CHAPTER 7

# Pecuniary interests (ss. 44 (v) and 45 (iii))

## CONSTITUTIONAL PROVISIONS

**7.1** Perhaps the most well-known disqualifying constitutional provisions, and ones which have caused the most concern and disquiet among members of Parliament, are the pecuniary interests provisions in ss. 44 (v) and 45 (iii). 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.

In addition s. 45 (iii) provides that:

> If a senator or a member of the House of Representatives—
>
> (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.

### (a) Background to s. 44 (v)

**7.2** This provision has its origins in the House of Commons (Disqualification) Act 1782 and evolved as a response to the Crown's attempt to gain political support through a comprehensive system of patronage, in particular the Crown's allocation of lucrative contracts to members. The original rationale for disqualifying government contractors is to be found in the preamble of the Act which states its object as being 'For further securing the freedom and independence of Parliament'. A different view of this basic rationale, however, emerged during the Convention Debates in the 1890s and has tended to dominate the issue of members' pecuniary interests; that is, a concern 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.

**7.3** At first sight, s. 44 (iv) seems extremely far-reaching, and capable—on a strictly literal interpretation—of disqualifying members for engaging in quite trivial or everyday transactions with government departments. Examples of the manifest absurdities that could arise include renting a telephone, subscribing to a Commonwealth loan, buying stamps and so on. Some commentators have argued that so many possible applications of the section are patently absurd that the courts would end up denying it any practical application at all. Others hold the view that s. 44 (v) is capable of relatively precise, narrow and acceptable application.[1] This latter view is more in accord with the reasonably well-defined body of case law developed around the Act of 1782 and the similar legislative provisions in Commonwealth jurisdictions, including the Australian States, and was the reasoning followed by Barwick CJ sitting as a Court of Disputed Returns when s. 44 (v) eventually came under judicial interpretation in the case of *In re Webster*.[2]

**7.4** *The Webster Case.* In April 1975 a question as to the qualifications of Senator Webster was raised by the Chairman of the Joint Committee on Pecuniary Interests of Members of Parliament[3], as a result of evidence placed before the Committee by a Melbourne journalist during the course of the Committee's hearings. The Committee Chairman, Mr J. M. Riordan MP, informed the Senate by letter that a member of the Joint Committee itself, Senator James J. Webster, 'probably unwittingly, had broken Section 44 (v) of the Constitution by contracts with the Crown'. The Senate referred the matter to the Court of Disputed Returns pursuant to s. 204 of the *Commonwealth Electoral Act* 1918.[4] The claim was that Senator Webster, at the time of his re-election to Parliament in May 1974, and subsequently, had a pecuniary interest in certain agreements entered into with departments of the Australian Public Service. Evidence produced before the Chief Justice established that Senator Webster at the relevant time was one of nine shareholders in J.J. Webster Pty. Ltd., and was also Managing Director, Secretary and Manager of the Company. His only reward from the Company was a fixed salary and use of a company car. At various relevant times the Company publicly tendered for, and subsequently supplied, material to the Postmaster-General's Department, and the Department of Housing and Construction.

**7.5** Senator Webster was held not to have contravened the Constitution. The Chief Justice's judgment was narrow in scope, and based very much on the particular facts before him. He had to determine several questions which are involved in any application of s. 44 (v): 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'. Barwick CJ had no difficulty with the first issue, holding that transactions with the Postmaster-General's Department and with the Department of Housing and Construction were unquestionably with the Public Service of the Commonwealth. His judgment focused on the second issue, i.e. whether the transactions in question were the kind of 'agreement' covered by s. 44 (v). He approached this key question by looking first to the purpose for which the clause had been enacted. Although Barwick CJ revealed during the hearings that he had consulted the Convention Debates,[5] which in our view emphasise the misuse of influence by a member himself rather than the Crown, he felt able to hold that the sole purpose of the clause was that indicated on the face of the 1782 United Kingdom progenitor, i.e. one the protecting parliamentary independence and integrity. This in turn enabled him to apply a number of English decisions on the progenitors of s. 44 (v) and to hold that the Australian provision only applies to executory contracts[6] and those of a 'more permanent or continuing and lasting character'.[7] These requirements, in Barwick CJ's opinion, spring out of the purpose of s. 44 (v): for there to be any possibility in practice of the government exercising improper influence, the agreements must be of more than a casual or transient character. His Honour was then able to hold, by paying minute attention to each of the agreements and to their proper technical characterisation under the law of contract, that these agreements for the supply of timber and hardware were of a 'casual and transient' kind.

**7.6** The Chief Justice then expressed an opinion—although it was no longer necessary to the case—as to whether Senator Webster could be said to have a direct or indirect pecuniary interest in any agreement to which the Company was a party. He referred to the general law, under which it is well established that a shareholder does not have any legal or equitable interests in the assets, including agreements, of a company (even if he owns almost all the shares), and suggested that the terms of s. 44 (v) do not amend the

general law. Consequently a shareholder *qua* shareholder 'does not by reason of that circumstance alone have a pecuniary interest in any agreement the company may have with the Public Service'. He conceded that 'due to particular circumstances' a shareholder may have such an interest, but concluded that no such circumstances existed in this case and he was 'doubtful' whether Senator Webster had in fact such an interest.[8]

**7.7** The decision in the *Webster* case has been widely criticised, not only because Barwick CJ sat alone, despite the constitutional importance of the case,[9] but also because of the basis and manner of his reasoning and its consequences for the intendment and scope of the provisions. Gareth Evans (now a member of this Committee) in a postscript to the *Webster* case contained in an article in the Australian Law Journal, commented on the narrow scope of the judgment and highlighted the extremely technical differentia involved in construing the contracts. As to the Chief Justice's interpretation of the purpose of the clause he stated:

> His emphasis on the almost archaic 'Crown influence' purpose will, if carried through to other contexts, go some distance towards 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.[10]

**7.8** Barwick CJ's emphasis on the Crown influence purpose has been criticised on the basis that it is contrary to the intention of the drafters of s. 44 (v), which was expressed not only during the Convention Debates but in the wording of the provision itself. The most striking difference between the constitutional provision and its progenitors is the inclusion of the words 'pecuniary interest': a term which had only been used in local government-type legislation before 1900 for the purpose of removing from those who govern 'the manifest possibility of a conflict between interest and duty'.[11] The phrase was apparently inserted after the 1897 Sydney Convention where the thrust of the debate was towards the need to prevent members of the national Parliament from using their elected office for personal gain.[12] However, Barwick CJ discounted completely the possibility that an analogy could be drawn between the purpose sought to be achieved by disqualification provisions, under local government legislation, and s. 44 (v). He gave no reason for this conclusion, apart from simply asserting that members of Parliament are in a 'significantly different situation' to that of councillors.[13]

**7.9** A case note on the *Webster* judgment by J. D. Hammond[14] questions the validity of the Court's conclusion that the sole purpose of s. 44 (v) is identical with that of the English Act. He compares the two provisions, including the successive drafts of s. 44 (v) and concludes that

> . . . the inclusion of the word 'pecuniary interest', coupled with the radical change in wording, indicated a deliberate attempt by the 1897 draftsmen to broaden the scope of the section beyond that contemplated by the English Act.[15]

Hammond argues that, although the High Court should not refer to the Convention Debates, it can consult successive draft bills,[16] in interpretating the intentions to be gathered from the language of the Constitution, and submits that the four drafts of s. 44 (v) support a conclusion different to that reached by the Court. In his opinion it is possible for the section to perform a two-fold purpose:

> First, it would still proscribe the sort of behaviour the English Act sought to affect. Secondly, it would go further, and require of Federal parliamentarians no lower standard of probity than was expected of their local government brethren.[17]

**7.10** Barwick CJ's interpretation of the purpose of s. 44 (v) has also been questioned in an article by P. Hanks. He states:

> I am not sure that it is as obvious as the Chief Justice maintained that the purpose of s. 44 (v) is confined to protecting the integrity of Parliament. That may have been the concern of the parliament which passed the Act of 1782 but it may be that the draftsmen of s. 44 (v) were also seeking 'to protect the public against fraudulent conduct of members of the House'.[18]

Hanks comments that the emphasis on pecuniary interests 'is peculiar to s. 44 (v), in that none of the earlier British or Australian colonial legislation contains such a qualification'. He then concludes:

> It is permissible, and not altogether unrealistic, to infer that the drafting amendments to s. 44 (v) (emphasising the notion of 'pecuniary interest') was made as a response to the Sydney delegates' preoccupation with the corrupt use of office rather than with the suborning of parliamentarians by the Crown.[19]

**7.11** Another point of criticism offered by Hanks was that:

> An interpretation which confines s. 44 (v) to long-term agreements for the supply of commodities to the Crown, but which omits a series of short-term agreements of a similar nature from the group of s. 44 (v) seems an imperfect way of securing the independence and integrity of Parliament.[20]

Evans was also critical of the manner in which Barwick CJ was able to characterise the contracts as casual and transient 'despite their magnitude and apparently ongoing nature'.[21] He noted that Barwick CJ came to this interpretation:

> . . . by paying minute attention to the proper technical characterisation, under the law of contract, of the agreements involved. Some of the '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'.[22]

**7.12** Barwick CJ's opinion on the third issue, that is, whether Senator Webster by virtue of his shareholding could be said to have a direct or indirect pecuniary interest in any agreement to which the company was a party, has also attracted adverse comment. The Chief Justice's views, which are noted in more detail in paragraph 7.6, were to the effect that Senator Webster did not have any such interest. Hanks's opinion on this aspect of Barwick CJ's judgment is explicit:

> I find that argument and conclusion difficult to accept. It seems to me that the draftsman of s. 44 (v) went to some pains to ensure that people did not evade the prohibition or disqualification in that paragraph by making their dealings with the Crown behind a corporate veil. First there is the reference to 'direct or indirect pecuniary interest'. Secondly, there is the exempting clause which excuses (perhaps quite illogically, but nevertheless unequivocally) from the disqualifications of s. 44 (v) persons who are members of incorporated companies with more than twenty-five members.[23]

**7.13** Two recent reports have also expressed criticism of the now restricted scope of s. 44 (v) since Barwick CJ's judgment in the *Webster* case: the Joint Committee on Pecuniary Interests of Members of Parliament[24] and the Committee of Inquiry Concerning Public Duty and Private Interest. The Joint Committee, in the course of its report, observed that 'the apparent prevention of conflict of interest situations to be derived from s. 44 (v) may prove to be illusory'[25] and, after considering the *Webster* case, concluded that s. 44 (v) 'could not be considered as a safeguard against conflict of

interest and duty'.[26] The Joint Committee, which tabled its Report on 30 September 1975, did not recommend any change to the disqualification provisions in s. 44 or the vacating provisions in s. 45, but recommended the establishment of a register of the pecuniary interests of members of Parliament. This recommendation was not accepted by the present Government as putting forward adequate solutions. A Committee of Inquiry was formed on 15 February 1978 under the chairmanship of the Hon. Sir Nigel Bowen, a former Commonwealth Attorney-General and now Chief Judge of the Federal Court.[27] The report of the Bowen Committee was tabled on 22 November 1979.

**7.14** The Bowen Report agreed with the Joint Committee statement that the constitutional provisions did not 'give the necessary assurance that decisions affecting the public will be taken in the public interest'.[28] They further stated that 'the decision in the *Webster* case, coupled with the associated change to the law concerning common informers, leaves s. 44 (v) of the Constitution relating to government contracts with very little substance'.[29] They conclude that

> . . . these Constitutional provisions [ss. 44 (iv), (v), and 45 (iii)] are inadequate to cope with the many conflict of interest situations which arise in the federal government. Although it will be difficult to amend them, the Committee recommends that ss. 44 (iv), (v), and 45 (iii) of the Constitution be reviewed.[30]

**7.15** While the *Webster* decision has substantially limited the scope of s. 44 (v) by confining it to the 'Crown influence' purpose, a result not entirely unexpected,[31] we do not agree with the opinions expressed in both Reports, and by other commentators, that this has left s. 44 (v) virtually denuded of substance. On the contrary, we are of the opinion that the provision still has a wide area of potential application and it will have significant importance in other commercial transactions not exempted by the essentially narrow and specific exceptions applied to the transactions in the *Webster* case. This is a matter that we view with some considerable concern, a concern that has been frequently expressed in the past by members of Parliament uncertain as to the possible application of s. 44 (v) in a whole variety of transactions between themselves and the Crown. Many of these agreements lie within the area of goods, services and other benefits provided by the Commonwealth on the same terms and conditions as they are made available to the public generally, and which are essentially of a private or personal service character. Transactions in this category which are still nonetheless ostensibly within the ambit of s. 44 (v) include:

- Government insurance;
- acquisition of property interests from the Crown—leasing residential premises or small plots of land;
- compensation settlements including payments for property compulsorily acquired;
- loans made to the Commonwealth, and by the Commonwealth.

**7.16** On a strictly literal interpretation, the provision could also apply to transactions with some essentially non-public service intermediary as well as transactions directly with the Public Service. Further, if the phrase 'Public Service of the Commonwealth' is regarded as being coterminous with 'Crown in the right of the Commonwealth', transactions with a variety of non-departmental servants, agents and instrumentalities might conceivably come within the operation of s. 44 (v). The question arises as to whether almost every agreement, other than the classes excepted by the Chief Justice, would disqualify a member of Parliament or whether there are some other implied limitations.

**7.17** Despite this wide area of potential application, we would not agree, as other commentators have suggested, that the courts would end up denying the provision any practical application at all. 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. A number of resignations have been induced not only by the English Act in the House of Commons[32] but also by similar provisions in other Commonwealth jurisdictions, including the Australian States.[33] A recent Australian example is the case of the Tasmanian MLC, Mr John Orchard, who was forced to resign from the Tasmanian Legislative Council in 1968, because he was performing printing work for the State Government through a printing company in which he and his wife were the sole proprietors.[34]. Other successful court cases have included *Bird* v. *Samuel*[35] (Britain), *Hackett* v. *Perry*[36] (Canada) as well as a number of cases involving analogous local government legislation. With the exception of *Samuel's* Case, which involved large sums earned by Sir Stuart Samuel, MP, as a partner in a firm purchasing silver for 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.

**7.18** While the Chief Justice's judgment in the *Webster* case offers little clarification on these issues, parliamentarians can perhaps gain some solace from the decision, as it indicates that the High Court is prepared to view the provision restrictively. Despite the difference in the statutory language between s. 44 (v) and its progenitors, His Honour felt able to apply English cases which tended to construe these earlier provisions in a restrictive manner, ensuring a relatively narrow and acceptable application. This raises the possibility that the High Court may consider many of these decisions as persuasive which would in turn, we suggest, give some efficacy to s. 44 (v). 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.

### (b) Background to s. 45 (iii)

**7.19** Section 45 (iii) provides:

> 45. If a senator or member of the House of Representatives—
>
> (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.

This provision does not appear to have any legislative origins in other jurisdictions and seems to have been adopted purely as a result of Australian political conditions at the time of the Convention Debates. It has not been subject to judicial scrutiny, and consequently its full effect is a matter of conjecture. The first limb of the clause was moved by Mr Carruthers at the Adelaide Convention in 1897 with the specific intention of preventing barristers in Parliament from accepting Crown work.[37] Other speakers to the motion took a broader view and envisaged the provision as encompassing medical practitioners, engineers and other professional men. 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 connection with legislative measures.[38]

Mr Reid's intention was to prohibit members of Parliament from accepting payment for advocating or putting Bills through the Parliament.

**7.20** The primary application of the first limb of s. 45 (iii)—concerning fees or honoraria for services rendered to the Commonwealth—appears to be directly within that area of *professional* services which Mr Carruthers wished to prohibit. 'Fee' and 'honorarium' are terms which would appear to have their ordinary dictionary meanings, the former being a sum of money payable under any contract or arrangement, the latter implying a voluntary payment, that is, one made without any formal contractual obligations 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 point noted by the Bowen Report which suggests that the 'existence of this provision has prevented the development of the consultancy arrangements which so concerned the British House of Commons and contributed to the decision to introduce a register of Members' interests'.[39]

**7.21** Vexed questions have arisen in this area, both in Parliament[40] and elsewhere, as to inadvertent payments by the Commonwealth to members, with a corresponding contravention of the Constitution. What is the position of members who are pharmaceutical chemists or medical practitioners and who may receive payments from the Commonwealth under the National Health Act; or members who have received payments from the Australian Broadcasting Commission after being interviewed on radio or on television; or solicitor-members who have accepted matters referred by a State or Territory Legal Aid Commission? While it is possible that such payments would, on a strictly literal interpretion of s. 45 (iii), constitute a breach of the provision, Evans suggested that:

> 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 prime facie questions in the public mind as to the possibility of improper influence being exercised by either the goverment, 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.[41]

**7.22** Although there is still some uncertainty as to the full extent of the meaning of the words of the first limb of s. 45 (iii) in the absence of judicial authority, there are payments which are seen as more clearly inapplicable. These include 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 parliamentary committees, but not Government boards and committees (the word 'Commonwealth' arguably being confined in this section to the Executive Government). The clause does not seem to extend to such things as gifts[42] and sponsored travel, which the Bowen Report suggests 'might be more serious than payment of fees and honoraria'.[43]

**7.23** There is no real difficulty in ascertaining the application of the second limb of s. 45 (iii): 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, advocating Bills—are clearly caught by the provision. The Convention Debates indicated that there was concern over the possibility of bribery of members and Mr Barton referred to a number of instances of expulson from the British House of Commons on this ground.[44] Erskine May notes that the British Parliament did not confine itself to the repression of direct pecuniary corruption. 'To guard against indirect influence, it has further restrained the acceptance of fees by its members for professional services connected with any proceeding or measure in Parliament.'[45] As to the

interpretation of various phrases in the section: 'any person' would include corporations; 'any State' is probably confined to States of the Federation as distinct from foreign countries; and 'services rendered' would probably not be confined to past services but also include those rendered in the future.[46] Whether the expressions 'fee' and 'honorarium' would include various prerequisites offered to members, for example, trips overseas, is unlikely, as the terms imply a direct cash advantage.[47]

## THE NEED FOR CLARIFICATION

**7.24** The provisions in ss. 44 (v) and 45 (iii) can be viewed as establishing a primitive code to deal with conflict of interest problems and which, given a not too restrictive reading, could avoid a considerable number of situations of potential conflict. Given the availability of the constitutional provisions, the question arises as to why they have not more often been relied upon. Although the most likely explanation is that there has never been any information readily available on which to found such proceedings, at least part of the explanation is doubt about the meaning and scope of the provisions. The decision in the *Webster* case merely reinforces our view that the whole question of members' pecuniary interests remains in need of systematic clarification by a formal constitutional amendment, and if this should prove fruitless, at least, by the laying down of parliamentary guidelines.

**7.25** Assuming for present purposes that constitutional change is possible, several options are open for consideration:

(1) Deleting ss. 44 (v) and 45 (iii), leaving any such matters for judgment within the Parliament or, ultimately, to the electorate.

(2) Replacing the present provisions with amendments to the Standing Orders of both Houses of Parliament. This may already be possible under s. 50 (ii) of the Constitution but could be put beyond doubt by the addition of a third subsection to s. 50 along the following lines:

> 50 (iii) Nature of interests pecuniary or otherwise which shall not be held by a senator or member of the House of Representatives.

(3) Replacing the present provisions by legislation empowered under s. 49 of the Constitution, i.e. by express declaration of the privileges of the Senate and of the House of Representatives.

(4) Replacing the present provisions with detailed constitutional provisions defining all the areas sought to be covered.

(5) Recasting the constitutional provisions in terms of a broad principle and enabling Parliament to prescribe detailed provisions.

(6) Replacing the present provisions by a general head of power enabling Parliament to prescribe detailed provisions as it sees fit.

**7.26** Option (1), proposing simple deletion of the constitutional provisions is not without merit: similar proposals have been made in other jurisdictions with provisions closely related to s. 44 (v). In the United Kingdom a 1956 Select Committee of the House of Commons[48] recommended the repeal of the section in the House of Commons Disqualification Act 1931, which disqualified government contractors. The prevailing view was that the provisions were no longer necessary as there had been little or no abuse in this area for over one hundred years. In considering the alternatives to repeal, they noted the uncertainty of the scope of the existing provision, and pointed out the extreme difficulty of drafting satisfactory provisions to cover all the possible contractual arrangements in which a member may, theoretically, become subject to the

influence of the government. The question of the appearance of conflict was not, however, a major issue, and the Select Committee's recommendation received legislative approval the following year.[49]

**7.27** Despite the historical ties between the English provision and s. 44 (v) and the applicability of the various arguments raised by the United Kingdom Select Committee, we are not convinced that such provisions are no longer necessary. The lack of known abuses and the virtually dormant status of the constitutional provisions does not, to our mind, necessarily indicate that there has never in fact been any conflict of interest of the kind in question. Further, obvious policy reasons predicate the retention of these provisions. Members of Parliament should avoid actual or potential conflicts of interest, and avoid being placed, or even being seen to be placed, in situations where a suspicion of undue influence can arise. As public confidence and trust in politicians is not especially high, the maintenance of respect for the institution of Parliament demands not only total integrity, but the appearance of total integrity. In such a climate we feel the deletion of these provisions would be unacceptable to an already suspicious electorate. These suspicions would be increased when the alternative modes of redress are considered—namely, public pressure being brought against the member to resign, or expulsion from the Parliament for misconduct. This latter power—exercisable by the United Kingdom House of Commons and ipso facto applicable to the Commonwealth Parliament under s. 49 of the Constitution—is unlikely to be used except in the most grave circumstances because of its inherent political ramifications. While public pressure can be a useful instrument of political and social persuasion, we are not convinced as to its appropriateness, effectiveness, or even deterrence, in this area of undue influence.

**7.28** Options (2) to (5) also suffer from various defects. As regards option (2), we have serious doubts as to whether amendments to Standing Orders could be implemented in an unrestricted and effective manner. For example, House of Representatives Standing Order 196, which prohibits members from voting on certain types of questions in which they have a pecuniary interest, has been severely limited in its operation in part because of the interpretation placed on it by successive Speakers. The adoption of such Standing Orders may also place either the Speaker or the President in an invidious position if a question of disqualification arises, and could easily result in an explosive political issue fuelled perhaps by allegations as to the partiality of the Presiding Officers. Option (3) is a feasible alternative, but the removal of overt constitutional provisions dealing with pecuniary interests may be unacceptable to the electorate. As to option (4), we consider that the inclusion of detailed provisions within the Constitution would be inappropriate: not only is there the difficulty of satisfactorily covering all the possible variations, but a concomitant risk that such provisions rapidly become out of date or irrelevant. Option (5) also presents drafting problems in that there is difficulty in phrasing such a general principle in wide enough terms to cover all the diverse situations which may arise now or in the future.[50] We also wished to avoid the possibility that any legislation enacted under such a principle would have to be tested in the High Court before its constitutional validity was ensured.

**7.29** Option (6), that of substituting the present provisions with a general head of power, is the one we favour: it avoids the shortcomings noted in the other options, enables Parliament to legislate witout restriction over the whole area of conflict of interests so as to make the matter non-justiciable and ensure contemporaneity with the prevailing social and economic conditions.

**7.30** Before attempting to formulate a general enabling power, we think that it would be helpful to delineate, at least in a general way, the areas of 'conflict of interests' and

'undue influence' sought to be covered. In our opinion, the purpose sought to be achieved by the progenitor of s. 44 (v) —that of securing the freedom and independence of the Parliament from the Crown and its influence —is still applicable despite the significant changes in political and social circumstances since the eighteenth century. Although this rationale is obviously less important today, we can still conceive of circumstances when the Executive may wish to influence a member of Parliament. For example, a recalcitrant backbencher's vote may be critical to the government in its legislative program, especially if the government holds only a slim majority in either House. If such a member was involved in commercial enterprises, a lucrative government contract could readily be seen as inducing or influencing such a member's role. This argument applies with equal force to services rendered within the Parliament in circumstances presently excluded by s. 45 (iii). Familiar examples are Crown briefs delivered to barrister members, or direct bribery in connection with legislative measures. While on the one hand we wish to include these more pernicious forms of government influence, we are equally concerned, on the other hand, to exclude those innocent or trivial transactions with, or payments from, the government. Further, we would wish to put beyond doubt all the allowances, fees, fares and so on made available to members of Parliament in that capacity.

**7.31** An area of considerable significance, and one presently excluded from the scope of s. 44 (v), is that of members using their position to their personal profit or advantage. These benefits need not be strictly financial in character, but clearly are ones from which a member of Parliament should not gain advantage, and which would certainly not be available to him as a member of the public, or as an ordinary member of his profession. The Convention Debates indicate that there was considerable concern about parliamentarians who engaged in fraudulent conduct against the public. The Hon. Isaac Isaacs, in moving an amendment to the second draft of s. 44 (v), stated that 'the object of the clause is to prevent individuals making a personal profit out of their public positions'.[51] This concern applied not only to the actual occurrence of profit but, as Sir John Downer remarks, to its possibility: 'I think it inexpedient to allow members of Parliament to have any contractual relations which might suggest to one that their position might be impure'.[52] We are in full agreement with these sentiments. For example, indirect profits and advantages gained through holdings in a corporation in which the member had a 'substantial interest', and which has entered into contracts with the Public Service, should be proscribed by any intended provision. The size of a member's interest in the issued capital of a company is clearly a far more relevant criterion than the present constitutional one, namely, the number of fellow shareholders.

**7.32** Another factor in our deliberations is that the interests we wish to prohibit are primarily of a pecuniary character. Although the non-pecuniary interests of a parliamentarian can conflict with his public duty, experience from other countries indicates that they may be too nubulous for legal definition.[53] The term 'pecuniary interests' has been tentatively defined by the Joint Committee on Pecuniary Interests as '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'. This definition is consistent with the case law in this area, which has generally construed the term in a very wide fashion, but which we consider is inappropriate in the parliamentary sphere and perhaps should be limited to situations where there is some identifiable and measurable advantage flowing from the contract or benefit in question.

**7.33** A further issue that requires examination concerns the concept inherent within ss.44 and 45, that of avoidance of conflict of interests. This concept is based on the assumption that it is preferable to avoid the occurrence of a conflict rather than rectify

a potentially scandalous situation. Arguments have been raised against the extent of, or even the use of, constitutional provisions in solving conflict of interests problems. The Joint Committee on Pecuniary Interests states:

> This principle [avoidance] is commendable in limited situations, but to attempt to solve all potential conflicts of interest problems by means of avoidance would require Senators and Members to divest themselves of all pecuniary interests. Evidence was given that this would be incompatible with the representative responsibilities of a Member of the Parliament, who has been elected, at least in part, because he has personal interests which coincide with those of many of his constituents. It may be regarded as an over- reactions in an area where some compromise must be found between protecting the privacy of individual Members of Parliament and protecting the interest of the public in ensuring that decisions are not being made for improper motives.[54]

A more negative stance has been taken in the Bowen Report:

> The constitutional or statutory provisions which provide for automatic vacation of an office by reason of a disqualification are, in the Committee's opinion, unsuitable for conflict of interest situations because they fail to allow for the varying degrees of seriousness of the conflict or the intent of the officeholder.[55]

**7.34** We do not concur with these statements. In our opinion there is a pressing need for adequate constitutional provisions disqualifying members of Parliament involved in situations where their pecuniary interests manifestly conflict with their public duties. Avoidance of these conflicts at the outset is far preferable to formulating rules to extricate members from potentially embarrassing or scandalous situations as they become known. The deterrent effect, inherent in avoidance provisions, would reduce the incidence of pecuniary conflicts and go some way towards raising public confidence in members of Parliament. In addition, legislation based on the enabling provision would provide a certain threshold, indicating whether the conflict was serious enough to warrant disqualification. The argument that avoidance provisions would require members of Parliament to divest themselves of all their pecuniary interests is clearly not applicable. These provisions merely attempt to prevent situations which would inevitably give rise to the appearance or actuality of improper influence. Under the proposed constitutional amendment, Parliament would be able to draft legislation with a relatively precise, narrow and acceptable application. We envisage that both candidates and members would then be capable of identifying those pecuniary interests which should be divested to avoid the disqualifying provisions.

**7.35** Members of Parliament have been held by the law to occupy positions of public trust[56] and as such have public duties, although it is impossible to state precisely what those duties are. A submissionby P.D. Finn to the Joint Committee on Pecuniary Interests examines this issue and notes that the only attempt at a judicial definition of those duties 'and that only a partial one'[57] was made by Isaac Isaacs in the High Court in *Horne* v. *Barber*:

> When a man becomes a member of Parliament, he undertakes high public duties. Those duties are inseparable from the position: he cannot retain the honour and divest himself of the duties. One of the duties is that of watching, on behalf of the general community, the conduct of the Executive, of criticizing it, and, if necessary, of calling it to account in the constitutional way by censure from his place in Parliament—censure which, if sufficiently supported, means removal from office. That is the whole essence of responsible government, which is the keystone of our political system, and is the main constitutional safeguard the community possesses. The effective discharge of that duty is necessarily left to the member's conscience and the judgment of his electors, but the law will not sanction or support the creation of any position of a member of Parliament where his own personal interest may lead him to act prejudically to the public interest by weakening (to say the least of it) his sense of obligation of due watchfulness, criticism, and censure of the Administration.[58]

Thus, Finn notes that a member's duties cover those activities associated with his respective Chamber and, equally, would seem to cover all his dealings with the Executive. But beyond this, he notes that 'it is impossible to state when he ceases to be a public officer and becomes a private individual.'[59]

**7.36** The question of what constitutes a public duty becomes relevant as we attempt to articulate, at least in a general way, the terms of the constitutional head of power and any legislation enacted thereunder. As a broad statement of principle, we consider that a member of Parliament should not have any interest, pecuniary or otherwise, which conflicts, or might reasonably be thought to conflict, with his public duty, or to improperly influence his conduct in the discharge of his responsibilities as a member of Parliament. More specifically, we envisage this principle as applying to cases where the character of an agreement with, or payment or benefit to, a member of Parliament is such as to 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, on the other. We wish to phrase the constitutional enabling power as widely as possible so as not to limit Parliament's ability to legislate as it seens fit on any facet of the area indicated above in the general principle.

**7.37 Recommendation: Sections 44 (v) and 45 (iii) of the Constitution should be deleted and a provision to the following effect inserted in their stead:**

**45A. The Parliament may 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;**

**(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.**

**7.38** It is to be hoped that legislation enacted under these proposed constitutional provisions will be an effective safeguard of the public interest and that it will also ensure a sensible and dispassionate determination of the issues so as not to jeopardise public confidence.

## GUIDELINES FOR PROPOSED LEGISLATION

**7.39** As a matter of convenience, this legislation could be divided into two separate parts, although these parts overlap to some extent. On the one hand, there would be those sections limiting the scope of the original rationale, namely, government contractors and professionals involved in situations in which they could be unduly influenced by the Executive. On the other hand, there would be those sections defining the scope of the modern rationale, which is the desire to avoid the appearance or actuality of improper influence being exercised by members of Parliament. With one exception, we do not intend to spell out the form of such legislation, as the full extend and meaning of the constitutional provision which we recommend obviously needs detailed examination and parliamentary debate before there can be any real consensus. We intend, however, to specify those areas which require consideration, and indicate generally the conduct which, in our opinion, is clearly within, or outside, the provision.

**7.40** *Government contractors.* The exception referred to above concerns the area of government contractors, which has been subject to both legislative and judicial scrutiny and which we feel can be codified in a restrictive fashion. We recommend a list of exceptions, for incorporation within legisaltion, empowered under the constitutional

provision, excluding those trivial transactions with the government which, in our opinion, do not raise questions as to the possibility of improper influence being exercised by either the government or the member. Evan's article discusses this question and concludes that there are two main sources of precedent in formulating a list of these exceptions: the 'understood' common law limitations of s. 44 (v) and the exception clauses in the various State Constitutions with provisions analogous to s. 44 (v). Evans drafted a basic list of categories of exception compounded from the above sources, which were subsequently adopted by the Joint Committee on Pecuniary Interests as follows:[60]

(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.

Two other provisions which were not adopted by the Joint Committee, but which we feel should be included are:

(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.

**7.41** *Fees, honorariums and benefits.* Persons accepting any fees or honorariums for services rendered to the Commonwealth are presently excluded under the first limb of s. 45(iii). The provision was intended to protect further the independence of Parliament and was directed at professionals, although it has a much wider application. Legislation under the proposed constitutional amendment could easily proscribe payments of this kind. Although we disapprove in principle of the paying or giving of any financial benefit to a member for services rendered to the Commonwealth, there are some obvious expections. Allowances received by a member for out-of-pocket expenses, fees for various kinds paid to a member for his services, including sitting on Parliamentary committees, should be specifically excluded from the operation of any such legislation. Similarly, the position of members who are lawyers, medical practitioners, pharmaceutical chemists and so on and who receive payments from the Commonwealth, should be clarified under the proposed legislation. Those members engaging in only a small way in professional activities should not have to face a parliamentary or judicial inquiry. However, when the payment received is substantial, there should be procedures to refer the matter to the Court of Disputed Returns for a decision on the particular facts.

**7.42** *Gifts, hospitality and sponsored travel.* Pecuniary interests in this category would not come within the ambit of s. 45 (iii), unless there was a direct cash advantage and a close nexus established between the benefit offered and the alleged service rendered. These benefits raise different issues from the other types of pecuniary interests. On the one hand, the giving and receiving of favours is common, and total prohibition is neither practicable nor desirable. On the other hand, there is an obvious concern with

appearances, and the possibility that undue influence could be suspected. A difficult question arises as to the determination of when such a benefit becomes improper. As the Bowen Report notes, these benefits 'may be provided to create a general climate of goodwill on the part of the beneficiary. The 'debt' might not be called in for years or ever.'[61] We make no recommendation as to whether these benefits should be regulated by an arbitrary threshold or otherwise —this is something Parliament should decide. However, a member's seat should be vacated under the proposed legislation, if he receives benefits which manifestly raise questions about the exercise of undue influence.

**7.43** *Bribery.* The second limb of s. 45 (iii) prohibits direct bribery of a member for services rendered in the Parliament —examples include lobbying ministers or voting a particular way. Corruption and bribery of members are clear examples of the exercise of undue influence. Although there are no Commonwealth statutory provisions relating to bribery of members of Parliament, other than s. 211 of the *Commonwealth Electoral Act* 1918, there are precedents for establishing that members of Parliament are public officers for purposes of the common law offences of misbehaviour or breach of trust in public office. Consequently, a member who uses his influence as a public officer in the Parliament, or with the Executive, may commit a criminal offence.[62]

**7.44** The foregoing headings are by no means an exhaustive list of areas of improper influence. A number of situations spring to mind: there is the possibility of a member secretly using his public office to protect and/or advance a property interest of his own; or the misuse by a member of Parliament of official information for pecuniary gain. While such activities are likely to remain hidden, and may be difficult to prove, they are clearly within the suggested conflict of interests principle. The moderating factor in each of these circumstances depends on the definition by the Parliament of what constitutes 'improper' influence. The case of bribery is clearcut, but the matter is not so clearly delineated in other cases, for example, medical practitioners receiving substantial payments from the Commonwealth under the National Health Act. We see this legislation as filtering out those ordinary or trivial financial transactions by a member which are unlikely to raise serious questions of impropriety, while the more serious cases are referred by the Parliament to the Court of Disputed Returns. These, then, are some of the matters which should be considered in any legislation under the proposed constitutional power and we recommend accordingly.

**7.45 Recommendation: Upon acceptance by referendum of a constitutional amendment along the lines recommended in paragraph 7.38, the Parliament should, pursuant to that constitutional amendment, enact legislation which encompasses within its terms the sorts of considerations with regard to conflict of interests and improper influence discussed in this chapter.**

## Notes and references

1. See Gareth Evans, 'Pecuniary Interests of Members of Parliament under the Australian Constitution', (1975) 49 ALJ 464: a detailed analysis of ss. 44(v) and 45(iii).
2. (1975) 49 ALJR 205.
3. The Joint Committee established late in 1974 was appointed 'to inquire into and report on arrangements to be made relative to the declaration of the interests of the Members of Parliament and the regisration thereof'. The Report of the Committee was tabled on 30 September 1975.
4. The terms of reference were 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 sitting as a senator; and
   (b) whether Senator Webster has become incapable of sitting as a senator.'
5. 'One ought not to do it, but I did it; I went and looked at original debates' per Barwick CJ: *Transcript of Proceedings*, Sydney, 2 June 1975, p. 95.

6. Contracts under which at the relevant time something remains to be done by the contractor in performance of the contract: the English cases deciding this point are *Royse* v. *Birley* (1869) L.R. 4 C.P. 296 and *Tranton* v. *Astor* (1917) 33 TLR 383. In *Royse* v. *Birley*, 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 government institution. He kept his seat.
7. *Tranton* v. *Astor*, ibid., at p. 387, per Low J.
8. *In re Webster*, cited fn. 2, p. 212.
9. When the matter came on for hearing, Barwick CJ refused an application that the matter be referred to the Full Court, even though at one stage during the preliminary hearing he had thought that it 'would be better (to have) more than one view about it': *Transcript of proceedings*, Sydney, 19 May 1975, pp. 6-7. It is to be noted that there is no appeal from the Court of Disputed Returns, however constituted.
10. Evans, cited fn. 1, at p. 476 fn. 86.
11. Local Government Act 1890 (Vic) No. 1112, s. 173.
12. Convention Debates, Sydney, 1897, pp. 1022 ff. Note, however, the different view taken by Barwick CJ ' . . . [the] provision was neither initially devised nor inserted in the Constitution in order to protect the public against fraudulent conduct of members of the House, carried out perhaps behind the shield of a corporation of small membership': (1975) 6 ALR 65 at p. 70.
13. (1975) 6 ALR 65 at pp. 70, 72.
14. J.D. Hammond, 'Pecuniary Interest of Parliamentarians: A Comment on the Webster Case', 3 *Monash Law Review* p. 91.
15. ibid., p. 99.
16. *Tasmania* v. *The Commonwealth and State of Victoria* (1904) 1 CLR 329, per Barton J at p. 351.
17. ibid., p. 100.
18. P.J. Hanks, 'Parliamentarians and the Electorate' in *Labor and the Constitution* 1972-1975, Gareth Evans ed., Heinemann, Melbourne, 1977, p. 196-7.
19. ibid., p. 197.
20. ibid., p. 196.
21. Evans, cited fn. 1, p. 476.
22. ibid., p. 576-7.
23. Hanks, cited fn. 18, p. 198.
24. Australia, Parliament, *Declaration of Interests: Report of the Joint Committee on Pecuniary Interests of Members of Parliament* (J.M. Riordan, Chairman), AGPS, Canberra, 1975.
25. Australia, *Public Duty and Private Interest: Report of the Committee of Inquiry* (Hon. Sir Nigel Bowen, Chairman), AGPS, Canberra, 1979.
26. ibid., p. 7.
27. ibid., p. 8.
28. ibid., p. 58, para. 7.6.
29. ibid., p. 59, para. 7.11.
30. ibid., p. 59, para. 7.14.
31. See Evans, cited fn. 1, p. 467 where he noted, writing before judgment in the *Webster* case was handed down, 'there are considerable difficulties, however, in the way of admitting evidence of the founders' intent as a guide to the construction of the Constitutional provisions 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'.
32. See Erskine May's *Parliamentary Practice* (10th edn 1893) at p. 605.
33. See article in the *Journal of the Society of Clerks-at-Table in Empire Parliaments*, vol. 17, 1948, at pp. 289-316.
34. See Senate, *Hansard*, 22 April 1975, at p. 1200.
35. (1914) 30 TLR 323.
36. (1887) 14 SCR 265 (Sup. Ct. Can.)
37. Note that in the *Webster* case the Chief Justice's view was that 'in the climate of the 18th century the likelihood of influence upon a government contractor was high. Accordingly the mere existence of a supply contract justified the disqualification. But in modern business and departmental conditions the possibility of influence by the Crown is not so apparent, whilst it need not be certain, at least it must be conceivable . . . ' 49 ALJR 209.
37. Convention Debates, Adelaide, 1897, at p. 737.
38. Convention Debates, Melbourne, 1898, at p. 1945.
39. Bowen, *Report*, cited fn. 27, p. 59, para. 7.13.
40. See Senate, *Hansard*, 22 April 1975, p. 1215 (Senator Greenwood).
41. Evans, cited fn. 1, p. 470.

42. A parliamentary precedent for excluding gifts from the provision is the 25,000 pounds gift to Prime Minister Hughes raised by subscription and expressed as a tribute to his wartime leadership. See House of Representatives, *Hansard*, 1921, vol. 95 at pp. 770 ff.
43. Bowen, *Report*, cited fn. 27, p. 59, para. 7.13. See also Evans' evidence to the Bowen Inquiry, *Transcript of Proceedings*, 20 September 1978.
44. Convention Debates, Melbourne, 1898, p. 1946.
45. Erskine May's *Parliamentary Practice*, 10th edn p. 81: a resolution of the House of Commons on 22 June 1858 stated 'It is contrary to the usage . . . of this House that any of its members should bring forward, promote or advocate . . . any proceedings or measure in . . . consideration of any pecuniary fee or reward.'
46. See the opinion of the General Council 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': Senate, *Hansard*, 4 April 1974, at p. 683. The Solicitor-General held a similar view: see note in 48 ALJ 221 at 223.
47. Evans, suggested that for this point to be even arguable 'the nexus between the benefit offered and the service rendered would have to be extremely close', cited fn. 1, p. 470.
48. Britain, House of Commons, Report of the Select Committee, HC 349 (1955-56).
49. House of Commons (Disqualification) Act 1957 (UK).
50. See the Report of the British House of Commons Select Committee of 1956, cited fn. 48, which pointed out the extreme difficulty of drafting satisfactory provisions to cover all the possible contractual arrangements in which a member may theoretically become subject to the influence of the government.
51. Convention Debates, Sydney, 1897, p. 1023.
52. ibid., p. 1025.
53. See the British Royal Commission on Standards of Conduct in Public Life 1974-1976 (Lord Salmon, Chairman), *Report*, Cmnd. 6254, HMSO, London, 1976, pp. 40, 64; see also Association of the Bar of the City of New York, Special Committee on the Federal Conflict of Interest Laws, Conflict of Interest and Federal Service, Harvard University Press, Cambridge, Mass., 1960, p. 17.
54. Riordan, *Report*, cited fn. 24, p. 9.
55. Bowen, *Report*, cited fn. 27, p. 22.
56. *R* v. *Boston* (1923) 33 CLR 386.
57. Riordan, *Transcripts of Evidence*, vol 2, p. 1344 at p. 1351.
58. (1920) 27 CLR 494 at p. 500.
59. Riordan, *Transcripts of Evidence*, vol 2, p. 1352.
60. Riordan, *Report*, cited fn. 24, p. 14.61. Bowen, *Report*, cited fn. 27, p. 14.
62. *R* v. *Boston* (1923) 33 CLR 386. See also *R* v. *White* (1875) 13 SCR (NSW) (L.) 322. Note the common law offence relating to breach of trust in public office is discussed by P.D. Finn in his submission to the Joint Committee on Pecuniary Interests, *Transcripts of Evidence*, vol. 2, pp. 1346-1361. See also Bowen, *Report*, pp. 125-127.