutiny. The first limb of the clause was introduced on the motion of Mr. Carruthers of New South Wales at the Adelaide Convention in 1897. His main, indeed sole, argument was that there should be a specific clause to catch the lawyers:³⁴ "It has almost become a scandal in Australia that our legal barristers in the various Chambers in the different Parliaments are retained by the Crown to do Crown work. . . . Our object is to try to correct the power of engaging in corruption by giving contracts or preferences to members of the Legislature, and what is sauce for the goose should be sauce for the gander. If it is good enough to disqualify laymen it is good enough to disqualify the lawyers. . . ." This theme was echoed by other speakers, though medical practitioners, engineers and other professional men were also given as examples of those encompassed. Mr. Isaacs, emphasising that the appearance of integrity was as important as its reality, argued that there should not be made "an improper and vicious exception in favour of the legal profession".³⁵ The second limb of the clause was introduced on the motion of Mr. Reid at Melbourne in 1898, who argued that: "If this provision had been in the Constitution of the United States there would have been an opportunity of stopping a number of abuses in connexion with legislative measures."³⁶

Although, as has already been noted, evidence of the founders' intent is inadmissible as an aid to interpretation, it seems likely that the primary application of the first limb of s. 45 (iii)—concerning fees or honoraria for services rendered to the Commonwealth—is in just that area of *professional* services which Mr. Carruthers wanted to catch. "Fee" and "honorarium" are terms which would appear to have their ordinary dictionary meanings, the latter implying a voluntary payment, that is one made without any formal contractual

³⁴ *Convention Debates*, Adelaide, 1897, at p. 737.

³⁵ *Ibid.*, at p. 1037.

³⁶ *Convention Debates*, Melbourne, 1898, at p. 1945.

obligation to make it. They would appear to cover not only the brief fees of a barrister advising or appearing for the Crown, but also retainers. A question may arise in some cases as to whether the professional relationship is with "the Commonwealth" or rather with some non-Commonwealth intermediary (cf. the argument above as to the meaning of agreements "with the Public Service"): "Commonwealth" is, however, a somewhat all-embracing descriptive term for the Executive arm of the Australian Government, more comparable to the term "Crown" than the term "Public Service" in this respect. It is certainly extremely unlikely that a solicitor-member, who accepted matters referred by the Australian Legal Aid Office (at least as that office is presently constituted, as a unit within the Attorney-General's Department), could escape the operation of the clause. In this kind of case, however, the courts may well be tempted (on the analogy of the law argued above to be applicable with respect to government contractors generally under s. 44 (v)) to read in requirements of, say, direct personal knowledge and a sustained, as distinct from casual or transient, course of action.

Similar considerations apply with respect to the equally vexed question of members who are pharmaceutical chemists or medical practitioners and who may receive payments from the Commonwealth under the provisions of the *National Health Act 1953-1975* (Cth). The courts may be expected to approach quite sympathetically these problems involving members engaging in a small way in professional activities of manifest benefit to the community. If all other more specific escape routes fail, the judges may be tempted to discern some more fundamental, underlying, exemption principle, perhaps along the following lines, namely, whether the payment in question was 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 member-payee, on the other. Each case would turn on its facts, but the application of some such principle would seem likely to exclude most cases involving members who act as doctors, chemists or legal aid lawyers.

There are payments to which the words of the first limb of s. 45 (iii) are rather more clearly inapplicable. These include expense allowances received by a member for out-of-pocket expenses incurred in performing services for the Commonwealth (these not being "fees" for the purposes of the section), and fees of various kinds paid to a member for his services—including sitting on committees—to the Parliament (the Parliament not being "the Commonwealth" for the purposes of

this section, the latter expression arguably being confined in this context to the Executive Government). There is also parliamentary precedent for treating as outside the section a gift to a member of moneys raised by subscription to honour his "services to the people".³⁷ It has been suggested, further, that the first part of s. 45 (iii) is confined in its operation to "limited or short-term" services,³⁸ with continuous employment situations being more appropriately covered by the "office of profit" provision in s. 44 (iv).

The primary application of the second limb of s. 45 (iii) again seems clear enough: direct bribery of a member for services rendered in the Parliament—voting a particular way, raising a particular matter at question time, lobbying a particular Minister—are ruled out. "Any person" would include corporations; any "State" is probably confined to States of the Federation as distinct from foreign countries (as to which latter, see s. 44 (i)). Questions may arise at the margin as to whether various perquisites offered to members—trips overseas and so on—can amount to an indirect taking of a fee or honorarium. It is suggested, however, that the expressions "fee" and "honorarium" (unlike "pecuniary interest" in s. 44 (v)) imply a direct cash advantage, and the nexus between the benefit offered and the service rendered would have to be extremely close in order to make the point even arguable.

A final question that arises, with respect to both the first and second limbs of s. 45 (iii), is whether the expression "services rendered" refers only to services rendered in the past or also to those which will be rendered in the future: this was debated recently by the Senate in the context of the Gair affair, though inconclusively. The better view is that future services *are* included.³⁹

CONSEQUENCES OF A BREACH OF SS. 44 OR 45

The consequences of a contravention of ss. 44 (v) or 45 (iii) are on the face of it extremely drastic. Section 44 enumerates the different kinds of status which, so long as they continue, render a person incapable of being chosen as a senator or member

³⁷ Cth Parl. Debs. (H.R.) (1921), Vol. 95, at pp. 770 et seq.; the issue was a £25,000 gift to Prime Minister Hughes, expressed to be a tribute to his wartime leadership.

³⁸ See opinion of General Counsel cited n. 39, post; and note in 48 A.L.J. 221, at 224.

³⁹ See the opinion of the General Counsel to the Attorney-General who argues, persuasively, that future services must be included, because "otherwise it would be easy to evade s. 45 (iii) by accepting a fee before rendering the services in question": Cth Parl. Debs. (Senate) 4th April, 1974, at p. 683. The Solicitor-General, also, was of the view that the words "services rendered" were not confined to past services; see note in 48 A.L.J. 221, at 223.

of the House of Representatives; even if he is in fact "chosen", in ignorance or disregard of the disqualification facts, he is nevertheless not chosen within the meaning of the Constitution, and is not a senator or member.⁴⁰ If he takes his seat, he may be liable to a penalty for every day on which he sits (s. 46, discussed below). Section 45⁴¹ deals only with a member who is qualified at the time of his appointment or election, and who becomes disqualified at some time thereafter. His place will become vacant immediately on the happening of the disqualifying event: in the case of s. 45 (j) the disqualifying event is the acquisition of any of the kinds of disqualifying status listed in s. 44, including the enjoyment of a pecuniary interest in a government contract, as proscribed by s. 44 (v). If he continues to sit, he may be liable to a penalty of \$200 for every day on which he does so (s. 46).

In reality, for the consequences envisaged by either s. 44 or s. 45 to come about, it would be necessary for a *declaration* to be made that the member was disqualified by the particular section: this operates as a useful safeguard against excessively stringent application of the provisions. The key section here is s. 47. This provides that:

"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 Parliament, . . . shall be determined by the House in which the question arises."

In 1904, in the absence of any legislation on the subject, the High Court decided that a question as to whether or not there was a particular Senate vacancy in South Australia was one for the Senate itself to decide.⁴² Since then the Parliament has "otherwise decided". Section 203⁴³ of the *Common-*

⁴⁰ Quick and Garran, *Annotated Constitution of the Australian Commonwealth* (1901), at p. 491.

⁴¹ "45. If a senator or member of the House of Representatives—

(i.) Becomes subject to any of the disabilities mentioned in the last preceding section: or

(ii.) Takes the benefit, whether by assignment, composition, or otherwise, of any law relating to bankrupt or insolvent debtors: or

(iii.) Directly or indirectly takes or agrees to take any fee or honorarium for services rendered to the Commonwealth, or for services rendered in the Parliament to any person or State:

his place shall thereupon become vacant."

⁴² *R. v. Governor of South Australia* (1907) 4 C.L.R. 1497.

⁴³ "203. Any question respecting the qualifications of a Senator or of a Member of the House of Representatives or respecting a vacancy in either House of the Parliament may be referred by resolution to the Court of Disputed Returns by the House in which the question arises and the Court of Disputed Returns shall thereupon have jurisdiction to hear and determine the question." For provisions governing the conduct of proceedings brought under this section, see ss. 189, 193, 195, 197, 198, 200-202, and 204-208.

wealth Electoral Act 1918-1973, introduced in 1907, provides that any question arising in a House respecting the qualification of a member or a vacancy, may be referred by resolution to the High Court sitting as the Court of Disputed Returns. "Any question" seems to mean just that: there does not appear to be, on the face of the Act, any ground for limiting the jurisdiction of the Court, for example, to qualifications questions arising in respect of the immediately preceding election or during the life of the current Parliament. However, the Court may be expected to be unwilling—unless the terms of the parliamentary reference unequivocally require otherwise⁴⁴—to examine questions as to the qualifications of a member in respect of earlier elections and Parliaments.

The operative word in s. 203 of the *Commonwealth Electoral Act* is "may": the relevant House clearly retains a discretion as to whether or not to refer a question of qualifications to the Court. The Webster reference is the first of its kind to have been made: until this occasion, the Houses have preferred to deal with qualifications questions themselves, ignoring pleas—genuine or not—that such matters are better dealt with in the politically neutral atmosphere of the courtroom.⁴⁵ Notwithstanding the relative dignity with which the Senate debate in the Webster matter was conducted,⁴⁶ it is argued below that it would be desirable for both Houses to pass sets of guidelines for their own future use on these occasions, so as to reduce somewhat the partisan clamour which has tended to accompany such debates in the past. In the view of the present writer, the proper role of the Houses of Parliament is to filter out trivial and unmeritorious claims of Constitutional breach, and guidelines of the kind recommended below can assist in this regard. But the proper place for the determination of difficult questions of law and fact, in cases that the Constitution was *prima facie* intended to cover, is certainly the High Court.

In the event of either House declaring that a person is disqualified by virtue of s. 44, the proper course would then appear to be, according to Quick and Garran,⁴⁷ for that House to either declare the candidate next on the poll duly elected or declare that the seat is vacant, that is, require another election. It may be that in the case of a vacancy occurring under s. 45, that is, *after* election,

⁴⁴ The terms of reference in the Webster matter, cited n. 3, ante, are ambiguous in this respect.

⁴⁵ See, e.g., the debate on Senator Gair's place in the Senate, Cth Parl. Debs. (Senate) 4th April, 1974, at pp. 681 et seq., and the Killen and Manning debate, cited n. 11, ante.

⁴⁶ See references to Cth Parl. Debs., n. 3, ante.

⁴⁷ *Annotated Constitution of the Australian Commonwealth* (1901), at p. 491.

that only the latter option would be available. In the event of the matter being referred to the High Court, that Court's power would appear to be limited to declaring that the person was disqualified, or incapable of being chosen or sitting, or that a vacancy exists.⁴⁸ Presumably it would then be for the House in question to proceed as above, either declaring the next candidate elected, or requiring another election as the case may be.

One of the most popularly discussed consequences of a member or senator being declared disqualified for breach of ss. 44 or 45 is that this would appear to throw in doubt the validity of such legislation as depended for its enactment on the vote of the senator or member in question. Assuming, as seems likely, that the High Court would not feel itself constrained from looking behind properly authenticated statutes⁴⁹ to the circumstances of their enactment, it does indeed appear that particular Acts could be invalidated for this reason. The Parliament is, however, perfectly entitled to legislate retrospectively on subjects within its power,⁵⁰ and remedial legislation of this kind could easily be passed: it may be assumed that considerations of convenience would overwhelm any temptation for one or other of the parties, if it happened to be so placed, to make political capital out of the situation.

COMMON INFORMERS

The framers of the Constitution provided an alternative mechanism by which members and senators alleged to be in breach of ss. 44 or 45, apart from s. 47, could be brought to account. This was the s. 46 "common informer" provision:

"46. 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."

During the seventy-five years which elapsed between the enactment of this provision and Parliament's "otherwise providing", s. 46, despite its obvious financial attractions, was never once relied upon. The reasons for this are perhaps not hard to find. Common informers are not, for one reason or another, very highly regarded by the courts, who tend to place as many procedural and evidentiary barriers in the way of the informer's

⁴⁸ Commonwealth *Electoral Act* 1918-1973, s. 206.

⁴⁹ See *Cormack v. Cope* (1974) 48 A.L.J.R. 319, and the general discussion of this question in Fajgenbaum and Hanks, *Australian Constitutional Law* (1972), at pp. 323-327.

⁵⁰ *The King v. Kidman* (1915) 20 C.L.R. 425.

success as they can reasonably devise, and to construe the substantive law even more strictly in favour of the defendant member than they might otherwise be tempted to do. The cases give abundant support for these large assertions: see, in particular *Forbes v. Samuel*,⁵¹ wherein Scrutton J. referred to "three informers . . . racing for penalties quite excessive as a reward for their public merits"; *Burnett v. Samuel*,⁵² *Proudfoot v. Proctor*,⁵³ and *Kelly v. O'Brien*.⁵⁴ That is not to say that common informers never win: two counter-examples are *McEarchern v. Hughes*⁵⁵ and *Bird v. Samuel*.⁵⁶ In the latter case Rowlatt J. was clearly not very happy at feeling obliged to award the informer his £13,000, but resigned himself to the task with the following thought: "The Legislature had thought fit to appeal to the cupidity of individuals as a means of preventing ills which the action of the authorities could not be depended upon to prevent."⁵⁷

If there were no Australian informers prepared to run the gauntlet of judicial disapproval in years gone by, the chances are perhaps now even less with the slimmer pickings available as a result of the passage in April 1975, in the midst of the alarums and diversions of the Webster affair, of the *Common Informers (Parliamentary Disqualifications) Act* 1975. In an extraordinary, if not altogether unsurprising, display of party unanimity, this legislation passed through all stages in both Houses in one evening,⁵⁸ and came into effect the following day. The Act, passed in reliance upon Parliament's power to "otherwise provide" in respect of s. 46, abolishes suits brought directly under s. 46,⁵⁹ but does not, as it could have done, abolish common informer suits altogether. Its main effect is simply to reduce the amount of money the informer can make: the return is limited to a single penalty of \$200 in respect of a past breach, plus a further \$200 per day recoverable for each day the member or senator continues to sit, when disqualified, after having been served with the originating process.⁶⁰ The member or senator thus risks a large payout only if he continues to sit after formally being put on notice of the allegations against him. In addition, the Act

⁵¹ [1913] 3 K.B. 706, at 739.

⁵² (1913) 109 L.T. 630.

⁵³ (1887) 8 N.S.W.R. 459, at 466.

⁵⁴ [1943] 1 D.L.R. 725.

⁵⁵ (1909) 7 E.L.R. 227 (P.E.I. Sup. Ct).

⁵⁶ (1914) 30 T.L.R. 323.

⁵⁷ *Ibid.*, at 326.

⁵⁸ Cth Parl. Debs. (H.R.) 22nd April, 1975, at pp. 1978-1986; (Senate) 22nd April, 1975, at pp. 1236-1239.

⁵⁹ *Common Informers (Parliamentary Disqualifications) Act* 1975 (Cth), s. 4.

⁶⁰ *Ibid.*, s. 3 (1).

confines such suits to "fresh" allegations,⁶¹ makes it clear that a member can be penalised only once in respect of any given period of sitting,⁶² and vests the High Court with exclusive jurisdiction in informer suits.⁶³ One of the few things left unclear by the new legislation is what follows if a difference of opinion occurs between on the one hand the Senate or House of Representatives, which may choose to proceed without reference to the Court in a disqualification matter, or even not to proceed at all, and on the other hand the High Court, adjudicating the matter in the context of a common informer action. Lumb and Ryan⁶⁴ suggest that if "the matter is being dealt with by the House or has been referred to a Court of Disputed Returns, the common informer's suit would be excluded", but it is not entirely clear on what this assertion is founded: ss. 46 and 47 of the Constitution appear on the face of it to provide for two entirely distinct procedures. Certainly it does not appear that a declaration of incapacity by a court in the context of a common informer action would of itself have the result of vacating the seat.

The question remains whether the common informer provisions, however cast, serve any useful purpose at all. The attraction in principle of such provision is, of course, that any member of the public who feels that Parliament is being unduly protective of one of its own members can force the issue and have the matter canvassed in a totally impartial forum. The trouble in practice, however, as was suggested above, is that those individuals who might be most likely to bring suit for proper, public interest, motives are those who will be most dissuaded by the "greedy informer" label still attaching to such suits. With the passage of the 1975 Act, the ironic result seems likely to follow that the amounts recoverable will now be too low to attract the genuinely greedy, but still high enough to embarrass the potential suitor who does not want to be thought greedy at all.⁶⁵ For one

⁶¹ *Ibid.*, s. 3 (2): "A suit under this section shall not relate to any sitting of a person as a senator or as a member of the House of Representatives at a time earlier than 12 months before the day on which the suit is instituted".

⁶² *Ibid.*, s. 3 (3).

⁶³ *Ibid.*, s. 4. Cf. "court of competent jurisdiction" in s. 46, which would appear to include not only the High Court but also any State court, at least in the State where the matter arose, invested with federal jurisdiction by virtue of s. 39 (2) of the *Judiciary Act 1903-1969* (Cth).

⁶⁴ *Annotated Constitution of Australia* (1974), p. 61.

⁶⁵ After this article was completed, but before going to press, it was announced that a High Court writ had been issued, at the instance of an Adelaide schoolmaster, against the then Treasurer and Deputy Prime Minister, Dr. J. F. Cairns, in respect of an alleged breach relating to his occupancy of a government flat in Canberra: *Melbourne Age*, 24th May, 1975.

reason or another, it seems to be the experience of all those jurisdictions retaining common informer provisions here that they work capriciously, fitfully or not at all. It may be that the solution lies not in abandoning altogether the independent access route to the courts, but rather recasting it and providing simply for an action for a declaration, at the suit of any person, as to whether or not a member of Parliament is disqualified.⁶⁶

THE CONSTITUTIONAL PROVISIONS AND THE QUESTION OF A REGISTER

The object here is not to canvass all the pros and cons of compulsory registration of members' financial interests, but simply to state the points of connection between that question and the issues here under discussion. The relevant points can be made quite shortly. Given the availability and applicability of the constitutional provisions, an explanation must be sought as to why they have never hitherto been relied upon. It is just not credible to claim that, perhaps because of their deterrent effect, there have never in fact been any conflicts of interest of the kind in question. Part of the explanation may be, as stated above, doubts about the meaning and scope of the various clauses, but a much more likely explanation is that there has never been any information readily available on which to found such proceedings. It is the opinion of the writer that a register of interests is a necessary component of any system of enforcement of rules against conflict of interest, particularly in relation to government contractors. It is true that a register is not a sufficient condition, for the clues must still be picked up and followed through and there is always the problem of deliberate non-disclosure, but it would give the watchdogs a fighting chance.

If this argument has any force—and it is one for which there is no easily obtainable evidence either way—then the corollary follows that the introduction of a register is likely to bring in its wake not only a greater awareness among members as to their obligations under the Constitution, but also a greater number of claims than hitherto that they have breached it. If such claims are to be dealt with sensibly, effectively and in such a way as not to jeopardise public confidence, there is an urgent need for reform of the procedures governing

⁶⁶ This is the recommendation of the Western Australian Law Reform Committee in *Disqualification for Membership of Parliament: Offices of Profit under the Crown and Government Contracts* (Project No. 14, 1971). The Committee suggests that "to discourage needless harassment, the applicant could be required to give security for costs" (para. 38).

the bringing of such claims. It is to one such, rather unambitious, mode of reform that the final section of this article is devoted.

GUIDELINES FOR DETERMINING CLAIMS OF CONSTITUTIONAL BREACH

Making the pessimistic assumption, for present purposes, that it is probably fruitless to contemplate amending the Constitution itself in this respect, there are none the less certain options open to the Parliament as the Constitution now stands. The course which is suggested in this article is, as foreshadowed above, the passage by each House of a set of resolutions laying out general *guidelines* for dealing, under s. 47, with claims that members have breached the pecuniary interest provisions of the Constitution. These guidelines would be designed to identify claims which were trivial or unmeritorious: they would be based on the "understood" common law limitations of s. 44 (v) and perhaps the most acceptable of the "exception" clauses set out in the various State Constitutions, as detailed below. The idea would be to give each House a set of criteria, not binding on it but difficult to subsequently ignore, to be used in making up its mind as to whether to deal with a matter itself, and if so how, or whether to refer it to the High Court. The criteria would be fixed in advance of any particular case arising with its likely partisan overlay. If the matter did in fact reach the judges, the guidelines would of course have no binding effect: it is for the High Court to determine for itself the meaning of Constitutional provisions.

The State Constitutions are a useful mine of precedents for anyone seeking to formulate such a set of guidelines, especially with respect to the position of government contractors.⁶⁷ The basic contractor-disqualification provisions in these State Constitutions are all more or less closely modelled on the English *House of Commons (Disqualification) Act 1782* (as is s. 44 (v) of the Australian Constitution), but the lists of exceptions which follow them in each case vary quite substantially, reflecting a miscellany of different local pressures and pre-occupations. In some States, notably New South Wales and South Australia, the list of exceptions

⁶⁷ N.S.W.: *Constitution Act 1902*, as amended, ss. 13-14; Vic.: *Constitution Act Amendment Act 1958*, ss. 23-26 (in the process of re-enactment, at the time of writing, as the *Constitution Act 1975*, ss. 54-57); Qld: *Constitution Act 1867-1961*, ss. 6-7A; S.A.: *Constitution Act 1934-1971*, ss. 49-54; W.A.: *Constitution Act Amendment Act 1899-1969*, ss. 32-36; Tas.: *Constitution Act 1934*, as amended, s. 33. In the following footnotes, references to these Constitutional enactments are abbreviated to the name of the relevant State alone.

is so extensive as to effectively reduce to total impotence the basic prohibition on contracting or rendering services.⁶⁸ On this score it is also to be noted that the Western Australian Law Reform Commission⁶⁹ has recently recommended that the example of the United Kingdom Parliament in 1957⁷⁰ be followed, and the government-contractor provisions be done away with altogether.

There are both legal and policy reasons, however, why the Australian Parliament, in devising its own guidelines, should not follow the example set by those States which have wholly or partly abolished, or may be about to abolish, disqualification for pecuniary interest. The legal reason is simply that the Australian Constitution, unlike those of the States, cannot be amended by the Parliament itself, and however much ss. 44 (v) and 45 (iii) can, and should, be read down so as to avoid manifest absurdities and injustices, none the less there is a core set of situations to which both provisions clearly apply: if the Parliament has any respect at all for the Constitution there should be a limit to the extent to which it is prepared to simply ignore its explicit language. This legal argument is not itself a conclusive one, since there are often circumstances (usually involving the expenditure of Commonwealth money) where it would be widely agreed that a piece of possibly unconstitutional legislation or action ought not to be challenged since it is manifestly in the public interest to have it in existence. The legal argument must be supported, then, by policy reasons. Here, as has already been stated above, the policy reasons are obvious. Members of Parliament should avoid actual or potential conflicts of interest, and avoid being placed—or being seen to be placed—in situations where a suspicion of undue influence can arise. The maintenance of respect for the institution of Parliament demands not only total integrity from its members, but the appearance of total integrity.

That said, what categories of exception can be specified which are consistent with the spirit and intent of the Constitutional provisions? The following is a suggested basic list, not drafted with any great precision and not necessarily exhaustive, but indicating the kinds of guidelines which would be desirable:

(i) *Agreements entered into by corporations in which the member has a less than substantial interest.* This was argued above to be not now a rule of law,

⁶⁸ See, especially, N.S.W., s. 13 (4) (e) and S.A., s. 51 (g), where contracts for the supply of goods or services to the government are entirely exempted, provided the terms are the same as those offered to the general public.

⁶⁹ Report cited n. 66, ante.

⁷⁰ *House of Commons Disqualification Act 1957* (c. 20), s. 9.

but it is perhaps a fair rule-of-thumb for the House to apply. A "substantial" interest might be designated, applying statutory precedent in this area,⁷¹ as control of not less than one-fifth of the voting rights in the company.

(ii) *Agreements fully executed by the person in question at the relevant time* (see above).

(iii) *Agreements performed, or services rendered, of a casual or transient kind*⁷² (see also above). It might be desirable to add a proviso here that the value of the transaction or the amount of the fee involved be relatively small: the transience of a transaction is no guarantee of its triviality in money terms.

(iv) *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*⁷³ (see also above).

(v) *Agreements with the Public Service to which the person in question is not a direct party, including 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 reasonable time*⁷⁴ (see also above).

(vi) *Agreements for the provision by the Commonwealth of goods, services or other benefits on the same terms and conditions as they are made available to the public generally*⁷⁵ (see also above). A provision in these general terms would appear to render unnecessary references to more specific Crown services (for example, insurance⁷⁶ and loans by the Crown⁷⁷) such as are common in the State Constitutions. Further, it would obviously foreclose any argument about disqualifications for buying stamps, renting a telephone or similar transactions. Some limits would have to be placed on the notion of "benefit", but the clause could probably also be regarded as extending to any transaction—including subscriptions to government loans, and even the acquisition of certain property interests—where the benefit in question is being offered to the public at large, and the person in question is a "price-taker", rather than being engaged in a one-off "price-agreeing" bargain with the government.

⁷¹ *Viz.*, Tas., s. 33 (2A) (b).

⁷² Compare Vic., s. 25 (2) (c) (isolated, casual transactions without knowledge that government a party), and W.A., s. 35 (casual sales in isolated locations).

⁷³ Compare Vic., s. 25 (2) (c).

⁷⁴ Compare N.S.W., s. 13 (4) (b) (i) and (ii); Vic., s. 25 (2) (b); S.A., s. 51 (e) and (f); W.A., s. 36.

⁷⁵ Compare N.S.W., s. 13 (4) (e); Vic., s. 25 (2) (a); S.A., s. 51 (g); W.A., s. 35; Tas., s. 33 (3) (d).

⁷⁶ Compare Qld, s. 7A (c); S.A., s. 51 (k) and (p); Tas., s. 33 (3) (d).

⁷⁷ Compare N.S.W., s. 13 (4) (f); S.A., s. 51 (h), (l) and (o); W.A., s. 35; Tas., s. 33 (3) (ca) and (f).

(vii) *Loans made to the Commonwealth*.⁷⁸ This kind of transaction could perhaps be subsumed under the preceding heading of "goods, services or other benefits supplied by the Commonwealth", to the extent that one could treat the return on one's bonds as a form of "goods, service or other benefit", but it would seem desirable, in the interests of clarity, to list such loans separately, as an exception in their own right. No court would appear likely to construe such a loan agreement, at least one where no special advantages not enjoyed by subscribers at large were attached, as coming within the ambit of ss. 44 or 45. It is manifestly not the kind of agreement which could raise suspicions of undue influence either way.

(viii) *Compensation settlements, including payments for property compulsorily acquired*.⁷⁹ This is another category of agreement which does not fit easily within any of the above general exceptions, but which again is manifestly outside the contemplated ambit of ss. 44 and 45, at least—and this is particularly important in the context of land acquisitions—when the bargain is a fair one, such that the person in question receives a price comparable to that paid or payable to others in a similar position. The best way to ensure fairness in practice may be to require public disclosure of all such compensation payments to members.

It will be noted that in the above list no general exception clause is suggested in relation to dealings by members in interests in land, even though such a clause is to be found in every State Constitution.⁸⁰ This is on account of the policy reason that dealings in land arguably tend to promote more public distrust of public men than any other single class of transaction, and accordingly, in the view of the writer, should receive no blanket exemption. Agreements in relation to land seem to have been squarely within the contemplation of, and the statutory language employed by, the makers of the Constitution.⁸¹ All this is not to say that members of Parliament could never engage in any land transaction with the Commonwealth if these guidelines were adopted and the law enforced in the way herein suggested: many such agreements will come within the terms of one or other of the more specific exemption categories listed above.

⁷⁸ Compare N.S.W., s. 13 (4) (a); Vic., s. 26; Qld, s. 7A (d); S.A., s. 51 (a) and (b); W.A., s. 34; Tas., s. 33 (3) (c).

⁷⁹ Compare N.S.W., s. 13 (4) (c); Vic., s. 25 (2) (d); Tas., s. 33 (3) (b).

⁸⁰ N.S.W., s. 13 (4) (d); Vic., s. 26; Qld, s. 7A (a) (and see further s. 7A (b) in respect of mining permits and leases); S.A., s. 51 (d) and (l); W.A., s. 35; Tas., s. 33 (3) (a).

⁸¹ See especially *Convention Debates*, Sydney, 1897, at pp. 1022-1028. Land dealings as such are not explicitly mentioned, but several delegates refer to the "abuses" then current in Colonial legislatures, and many of these were notoriously in relation to land.

POSTSCRIPT: THE WEBSTER CASE

On 24th June, 1975, after the present article had been completed, judgment in *In re James Joseph Webster* was handed down by Barwick C.J., sitting alone⁸² as the Court of Disputed Returns. The matter had been referred to the Court by resolution of the Senate, pursuant to s. 204 of the *Commonwealth Electoral Act* 1918-1973. A question had arisen as to Senator Webster's qualifications as a result of evidence placed before the Joint Committee on Pecuniary Interests by a Melbourne journalist during the course of the Committee's hearings in April 1975.⁸³

The claim was that Senator Webster was in breach of the Constitution, s. 44 (v) in that, at the time of his re-election to Parliament in May 1974, and subsequently, he had a pecuniary interest in certain agreements for the supply of timber and hardware entered into with Departments of the Australian Public Service by the firm of J. J. Webster Pty. Ltd., a company of less than twenty-five members in which Senator Webster was a major shareholder. Although there was, apparently, some evidence of a course of dealing between the company and various Departments stretching back into the life of all the Parliaments in which Senator Webster had sat since first entering the Senate in 1964, the submissions before the Court were confined to dealings in the recent period mentioned.

Senator Webster was held not to have contravened the Constitution. Barwick C.J.'s judgment was narrow in scope, and based very much on the particular facts before him, but it does throw some light on several of the speculations made and conclusions reached above, reinforcing some and undermining others. What it does not, however, undermine is the major conclusion reached above, which is that the whole question of members' pecuniary interests remains in need of systematic clarification, if not by Constitutional change then at least by the laying down of Parliamentary guidelines.

Of the three separate questions stated in the text above to be involved in any application of s. 44 (v), the Chief Justice's judgment focused on the second, i.e. whether the agreements in question were the kind of agreements covered by s. 44 (v). He had no difficulty with the first question, holding that transactions with the Department of Housing

⁸² When the matter finally came on for hearing, Barwick C.J. refused an application that the matter be referred to the Full Court. It is to be noted that there is no appeal from the Court of Disputed Returns, however constituted.

⁸³ See ante n. 3 for the Court's terms of reference and the relevant Senate debates.

and Construction and with the Postmaster-General's Department were unquestionably with "the Public Service of the Commonwealth". As to the third question, whether Senator Webster, by virtue simply of his shareholding, could be said to have a "direct or indirect pecuniary interest" in any agreement to which the company was a party, Barwick C.J. said that a shareholder qua shareholder could be so interested, but he was "doubtful" whether Senator Webster had in fact such an interest in this case. Since he offered no further elucidation of the grounds for this doubt, its significance for future cases remains somewhat obscure.

The Chief Justice approached the key question, the scope of s. 44 (v) "agreements", by looking first to the purpose for which the clause had been enacted. Though casting a sideways glance at the Convention Debates which, as noted in the text above, emphasise the misuse of influence by the member himself rather than the Crown, Barwick C.J. felt able to hold that the sole purpose of the clause was that indicated on the face of its 1782 United Kingdom progenitor, i.e. the eighteenth century one of protecting Parliamentary independence from being undermined through financial seduction of its members by the Crown. This in turn enabled him to hold that both executed contracts and those of an "over-the-counter" (*Royse v. Birley*⁸⁴) or "casual and transient" (*Tranton v. Astor*⁸⁵) character were beyond the scope of the clause: for there to be any possibility in practice of the Government exercising such improper influence, the agreements had to be of a "more permanent or continuing and lasting character".⁸⁶

It remained only then to hold that the various contracts for the supply of timber and hardware into which J. J. Webster Pty. Ltd. had entered during the crucial period were, despite their magnitude and apparently ongoing nature, of a "casual and transient" kind. This difficulty Barwick C.J. solved by paying minute attention to the proper technical characterisation, under the law of contract, of the agreements involved. Some of the

⁸⁴ (1869) L.R. 4 C.P. 296.

⁸⁵ (1917) 33 T.L.R. 383.

⁸⁶ It will be noted that, in accepting these exceptions to the scope of s. 44 (v), and in not feeling unduly hampered in this respect by different statutory language from that in the cases cited, Barwick C.J. comes to essentially the conclusion reached in the text above, albeit by a slightly different route. His emphasis on the almost archaic "Crown influence" purpose will, if carried through to other contexts, go some distance toward allaying the fears of Parliamentarians. Whether it will satisfy those citizens who see the section playing a role in preserving both the appearance and reality of Parliamentarians' integrity is of course another question.

“accepted tenders” proved upon close scrutiny to be mere offers to treat, or for some other reasons were not agreements at all. And those agreements that were agreements were not agreements of a “standing or continuing character”: rather these were offers for the supply of goods, up to a certain maximum quality and at a certain price, which (although appearing to be accepted in general terms when each tender was accepted) were not in truth accepted by the Department until specific orders for the goods were given. Each tender resulted, then, not in an ongoing contract, but a series of individual agreements each of which was

indistinguishable in principle from an “over-the-counter transaction”. As the Chief Justice himself conceded during the course of his judgment, “It is indeed . . . a matter for real regret that the composition of a House of the Parliament should depend on such highly technical differentia”.

With this result on the substantive question, the Court in *Webster* neither listened to argument nor in any way pronounced upon the various consequential problems flowing from a finding of breach of s. 44 (v), in particular the appropriate method of filling the vacancy so caused. That is yet another question left to be solved on another day.

The Family Law Act 1975

BY THE HONOURABLE KEP. ENDERBY*

The *Family Law Act 1975* (Cth),¹ providing for the replacement of the existing divorce law with a new law, extending Federal jurisdiction to a wide range of family law proceedings outside divorce and providing for the establishment of family courts, is unquestionably a change of great magnitude in the law of Australia. I believe, as I have stated elsewhere, that the Act will prove to be possibly the most humane and enlightened social reform to be enacted in Australia since the Second World War. For legal practitioners, as well as for parties to family law proceedings, both the nature and the scope of the changes made by the Act are substantial, and in this article I shall attempt to give a broad indication of the outline of the changes. Before doing so, it may be of interest to readers to have a sketch of the background and events leading up to the passage of the legislation through Parliament.

HISTORICAL BACKGROUND

Within a very few years after the *Matrimonial Causes Act 1959* (Cth) became law, it was found wanting by an increasing number of critics. More and more divorce litigants began to ask why the only way to obtain relief from an unhappy marriage without having to wait at least five years was by subjecting one's self and one's spouse to the humiliation of having to prove misconduct by one

or other justifying the dissolution of the marriage. Apart from this indignity, the Act came under criticism for the complexity and delays in proceedings and the consequent high cost to litigants. At the same time as these criticisms were being voiced, there was a growing movement amongst academics, commentators and practitioners for adding to the existing grounds of divorce, or replacing them with, a ground of irretrievable or irreparable breakdown of the marriage, without the requirement of proof of misconduct by one or other party to the marriage. When Leader of the Opposition in the Senate, my predecessor in office, Senator Murphy,² moved a motion, which was carried by the Senate on 7th December, 1971, for the following matter to be referred to the Senate Standing Committee on Constitutional and Legal Affairs—“The law and administration of divorce, custody and family matters, with particular regard to oppressive costs, delays, indignities and other injustices.” During the ensuing year of 1972, the Committee invited submissions from interested persons and bodies in the community on the reference, and advertised its invitation in the press.³ The Committee held several public and private hearings in which it received evidence from a variety of interested persons. On 31st October,

² Now Mr. Justice Murphy of the High Court of Australia.

³ A full list of submissions received by the Committee may be found in the interim report of the Committee of September 1974 (Parl. of Cth of Australia, 1974—Parl. Paper, No. 134).

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