CHAPTER 4

Bankruptcy and Insolvency (ss. 44 (iii) and 45 (ii))

CONSTITUTIONAL PROVISIONS

4.1 The operative provisions in this chapter are as follows:

> 44. Any person who—
> (iii) Is an undischarged bankrupt or insolvent:
> shall be incapable of being chosen or of sitting as a senator or a member of the House of Representatives
> 45. If a senator or member of the House of Representatives—
> (ii) Takes the benefit, whether by assignment, composition, or otherwise, of any law relating to bankrupt or insolvent debtors:
> his place shall thereupon become vacant.

4.2 Sections 44 (iii) and 45 (ii) have attracted little attention during the last eighty years in common with the other provisions disqualifying members of Parliament. There has been virtually no commentary or analysis as to their meaning or likely interpretation in constitutional texts, nor have they been subject to judicial interpretation, with the exception of some incidental remarks in the Supreme Court of South Australia.[1] As far as we are aware, the only Parliamentary discussion of these provisions occurred in relation to an alleged breach of s. 45 (ii) by Mr Michael Baume MP.[2]

4.3 It can be argued that these provisions, and in particular s. 44 (iii), are far-reaching, if strictly interpreted according to their current meaning, and as a result this may cause considerable difficulty in determining whether a disqualification has definitely occurred. We will now consider the meaning and likely interpretation of these provisions and then broach the more substantive question of whether, as a matter of policy, such provisions should remain in the Constitution no matter what form they take.

(a) Meaning of s. 44 (iii)

4.4 The making of a formal bankruptcy order is a clear and definite event which can disqualify a candidate, sitting member or senator under s. 44 (iii). However, the use of the word 'insolvent' in s. 44 (iii) presents considerable difficulties of interpretation. Today, the word is more usually used to describe a condition of being unable to pay debts; used in this way it introduces a less clearly defined status as it does not imply any formal process of being declared insolvent. In bankruptcy proceedings the word 'insolvency' is used in two senses, first, to indicate that the realizable amount of the property of a person is less than the amount of a person's liabilities and, second, that the property of a person, although its realizable amount may exceed the amount of the liabilities, is in such a form as to prevent that person from paying his debts as and when they become due. This second usage was elucidated by Isaacs, J. in *Bank of Australasia* v. *Hall*.[3]

4.5 However, there has been no detailed discussion of 'insolvency' as it appears in s. 51 (xvii) of the Constitution, and in the Bankruptcy Act the insolvency of a person is expressed in terms of his inability to meet his debts as they become due out of his own moneys.[4] In *Sandell* v. *Porter*, Barwick CJ, interpreted this expression restrictively in relation to traders:

> . . . the debtor's own moneys are not limited to his cash resources immediately available. They extend to moneys which he can procure by realization by sale or by mortgage or pledge of his assets within a relatively short time —relative to the nature and amount of the debts

and to the circumstances, including the nature of the business, of the debtor. The conclusion of insolvency . . . ought not to be drawn simply from evidence of a temporary lack of liquidity.[5]

While a restrictive interpretation is essential to ensure that traders may continue to trade with each other notwithstanding temporary liquidity problems, different interests are at stake in relation to non-business debtors. Generally credit is not extended to them, as it is to traders, to enable them to earn income. In effect, the definition of the concept of insolvency changes in accordance with a debtor's commercial status, or lack thereof, in the community.

4.6 Whether a person is able to pay his debts as they fall due is in each case a question of fact, and often there is no definite event which would automatically render a person insolvent. Insolvency can be inferred when debt recovery processes such as examination orders, instalment orders, garnishment orders, warrants and writs of execution have been instigated against an individual. However, the issue of a judgment recovery process cannot be taken as an infallible indication of the insolvency of the debtor at whom it is directed. He may have forgotten to pay, may dispute the debt, or may simply not wish to pay. In none of these cases can insolvency confidently be inferred. Despite these inherent difficulties, it could be argued that the word 'insolvent' is to be interpreted according to its current and ordinary meaning, and consequently any person who is unable to pay his debts, in either of the senses previously indicated, would be disqualified. The alternative approach that can be adopted is to hold that the word held a different meaning, either in its contemporaneous exposition, or in a technical legal sense, at the time of the enactment of the Constitution.

4.7 The approach of the courts used to be that each word in an Act retains the meaning that it had at the point of time when it was enacted. However, the operation of this rule has been virtually abandoned and the courts now generally interpret words in an Act in accordance with their current meaning, subject to certain limited exceptions.[6] It is possible that an exception may occur when construing ambiguous words in an old statute, where a word or phrase has acquired an extended or different meaning since enactment, which would clearly not have been intended by the legislature.[7] The courts are also frequently concerned with technical words and phrases, and when words have acquired a technical legal meaning, the courts will construe them on the basis that the legislature intended to use them with that meaning unless a contrary intention clearly appears from the context.[8]

4.8 The Convention Debates provide some assistance as to the proper construction to be given to the provision. Although none of the speeches explicitly define the word 'insolvent', it is apparent that the framers of the Constitution intended a different interpretation of the word than its current meaning. Perhaps the clearest exposition of the provision was made by Mr O'Connor:

So that directly a man became bankrupt or insolvent, and until his discharge, he is under one of the disabilities in sub-section (3), (4) and (5). As soon as he comes under these diabilities his place becomes vacant. That deals with cases of compulsory sequestration . . .[9]

The inference in this passage, that insolvency was synonomous with bankruptcy, also appears in the speeches of other members of the Convention who debated the clause.

4.9 Whether the courts would refer to the Convention Debates in attempting to ascertain the meaning of this word is, of course, another matter. There is strong authority denying the right of courts to consider what was said in parliamentary debates or at the Constitutional Conventions.[10] This approach is still followed by the courts as was pointed out by Barwick CJ in *Attorney-General for Australia (at the relation of McKinlay) and Others* v. *Commonwealth of Australia and Others:*

> But it is settled doctrine in Australia that the records of the discussions in the conventions and in the legislatures of the colonies will not be used as an aid to the construction of the Constitution.[11]

4.10 Perhaps the most notable exception to this rule occurred in the case of *In re Webster*.[12] As we mention in a later chapter, Barwick CJ specifically referred to the Convention Debates in reaching his conclusion as to the scope of s. 44 (v). While it is probable that this was merely an isolated instance and does not represent a change in the general rule, there is authority for the view that parliamentary debates, including the Convention Debates, may be referred to in order to determine the background to the enactment of legislation.[13] In the *McKinlay* case the Chief Justice states:

> In case of ambiguity or lack of certainty, resort can be had to the history of the colonies, particularly in the period of and immediately preceding the development of the terms of the Constitution.[14]

Gibbs J also referred to this aspect:

> In Australia it has been accepted that in construing the Constitution . . . regard may be had to the state of things existing when the statute was passed, and therefore to historical facts and to earlier legislation.[15]

4.11 These judicial statements lead us to the view that the courts would be likely to look at the meaning of the word 'insolvent' at the time of the enactment of the Constitution by reference to earlier legislation and usage.

4.12 The inference in the Convention Debates, that insolvency was synonomous with bankruptcy, can also be ascertained from the relevant colonial legislation. At the time of Federation three of the colonies, Victoria, Queensland and South Australia, had legislation described as Insolvency or Insolvent Acts.[16] A study of these statutes indicates that the term 'insolvency' appears to have been substituted for the earlier word 'bankruptcy', and that a person referred to as insolvent indicated that a formal order had been made against the individual concerned. It is probable that the framers of the Constitution, in their desire to comprehensively cover the situation of bankrupt members of Parliament, included the word 'insolvent' to be in accordance with the exact terminology of the relevant colonial legislation. If this interpretation is accepted, the word 'insolvent' could be classified as a noun and would be qualified by the adjective 'undischarged'. While it is not customary to speak of an 'undischarged insolvent', the Convention Debates as well as the colonial legislation are highly persuasive in confirming our view that this term was commonly used at the time of the enactment of the Constitution.

4.13 There are also practical reasons why s. 44 (iii) could be construed in a restrictive form to persons who have been declared bankrupt. Unless some formal step is required under the disqualifying provisions, great difficulties could occur in determining the date on which the disqualification occurred. This would be difficult in relation to eligibility for election, but even more so in relation to votes cast, or penalties incurred under s.46 of the Constitution, by a person whose financial position was not clear on any particular day.[17] Further, the wider interpretation of s. 44 (iii) might render s. 45 (ii) otiose, and obviously this result was neither intended, nor, we would argue, overlooked by the framers of the Constitution.

4.14 The only case to have judicially considered ss. 44 (iii) and 45 (ii) was the South Australian Supreme Court judgment in *Stott* v. *Parker*.[18] The Full Court was considering a petition of right for payment of salary by a member whose salary had been withheld by the Speaker, following the holding of a meeting of the creditors of the member, which agreed that the creditors would accept a composition in satisfaction of their

claims; the meeting also decided that the holding of the meeting did not constitute an act of bankruptcy. The Court considered s. 31 of the Constitution Act of South Australia, which provides that if any member of the House of Assembly becomes bankrupt or an insolvent debtor within the meaning of the laws in force in the State relating to bankrupts or insolvent debtors, his seat shall become vacant.

4.15 The majority (Napier and Richards JJ) found that the Court did not have jurisdiction to determine the question, but Napier J indicated that if jurisdiction existed, he would have been disposed to hold that the Commonwealth Bankruptcy Act is a law in force in the State relating to bankrupt or insolvent debtors, and that a debtor who takes the benefit of that law is an insolvent debtor within the meaning of s. 31 of the Constitution Act.

4.16 Cleland J held that the court did have jurisdiction, but considered that the member had not come within the disqualifying provision. He was not a 'bankrupt' and he was not an 'insolvent debtor', because even in ordinary language this means a debtor whose insolvency has in some way become definitely established. He comments on the earlier S.A. Insolvent Act 1860 and S.A. Insolvent Act 1868, pointing out that each distinguishes between insolvent debtors and debtors who make arrangements without insolvency. In illustrating that the statutory language corresponds to the popular idea of an 'insolvent debtor', he turns to ss. 44 (iii) and 45 (ii) of the Constitution. In his opinion the word 'bankrupt' is the equivalent of 'insolvent' because of the word 'undischarged'. He also notes that the creation of a further or new disability in s. 45 (ii) seems to be an implicit recognition in the Constitution that 'bankrupts' and 'insolvents' do not include persons who take the benefit etc. of any law relating to bankrupts or insolvents, otherwise this extended meaning would be otiose.

4.17 In considering the laws in force in South Australia, Cleland J noted that while the Commonwealth Act refers to 'bankrupts' viz. a person in respect of whose estate a sequestration order has been made, the earlier South Australian legislation refers to 'insolvents' as debtors who were made 'insolvent' (i.e. bankrupt) by proceedings in the Insolvency Court.[19] His argument reinforces the view that the word 'insolvent' was inserted by the framers of the Constitution as a semi-technical description used as a statutory synonym of the word 'bankrupt' and it is probable although not certain, that the High Court, sitting as a Court of Disputed Returns, would interpret this provision accordingly.

4.18 Because of the complexities of interpretation, and in the light of the persuasive practical reasons for limiting the operation of the provision, we are of the opinion that the words 'or insolvent' should be deleted from s. 44 (iii). However, we do not intend to make a recommendation at this stage as we come to the conclusion later in this chapter that the whole provision, and not just a part thereof, should be deleted from the Constitution.

(b) Meaning of s. 45 (ii)

4.19 The additional disqualification in s. 45 (ii) appears to have been inserted in an attempt to prevent members of Parliament avoiding bankruptcy or insolvency proceedings, with its inevitable disqualification, by entering into an arrangement with creditors. In the Convention Debates s. 44 (iii) was seen as dealing with cases of compulsory sequestration and s. 45 (ii) as extending to persons who voluntarily seek the assistance of the Bankruptcy Court. Mr O'Connor stated:

> There are cases in which a man may make an arrangement with some of his creditors without insolvency, and yet this arrangement comes under the direction of the court, which has

to give a certain legal effect to it. There are some cases in which a person may take the benefit of the insolvency laws by assignment or composition made under the direction of the court, and have a certain legal effect given to that arrangement by the court without actually becoming bankrupt or insolvent. It is to provide for cases of that kind that sub- section (2) was introduced.[20]

4.20 This provision was probably inserted to provide some consistency with s. 44 (iii). It would have been inconsistent to vacate the seat of a member against whom a sequestration order was made by a court, and not a member whose indebtedness would justify the making of such an order, but whose creditors allow him to enter into a substitutional form of statutory composition or arrangement. A literal reading of the provision however, appears to require an even higher standard than that imposed by s. 44 (iii). There are cases where a person who is not insolvent in that he has assets to cover all his liabilities[21] chooses not to sell assets but to enter into an arrangement with creditors; such a person is not bankrupt or insolvent but does take the benefit of a law relating to bankrupt or insolvent debtors.

4.21 However, a difficulty arises in the interpretation of s. 45 (ii), as it is not clear how widely the words 'takes the benefit' are capable of being interpreted. Given a broad interpretation, s. 45 (ii) would disqualify a member if he took any benefit under bankruptcy or insolvency legislation: such a benefit could be taken by a creditor or even a trustee in bankruptcy. Clearly the drafters of the Constitution could not have intended this result. Traditionally, bankruptcy laws were introduced to benefit the debtor at least as much as the creditor: among other things, bankruptcy legislation provides relief from debts which are impossible to defray, attempts to protect a debtor from undue harassment by creditors, and ensures a diligent and honest administration of his affairs.

4.22 It could be argued that the benefit in relation to bankruptcy is that of compulsion or involuntary agreement, in that one of the principal effects of a scheme under the Bankruptcy Act is to bind all creditors, even the dissenting ones who oppose the relevant scheme. But this is a benefit obtained by both a majority of creditors and by the trustee, and it seems unlikely that these words would be given this meaning. In our opinion, the most sensible interpretation of s. 45 (ii) is to regard it as limited to cases in which a member as a debtor takes the benefit by way of relief of his indebtedness of a law relating to bankrupt or insolvent debtors. This is obviously the meaning contemplated by the drafters of the Constitution, and there is no suggestion in the Convention Debates that the clause applied to any person who obtained an incidental benefit under any bankruptcy or insolvency legislation.

4.23 The question arises as to whether the courts would reach this conclusion. Under the literal rule of statutory interpretation, they are bound to apply the ordinary and natural meaning of words even if the result is inconvenient or improbable. Although in most contexts the application of this rule has been gradually watered down over the years, and statutory provisions have often been virtually ignored by the courts if they resulted in manifest absurdity, nonetheless the Committee is of the opinion that the words 'takes the benefit' give s. 45 (ii) an uncertain scope of operation. If the provision is to become effective, it should be amended to the relatively narrow and acceptable application suggested above.

4.24 Lumb and Ryan state that s. 45 (ii) covers the case where the member is not made bankrupt for his inability to pay his debts, but takes advantage of the alternative procedure to sequestration laid down in the Bankruptcy Act by entering into an arrangement with his creditors.[22] However, they do not discuss the anomalous situation which arises as a result of the respective ambits of ss. 44 (iii) and 45 (ii). The former permits a person who is currently involved in an arrangement with creditors to be

elected and sit as a member, but the latter makes the entering into of such an arrangement after election an event which vacates the member's seat. A number of other complexities also arise under the provision. For example, under s. 188 of the *Bankruptcy Act* 1966 the signing of an authority to enable a meeting of creditors to be called under Part X, constitutes an act of bankruptcy under s. 40 of the Act. It is unlikely that this would be sufficient to attract the status of a bankrupt under s. 44 (iii), but it would have to be considered in any litigation under s. 45 (ii). There is also a further question of whether deeds of arrangements under Part X of the Bankruptcy Act come within the ambit of s. 45 (ii). In our opinion, the words 'assignment' and 'composition' are not used technically, but in a broad sense, and when the phrase 'or otherwise' is read in conjunction with those words, it is intended to cover any type of arrangement in lieu of sequestration entered into between a debtor and his creditors under the Bankruptcy Act or similar legislation.[23]

4.25 The Baume case highlighted some of the difficulties in determining the scope of s. 45 (ii). Mr Baume MP had been a member of the collapsed stockbroking firm, Patrick Partners; he subsequently on 19 March 1976 entered into an agreement, formalised by deed, with the appointed trustee of the firm. The collapse of Patrick Partners had been raised on numerous occasions in Parliament and from time to time Mr Baume's involvement with the firm was brought up with suggestions of a possible breach of ss. 44 or 45. Eventually a motion was moved that the question of whether the place of the member had become vacant pursuant to s. 45 (ii) be referred for determination by the Court of Disputed Returns.[24]

4.26 The facts contained in the lengthy motion were not really in dispute although they were quite complex. The agreement between Mr Baume and the trustee recited that there was a dispute as to whether or not Mr Baume was indebted to the firm in respect of certain monies, and provided for Mr Baume to pay the sum of $106,082 in full settlement of all claims between the parties. The trustee covenanted not to bring any action against Mr Baume in respect of the trustee's claim, and to restrain any creditors from bringing any action or taking steps to enforce payments against him arising out of any joint indebtedness of the firm.

4.27 On the same day the eleven partners of the firm, excluding Mr Baume, executed Deeds of Arrangement under Part X of the Bankruptcy Act, each obtaining a moratorium for the currency of the deed and release at the end of it. Mr Baume was not a party to any of these deeds of arrangement, but they all contained covenants that the creditors would not commence or continue proceedings against Mr Baume during the currency of the deed, and on the expiration of that currency he received the benefit of a release.

4.28 The motion for referral to the Court of Disputed Returns was debated in the House of Representatives on 5 May 1977. The basis of the arguments in favour of referral was that the facts, prima facie, indicated that the agreement signed by Mr Baume constituted a deed of arrangement within the meaning of s. 45 (ii) or alternatively that he, additionally and separately, received the benefits of arrangements made under Part X of the Bankruptcy Act by the partners. The then Attorney-General, Mr Ellicott QC, rebutted these arguments and during the course of his speech tabled three legal opinions,[25] including a joint opinion by himself and the Solicitor-General. Each of the opinions concluded that the member's seat had not become vacant on the basis that Mr Baume's agreement did not constitute a deed authorized by any law of the kind mentioned in s. 45 (ii). Mr Ellicott stated:

> There is no basis on which it can be asserted to be a deed of arrangement. One might say that it was a deed executed contemporaneously with a deed of arrangement but not executed by him as a debtor under this Act as a deed of arrangement.[26]

4.29 Probably the more difficult issue was the fact that the deeds executed by the eleven partners undoubtedly conferred benefits upon Mr Baume, and those benefits were conferred by virtue of the Bankruptcy Act. However, each of the opinions concluded that these benefits were not the benefits to which s. 45 (ii) refers. It was argued that the provision applies only to cases in which a debtor/member takes the relevant benefit *as a party* to one of the transactions referred to. The word which supplies this meaning is 'takes', which stands in contradistinction to 'receives', denoting actual participation in a relevant transaction.

4.30 On the strength of the arguments in these opinions, the Government decided the issue was beyond doubt and that the matter should be decided by the House and not referred to the Court of Disputed Returns. Accordingly the motion for referral was put and negatived on party lines.

4.31 Although the rather complex facts in the Baume case brought attention to the uncertainties of the exact scope of s. 45 (ii), one fact was made quite clear in each of the opinions: the execution by a debtor/member of a deed of arrangement, deed of assignment or a composition under Part X of the Bankruptcy Act, would result in the automatic vacation of that member's seat.

APPROPRIATENESS OF DISQUALIFICATION UNDER ss. 44 (iii) AND 45 (ii)

4.32 The modern law of bankruptcy contrasts sharply with the law in past centuries when debtors could be imprisoned for non- payment of their debts, and never released from liability for them. Legislation in the 17th century provided for debtors guilty of improper conduct to be stood in the pillory; one ear was to be nailed to the pillory and then cut off when the debtor was released. The view was taken that bankruptcy was a crime and that a debtor was solely responsible for his debt. The attitude towards bankruptcy ameliorated after the 18th century, but even late in the 19th century there was still a strong presumption that bankruptcy involved moral turpitude.

4.33 Provisions for disqualification of bankrupt or insolvent persons are included in the Canadian Constitution and British legislation. Under the British Bankruptcy Act 1883, which disqualified an adjudged bankrupt from being elected to or sitting in either House of Parliament, the disqualification could be removed if the bankrupt obtained from the court his discharge with a certificate to the effect that his bankruptcy was caused by misfortune, without any misconduct on his part.[27] The Convention Debates mirrored the prevailing attitudes towards indebtedness. Bankruptcy was not considered merely as a venial matter but, as Sir John Downer commented, 'one that involved great disgrace'.[28] In support of the provisions the Hon. Isaac Isaacs stated:

> Surely a person under a cloud for the time- being ought to stand aside until his conduct has been thoroughly cleared —in the interests of public morality he ought to keep a stain off the highest court of the country. Surely it is his duty to stand aside, and if so, it is for us to see that the law is made perfectly clear to, if necessary, compel him to do so.[29]

4.34 Several attempts were made during the Convention Debates to exclude the provision but were negatived on each occasion. At the Sydney session in 1897, a suggestion by the Legislative Assembly of New South Wales, to omit the disqualification of 'an undischarged bankrupt or insolvent, or a public defaulter' was supported by Mr

Carruthers.[30] He argued that none of the constitutions of the Australian colonies required such a person to remain out of public life during the whole period of his bankruptcy or insolvency. This was not the case, however, as at least one State Constitution (Victoria) provided that a bankrupt was incapable of being elected or of sitting in the State Parliament. Mr Curruthers was referring to the States (N.S.W., S.A. and Queensland) whose constitutions vacated a member's seat if he was adjudged bankrupt, but did not render him incapable of being chosen or sitting: such a person would forfeit his seat, but could immediately go before his constituents for re-election. Mr Carruthers alluded to a number of instances, without being specific, where parliamentarians including Premiers had to seek the protection of the Bankruptcy Court. Perhaps the most notable instances concerned Sir Henry Parkes who was declared bankrupt on three occasions—once as a member of the New South Wales Legislative Assembly, and on another occasion while he was the Premier. On both occasions, Parkes resigned his position in Parliament in accordance with the New South Wales Constitution, went to his constituents and was re-elected. Mr Carruthers argued that this would not be possible under the proposed Commonwealth constitutional provision as such members would have to wait until they were discharged from bankruptcy before they could be re-elected.

4.35 Mr Carruthers again moved for the omission of the provision at the Melbourne session for substantially the same reasons.[31] In negativing the amendment, the majority expressed the view that there was a very great probability of danger to the Commonwealth without such a provision and, that the interests and safety of the State were paramount even though in some cases hardship may be created.

4.36 At the Sydney session Mr Glynn moved that the first portion of the clause (i.e. s. 44) should be amended by the addition of the words 'until parliament otherwise provides'.[32] He referred to several of the disqualifications in s. 44 including the bankruptcy provision, and indicated that in his opinion they were only of a temporary nature to cover the gap until the Federal Parliament passed appropriate legislation. He argued that the Federal Parliament should have the power to legislate in this area of disqualification. There was some support for this amendment, but it was negatived by a majority of the Committee.

4.37 Modern economic and social conditions, including the remarkable growth of consumer credit since the Second World War, must be taken into account in considering the applicability or even necessity of s. 44 (iii). Finance companies have increasingly made available credit facilities to both businessmen and consumers, and the risks that go with this easily available credit pose difficulties for an ever growing number of people. Since 1945 there has been a significant growth in the total number of annual bankruptcies. It seems likely that part of this rise in bankruptcy rates can be related to the increase in business activity over the last three decades, as well as changes in business practices.

4.38 These changes in economic conditions have brought about a different community attitide towards debt. Nearly everyone accepts debt as an inevitable part of their daily lives, whether it includes housing or domestic loans or those of a business character. It is not surprising therefore, that there has been a significant change in attitudes towards bankruptcy and insolvency. This attitudinal change from the moral and criminal precepts of the insolvency laws of earlier centuries—which were so evident during the Convention Debates —is, we think, a sufficient reason in itself to reconsider the justification for ss. 44 (iii) and 45 (ii).

4.39 The Twelfth Annual Report of the Bankruptcy Act provides a further impetus to our argument, as it reveals a disturbing trend in the rise of the incidence of bankruptcies and arrangements under Part X of the Act. In 1978-79 there were 3,857 bankruptcies, which was the third consecutive year in which the number had risen. In the last three years since 1975-76, the incidence of bankruptcies rose 103 per cent—a very substantial increase. The total number of assignments, arrangements and compositions under Part X of the Act in favour of creditors during the year 1978-79 was 560, which represents an increase of 71 per cent on the numbers during the previous years.

4.40 The relevance of current social and economic conditions is also raised by Mr Justice Kirby, to whose submission (No. 15) was attached the Commission Report[33] and a further discussion paper on insolvency.[34] Mr Justice Kirby draws attention to the Commission's findings that 'perfectly honest and reliable people can get into debt difficulties by reason of circumstances over which they have little control'. The Commission Report refers in particular to individuals with instalment credit plans, who become ill for an extended period or otherwise become unemployed,[35] and to business debts, where a change in tariff policy, interest rates, or other operating costs may result in the unexpected financial collapse of a business venture.[36]

4.41 Mr Justice Kirby states that the aim of the law should not be to treat debt defaults as punishable offences, but to encourage and facilitate rehabilitation. Further, consistent with this approach, he states that the inclusion of bankruptcy and insolvency in the disqualifying provisions:

> . . . may require revision to bring it more into accord with current attitudes to indebtedness, particularly consumer indebtedness. It is one thing to disqualify a person from holding office who deliberately and without justification avoids the payment of his debts. It is quite another to disqualify a person because of his status as a bankrupt or insolvent. He may well, either under current bankruptcy laws or under the proposed revised laws on insolvency, be making every proper effort to reduce his indebtedness, consistent with his current means and circumstances.

This point is also taken up by Professor Sawer's submission (No. 7) in relation to s. 45 (ii). In his opinion the case for the additional disqualification, which applies only to sitting members or senators, is very weak as it is unlikely to involve any fraudulent or other morally reprehensible circumstances.

4.42 An argument that can be advanced for the retention of ss. 44 (iii) and 45 (ii) is that a candidate or a sitting member should be seen to be above moral reproach. While insolvency *per se* does not necessarily imply fraudulent or morally reprehensible behaviour, in the parliamentary sphere an insolvent candidate or member could be seen as being open to financial persuasion to adopt a particular policy, either locally within his electorate, or on a national issue. Again, greater pressures may exist on such a person to abuse the privileges of Parliament, financially or otherwise, or even to take fraudulent steps to cover up his indebtedness. However, the mere chance of such an imputation being raised upon a member's bankruptcy or arrangement with creditors is, we would argue, a tenuous supposition and not sufficient reason for the retention of these disqualifying provisions.

4.43 During the Convention Debates it was argued that the bankruptcy or insolvency of a member or candidate should be a matter for the electorate to consider. Mr Carruthers expressed the opinion that:

> The electors of the country have a right to make their choice, and if they chose to be represented by a man who is compelled by the necessities of his life to become bankrupt or insolvent, surely it is not our business to take away that choice from them.[37]

Other participants in the Convention Debates expressed similar views. Mr Reid considered that many men fell into financial difficulties not from dishonesty but from sheer misfortune, and that a man

> . . . should be able to submit himself to his constituency for their judgment, to be re-elected . . . If his conduct has been disgraceful, we can expect that the constituency will deal with him.[38]

Although several other members expressed their confidence in the electorate and their competency to adjudicate such matters, the majority thought otherwise. It was argued that steps could be taken to prevent the affairs of a bankrupt being brought under consideration before an election took place. Mr O'Connor stated:

> It is the easiest thing in the world to defer the examination of a bankrupt Member of Parliament until after his re-election. That is frequently done, . . . afterwards an inquiry discloses a condition of things which would have induced his constituents, had they known the real state of affairs, to refuse to re-elect him.[39]

Another argument advanced by Mr Wise for the inclusion of the provision concerned the fact that:

> . . . there have been frequent scandals from men becoming bankrupt, and making use of their bankruptcy as a ground for re-election, appealing to the sympathy of electors, . . . and asking them to return them, not on their merits, but because they are unfortunate.[40]

4.44 While these arguments, viewed in isolation, point out the possibility of abuse, we do not consider them to be significant. We are more influenced by the current attitudes towards bankrupt and insolvent persons; such persons are not, in our view, tainted as morally reprehensible or delinquent, nor are they prima facie unsuitable as a candidate or member of Parliament. The continuing expansion of credit facilities and the increasing uncertainties of economic conditions make these provisions inappropriate as a disqualification. We have no hesitation in leaving such a decision to the electors as we have already indicated as a basis for our recommendation in s. 44 (ii).

4.45 Recommendation: Sections 44 (iii) and 45 (ii) of the Constitution should be deleted.

Notes and references

1. *Stott* v. *Parker*, (1939) S.A.S.R. 98.
2. House of Representatives, *Hansard*, 7 April 1976, pp. 1416-17; 10 March 1977, pp. 131-132 and 164-165; 22 March 1977, pp. 461-62; 23 March 1977, pp. 483-87; 30 March 1977, pp. 719-721; 31 March 1977, pp. 877-78; 5 May 1977, pp. 1598-1610. See also three opinions tabled during the debate on 5 May 1977 (p. 1608) as to whether the member's seat had been vacated: a joint opinion by the then Attorney-General Mr R. Ellicott, QC and the Solicitor-General Mr M.H. Byers, QC and two opinions obtained by Mr Baume MP from Mr D. Bennett and Mr T.E.F. Hughes QC, former Attorney-General.
3. (1907) 4 CLR 1514.
4. *Bankruptcy Act* 1966, s. 122.
5. (1966) 115 CLR 666 at p. 670.
6. See D.C. Pearce, *Statutory Interpretation in Australia*, Butterworths, Sydney, 1974, pp. 27-31.
7. See *Lake Macquarie Shire Council* v. *Aberdare County Council* (1970) 123 CLR 327; see also Pearce, *Statutory Interpretation*, pp. 28-29.
8. See *Attorney-General for State of New South Wales* v. *The Brewery Employees' Union of New South Wales* (1908) 6 CLR at 531 per O'Connor J.
9. Convention Debates, Melbourne, 1898, p. 1944.
10. See *Municipal Council of Sydney* v. *Commonwealth* (1904) 1 CLR 208 at p. 213; *Tasmania* v. *Commonwealth* (1904) 1 CLR 329 at p. 333.
11. (1975) 7 ALR 593 at p. 600; see also Gibbs J at p. 624, who notes that one reason for this rule is 'because it cannot be certain that what any particular speaker said received the acquiescence of the majority of those present'.

12. (1975) 49 ALJR 205.
13. See P. Brazil, 'Legislative History and the Sure and True Interpretation of Statutes in General and the Constitution in Particular', (1961) 4 UQLJ 1; see also Pearce; *Statutory Interpretation*, pp. 45-47.
14. (1975) 7 ALR 593 at p. 600.
15. ibid., p. 624.
16. Insolvency Act 1890 (Vic.); *Insolvency Act* of 1874 (Qld); Insolvency Act, 1886 (S.A.).
17. Note that different consequences can flow from disqualification under s. 44 in contrast to s. 45.
18. (1939) SASR 98.
19. Until recently the *Bankruptcy Act* 1966 also appeared to confirm this view in relation to State legislation. Former s. 149(6), dealing with undischarged bankrupts under Commonwealth and State laws provided that 'bankrupt' included an insolvent and 'bankruptcy' included insolvency.
20. Convention Debates, Melbourne, 1898, pp. 1944-5.
21. Note differences between traders and non-business debtors. In the latter class, regard should not be had to the possibility of realizing assets which are usually regarded as necessary to a reasonably comfortable and dignified existence, nor to those which cannot be realized without significant loss and consequent disruption e.g. household goods, motor vehicle or home. If these are the only available assets over and above a non-business debtor's liabilities, he would be considered insolvent; see The Law Reform Commission, Report No.6, *Insolvency: The Regular Payment of Debts*, AGPS, Canberra, 1977, p. 77, para. 161.
22. R.D. Lumb and K.W. Ryan, *The Constitution of the Commonwealth of Australia, Annotated*, 2nd edn., Butterworths, Melbourne, 1977, p. 65.
23. This construction results from the application of a legal rule of interpretation known as *ejusdem generis* i.e. where general matters are referred to in conjunction with a number of specific matters of a particular kind, the general matters are limited to things of the same nature as those which have been specifically mentioned.
24. The notice of motion was given on 30 March 1977 and debated on 5 May 1977: House of Representatives, *Hansard*, 5 May 1977, pp. 719-721 and pp. 1598-1610.
25. Cited footnote 2.
26. House of Representatives, *Hansard*, 5 May 1977, p. 1606.
27. s.32(2)(b).
28. Convention Debates, Melbourne, 1898, at p. 1934.
29. Convention Debates, Sydney, 1897, p. 1019.
30. ibid., p. 1015.
31. Convention Debates, Melbourne, 1898, p. 1932.
32. Convention Debates, Sydney, 1897, p. 1012.
33. Australia, Law Reform Commission, Report No.6, *Insolvency: The Regular Payment of Debts*, AGPS, Canberra, 1977.
34. Australia, Law Reform Commission, Discussion Paper No.6, *Debt Recovery and Insolvency*, 1978.
35. ALRC6 paras. 128 ff. and ALRC Discussion Paper No.6 para. 2.
36. ALRC Discussion Paper No.6 para. 2.
37. Convention Debates, Melbourne, 1898, p. 1933.
38. ibid., p. 1934.
39. Convention Debates, Melbourne, 1898, p. 1939.
40. Convention Debates, Sydney, 1897, p. 1017.