

DISQUALIFICATION OF MEMBERS OF PARLIAMENT IN VICTORIA

JOHN WAUGH*

Laws restricting eligibility for membership apply to all Australian parliaments, but their meaning and effect are often uncertain. The laws governing membership of the Parliament of Victoria are particularly archaic and confused. Successive amendments have been poorly integrated, creating awkward problems of interpretation. Most of the grounds of disqualification were originally derived from British models, but some have remained in Victorian law long after their abolition in the United Kingdom. Questions about their effect arise regularly, but few cases reach the courts, partly because of limitations on justiciability. This article explores the Victorian disqualifications, considering in particular the position of government office-holders and government contractors, and avenues for raising disqualification questions.

I INTRODUCTION

Legal restrictions on membership are a basic feature of elected legislatures. In Australia, they date back to the first partly-elected legislature, the Legislative Council of New South Wales, which first met in 1843.¹ Their functions, however, have changed. They once ensured that, among other things, members had at least a minimum level of wealth, beyond the property qualification required for voters. As the right to vote extended, so too did eligibility for membership. Qualifications based on wealth disappeared, leaving exclusions based on other grounds, such as nationality, bankruptcy, and conviction for serious criminal offences. Varying provisions of this kind apply to all Australian parliaments.²

The Victorian disqualification provisions trace their origins to the *Constitution Act 1855* (Vic), and beyond it to British law of the eighteenth century. In the original British context, paid positions and lucrative contracts were means by which the monarch, still politically powerful, could influence or control members. The use of Crown appointments to win support in the House of Commons became a 'comprehensive system' during the seventeenth century.³ In protracted struggles over the question of Crown influence, the government's opponents in Parliament asserted their independence not only through the familiar parliamentary privilege of free speech and other legal immunities, but

* Senior Lecturer, Law School, University of Melbourne.

¹ See *Australian Constitutions Act 1842*, 5 & 6 Vict, c 76, s 8.

² See generally Gerard Carney, *Members of Parliament: Law and Ethics* (2000) chs 2-4.

³ Select Committee on Offices or Places of Profit Under the Crown, *Report*, House of Commons Paper No 120, Session 1940-1 (1941) 141 (Memorandum by Sir Gilbert Campion).

also by disqualifying first (from 1706) holders of certain government offices, and later (from 1782) government contractors.⁴

Similar arguments supported the disqualifications in Victoria, when they were included in the Constitution of 1855 and again when they were modified in 1859. The 1855 Constitution excluded contractors absolutely (except where the contract was made for the general benefit of a company or association with more than twelve members), but it required holders of offices of profit under the Crown merely to be re-elected after appointment.⁵ The Legislative Council had opposed complete exclusion of government officials, on the grounds that it would constrain electors' choice and could leave the government under-represented in Parliament for such purposes as supplying information. A minority supported exclusion, using arguments about government influence in Parliament.⁶ The policy of allowing any official to sit if re-elected was short-lived. From 1859, a specified number of ministers were the only office-holders exempted from disqualification; until 1915 they continued to go through the process of re-election after appointment.⁷ There was little or no debate about the exclusion of contractors.

It may seem surprising that English debates of the seventeenth and eighteenth centuries carried so much weight in Victoria, but the colonial situation produced some similar dynamics of Crown influence and legislative independence. Until the new Parliament met in 1856, only two-thirds of the Victorian legislature was elected; the Crown – that is, the Lieutenant-Governor, acting on behalf of the British government – appointed the rest. Without responsible government, not formally adopted until 1855, this situation reproduced in miniature some of the older British tensions between Crown supporters and independent members, tensions already largely resolved in England, but recreated in the eastern colonies of Australia by the compromise between elected legislatures and imperial control.⁸

The question of Crown influence thus evoked not only older British constitutional rhetoric, but also politicians' experience of relations between the Lieutenant-Governor and the Legislative Council. The disqualifications made particular

⁴ *Regency Act 1706*, 4 & 5 Anne, c 20, ss 29-34; *Succession to the Crown Act 1708*, 6 Anne, c 41, ss 24-8; *House of Commons Disqualification Act 1782*, 22 Geo 3, c 45, ss 1-4. See David Hayton and Clyve Jones, 'Peers and Placemen: Lord Keeper Cowper's Notes on the Debate on the Place Clause in the Regency Bill, 31 January 1706' (1999) 18 *Parliamentary History* 65, 65-73. A precursor was 5 Wm & M, c 7, s 57 (1694), which barred most MPs from involvement in collecting certain taxes. A disqualification provision in the *Act of Settlement 1701*, 12 & 13 Wm 3, c 2, s 3, was repealed before it took effect. The reference in *Re Webster* (1975) 132 CLR 270, 278, to 7 & 8 Wm 3, c 25 (1696) as the source of the disqualification of contractors is mistaken.

⁵ *Constitution Act 1855* (Vic) ss 17, 25.

⁶ George Webb, *New Constitution Bill. Debate in the Legislative Council of the Colony of Victoria, on the Second Reading of the New Constitution Bill* (1854) 73-4, 94; 'Legislative Council', *Argus* (Melbourne), 17 February 1854.

⁷ *Independence of the Legislature Act 1859* (Vic), 23 Vict No 91; *Officials in Parliament Act 1914* (Vic) (Royal Assent 1915). See Victoria, *Parliamentary Debates*, Legislative Assembly, 5 November 1858, 234-6; 16 November 1858, 318-20; 18 November 1858, 342-9.

⁸ See Ray Wright, *A Blended House: The Legislative Council of Victoria 1851-1856* (2001) 19.

sense in the early years of responsible government, when groupings and allegiances were weak and changeable. Quite apart from any question of influence by the Governor, they reduced the risk of a group of members buying a majority with government jobs and other deals.

This was never the only reason for disqualifying officials.⁹ The earliest cases of disqualification of office-holders from the House of Commons rested at least partly on another consideration: the need to ensure that members were able to perform their parliamentary duties without being obstructed by the requirements of another office.¹⁰ With time, related considerations were also recognised. The demands of membership could prevent public servants from performing their government duties properly, and, once payment of members was introduced, holding both positions involved what we would now call 'double dipping', or receiving two public salaries. The two roles of a public servant in Parliament could also involve conflict between the duties of the two positions, or between the private interest of an employee and the public duty of a member. Disqualification of contractors has rested on much the same reasons.

There remained one necessary and fundamental exception to these principles. Ministers, although holders of offices of profit under the Crown, had to be members of Parliament for the sake of the system of responsible government, as it developed in Britain and Australia. They remain exempted from the disqualification of office-holders. The grounds that support the disqualification provide reasons for the upper limit imposed on the number of ministers. If any number of ministers could be appointed, the government could evade the controls on office-holders in Parliament. It would also have greater means to reward or placate its own supporters with ministerial positions. This reasoning, though, carries decreasing weight in modern politics, as was demonstrated when the New South Wales Parliament repealed the limit on the number of ministers in 1997.¹¹

The system of responsible government itself provided a justification for exempting ministers from the disqualification of office-holders. In theory, ministers could safely be exempted because they were directly responsible to Parliament and would lose their positions if Parliament lost confidence in them as a group. In the language of s 88 of the *Constitution Act 1975* (Vic) (the '*Constitution Act*'), they are 'liable to retire from office on political grounds'. They were controlled by Parliament, not the Crown, so their membership was consistent with the purpose of the disqualification. Other office-holders were not directly responsible to Parliament, which could not dismiss them. Instead, the Crown retained its influence over them, thus creating the need for disqualification.

⁹ See generally submission by J C Finemore and J Lewis, Joint Select Committee on Qualifications, Parliament of Victoria, *Interim Report* (1973) 6; Australia, Constitutional Commission, *Final Report* (1988) vol 1, 300, 303; Senate Standing Committee on Constitutional and Legal Affairs, Parliament of Australia, *The Constitutional Qualifications of Members of Parliament* (1981) 41-2, 75; *Sykes v Cleary* (1992) 176 CLR 77, 96.

¹⁰ Select Committee on Offices or Places of Profit Under the Crown, above n 3, x, 138-41.

¹¹ *Constitution and Parliamentary Electorates and Elections Amendment Act 1997* (NSW) s 3, sch 1.

II WHO CAN BECOME A MEMBER OF PARLIAMENT?

The right to vote is the basic qualification for membership of the Victorian Parliament. Under s 44(1) of the *Constitution Act*, a person who is enrolled as a voter, is entitled to vote and resides in Victoria, is qualified to be elected a member of either House. Voters, in turn, must be eighteen years old, Victorian residents (with some exceptions), and Australian citizens; some British citizens who could vote in Australia in 1983-4 are also eligible to vote.¹²

People who are not eligible to vote are thus indirectly disqualified from membership of Parliament. Such people include those convicted of treason or treachery (and not pardoned), those serving a sentence of at least five years' imprisonment, holders of temporary entry permits, prohibited immigrants, and people of unsound mind.¹³

Aside from these limitations on eligibility arising from restrictions on the right to vote, Victorian law excludes several other categories of people from membership of Parliament. Judges, members of the Commonwealth Parliament and undischarged bankrupts are disqualified from being elected.¹⁴ Unlike s 44(i) of the *Australian Constitution*, the *Constitution Act* does not disqualify foreign citizens from Parliament, as long as they also hold Australian citizenship or qualify under the special provisions for British citizens. Holders of dual citizenship therefore remain eligible.

Separate provisions exclude some convicted criminals from membership of Parliament. These overlap with disqualifications from voting. The following conditions apply to disqualification from membership on this ground: (i) the conviction must be for an indictable offence, as distinct from a summary offence; (ii) the penalty must be prescribed by an enactment, as distinct from common law; (iii) the offence must be punishable on first conviction by imprisonment for life or for five years or more; (iv) the offence must have been committed by a person of or over the age of eighteen years; and (v) the offence must have been committed under the law of Victoria or another part of the British Commonwealth of Nations (offences committed in other countries will not lead to disqualification).¹⁵

Unlike disqualification from voting while serving a term of imprisonment, disqualification from membership under these provisions is permanent.¹⁶ A person convicted of an offence that meets these criteria does not become eligible for election again once the sentence has been served.

A member of one House cannot be elected to the other, or sit or vote there.¹⁷ No

¹² *Constitution Act 1975* (Vic) s 48(1); *Electoral Act 2002* (Vic) s 22.

¹³ *Constitution Act 1975* (Vic) s 48(2).

¹⁴ *Constitution Act 1975* (Vic) s 44(2).

¹⁵ *Constitution Act 1975* (Vic) s 44(3).

¹⁶ See *Re Walsh* [1971] VR 33, 42-3.

¹⁷ *Constitution Act 1975* (Vic) ss 29, 36.

single provision prevents one person holding more than one seat in the same House, although such a restriction follows indirectly from provisions prescribing the number of members and electorates in each House.¹⁸ Other provisions, discussed below, deal with the disqualification of government contractors and holders of government offices.

III TIMING OF DISQUALIFICATION

The disqualifications outlined above apply not only to the election process, but to a member's whole term in Parliament. If members cease to be qualified to be elected to Parliament (that is, if a disqualification arises during their term of office), their seats become vacant; the same consequence flows from failure to attend during an entire session, without permission of the House concerned.¹⁹ Grounds of disqualification from election thus become grounds of disqualification from sitting.

The provisions also apply earlier, during the election process. Disqualification of public servants and holders of offices of profit operates from the time of nomination.²⁰ The same rule is likely to apply to contractors with the government, because of the similarity of the wording and structure of the relevant provisions.

The rule about timing applies also to candidates for the Commonwealth Parliament, although the wording of the Commonwealth and Victorian provisions is different. Section 44 of the *Australian Constitution* makes a disqualified person 'incapable of being chosen or of sitting' as a member of Parliament. In *Sykes v Cleary*,²¹ the High Court concluded that the process of choice includes the time of nomination; a candidate is excluded if any grounds of disqualification exist then.²² It follows that a candidate cannot be saved from disqualification by events that occur after the voting – or even between nomination and voting – but before the declaration of the poll.²³

Not all the Victorian provisions operate from the time of nomination. Under s 61 of the *Constitution Act*, public servants lose their government positions on their 'election' to be members, that is, when they are declared to be elected or when the writ for the election is returned.²⁴ This provision must apply only when the election result is known, if it is to serve its purpose of allowing public servants to stand without losing their jobs.

¹⁸ *Constitution Act 1975* (Vic) ss 26-7, 35(1); see also *Electoral Act 2002* (Vic) s 69(6). Cf *Constitution Act Amendment Act 1958* (Vic) s 22 (now repealed).

¹⁹ *Constitution Act 1975* (Vic) s 46.

²⁰ *Hyams v Victorian Electoral Commissioner and Buchanan* [2003] VSC 156, [124], [169] (Gillard J).

²¹ (1992) 176 CLR 77.

²² *Sykes v Cleary* (1992) 176 CLR 77, 99-101 (Mason CJ, Toohey and McHugh JJ; Brennan, Dawson and Gaudron JJ concurring); see also *Free v Kelly* (1996) 185 CLR 296, 301 (Brennan CJ).

²³ See *Sykes v Cleary* (1992) 176 CLR 77, in which the candidate was disqualified despite resigning, after the voting but before the declaration of the poll, from the office that caused his disqualification.

²⁴ *Hyams v Victorian Electoral Commissioner and Buchanan* [2003] VSC 156, [136]-[138] (Gillard J).

IV OFFICES OF PROFIT

The most troublesome questions about eligibility for membership of Parliament in Victoria concern government contractors and office-holders. Amended and supplemented over many years, the relevant provisions form a confusing patchwork of overlapping disqualifications.

An apparent disqualification of government employees, or ‘public officers’, as the section heading calls them, is found in s 49 of the *Constitution Act*. It applies to anyone who (i) holds an ‘office or place of profit under the Crown’, or (ii) is ‘in any manner employed in the public service of Victoria for salary wages fees or emolument’. Section 49 states that people in these categories may not sit or vote in either House, and that their election to Parliament is ‘null and void’.

This section, however, is deceptive. So far as *candidates* are concerned, it is nullified by s 61 of the *Constitution Act*, which applies to the same officials (those holding ‘any office or place of profit under the Crown or in any manner employed in the public service of Victoria for salary wages fees or emolument’) and states that they are not disqualified or disabled from being candidates, and that their election to Parliament is not void by reason only of their holding such offices.

The *Constitution Act* subjects these officials to what is sometimes called ‘reverse disqualification’: disqualification, not from Parliament, but from their government posts. They cease to hold their offices or places of profit, or to be employed in the public service; other legislation allows for reinstatement of former members and unsuccessful candidates.²⁵ Government ministers are in a special category. The express words of the *Constitution Act* allowing their appointment override their reverse disqualification as holders of offices of profit under the Crown.²⁶

Despite the apparent effect of s 49, then, holders of offices of profit are not disqualified from running for Parliament and being elected, although they lose their employment in the Victorian government. What about serving members of Parliament, as distinct from candidates, who accept offices of profit? Section 49 disqualifies members as well as candidates, by stating that none of the officers it applies to shall sit or vote in either House. Section 61 does not nullify the disqualification of serving members who accept offices of profit. It states that officers shall not be ineligible to be *candidates* or to be *elected or returned* as members, but does not apply to serving members who are elected before becoming government employees.

The disqualification of serving members who take government posts is reinforced by s 55(d) of the *Constitution Act*. It vacates the seat of any member who accepts any office or place of profit under the Crown, or ‘in any character or capacity for

²⁵ *Constitution Act 1975* (Vic) s 61; *Public Administration Act 2004* (Vic) s 115, sch 1.

²⁶ See *Constitution Act 1975* (Vic) s 50.

or in expectation of any fee gain or reward performs any duty or transacts any business whatsoever for or on behalf of the Crown’.

The reference to duty or business performed for the Crown in s 55 extends the disqualification beyond offices of profit, although its exact meaning is unclear. It covers two kinds of case: (i) those concerning performance of a duty for reward, even if no formal appointment is involved; and (ii) those concerning transacting business for or on behalf of the Crown for reward, perhaps as an agent.

As with the disqualification of contractors, the potential reach of this provision is very broad. Privatisation, for example, creates situations in which businesses, in return for privileges or subsidies, are under a duty to provide public services. Unlike the contract provisions, s 55(d) contains no exemption for companies and partnerships. Its interpretation should conform to its underlying purposes, so that the ambiguous references to ‘duty’ and ‘business’ apply only where the arrangement may allow the government to influence the member or where conflict arises between the member’s public duty and private interest. Better still would be reform of these obscure and archaic provisions.

In summary, then, candidates lose any Victorian government positions they hold when they are elected to Parliament, but serving members who accept government positions keep their government posts and lose their seats. The special position of government employees from other jurisdictions is discussed below.

A Exemptions

Other Acts of Parliament may exempt officials from these disqualifications.²⁷ A number of Acts contain sections that deem appointees not to hold offices or places of profit under the Crown for this purpose.²⁸ Government ministers hold offices of profit under the Crown, but, as we have seen, the *Constitution Act* exempts them from disqualification, and from the former requirement for re-election at a by-election after appointment to the government.²⁹

Armed forces personnel are exempted from disqualification, at least where they do not serve full-time.³⁰ Whether full-time personnel are also exempted is one of the many uncertainties of this part of the *Constitution Act*. The exemption rests on two overlapping sub-sections; one explicitly excludes full-time personnel from its scope and the other does not. However, the functions of the sub-sections, their legislative history and the similar wording in s 44 of the *Australian Constitution* (on which the Victorian provisions were apparently based) suggest that the two sub-sections should have the same scope, and that the exemption does not apply

²⁷ *Constitution Act 1975* (Vic) ss 49, 55(d).

²⁸ For example: *Building Act 1993* (Vic) sch 3, cl 7; *Country Fire Authority Act 1958* (Vic) s 7A; *Docklands Act 1991* (Vic) s 43; *Health Services Act 1988* (Vic) ss 38, 115J; *Arts Institutions (Amendment) Act 1994* (Vic) ss 8, 21, 35, 43, 51, 60, 73, 78.

²⁹ *Constitution Act 1975* (Vic) ss 50, 53.

³⁰ *Constitution Act 1975* (Vic) s 60.

to full-time personnel.³¹ The explicit intention of the Attorney-General in introducing the predecessor of the current provision was to excuse only some and not all members of the armed forces; full-time service personnel other than those serving in World War I were to be disqualified.³² On this basis, s 60 does not exempt full-time members of the armed forces from disqualification; whether the disqualification provisions apply to such people in the first place is considered below.

A member of Parliament who accepts an office of profit under the Crown is guilty of an offence, and liable to a penalty of A\$100 for each week the office is held. Government ministers are again exempted, as are other members where 'express provision is made to the contrary by any Act or enactment'.³³ Wilful contravention or failure to comply with the disqualification provisions is also an offence.³⁴

B Meaning of 'Office of Profit'

The courts have clarified some aspects of the meaning of 'office or place of profit under the Crown', but for a basic definition one must turn to authoritative commentaries rather than judicial decisions. Concerning the concept of an office, the Senate Standing Committee on Constitutional and Legal Affairs cited P H Lane's definition: 'a public position having a certain tenure, duties and emolument'.³⁵ In other contexts, the word 'office' has connotations of permanency, or of a defined position to which people may be appointed in sequence.³⁶

Holders of offices in this narrow sense would clearly come within the scope of the expression. But because of the underlying purposes of disqualification, in this context the word 'office' has a broader meaning.³⁷ It can extend beyond defined positions that are passed from one holder to another. The Commonwealth disqualification, for example, is not limited to senior positions, and includes 'at least those persons who are permanently employed by government'.³⁸

It has been accepted in England that the disqualification of the holder of an 'office of profit under the Crown' excludes permanent public servants, being officers of the departments of government, from membership of the House of Commons. Likewise, it has been accepted in Australia that a provision for disqualification expressed in the same terms excludes public servants, who are officers of the

³¹ See *Members' Qualification (Amendment) Act 1916* (Vic) s 2(2); *Constitution Act Amendment Act 1928* (Vic) s 28(2).

³² Victoria, *Parliamentary Debates*, Legislative Assembly, 11 October 1916, 1928-31.

³³ *Constitution Act 1975* (Vic) s 58.

³⁴ *Constitution Act 1975* (Vic) s 59.

³⁵ Senate Standing Committee on Constitutional and Legal Affairs, above n 9, 39, citing Patrick H Lane, *The Australian Federal System* (2nd ed, 1979) 43.

³⁶ See, eg, *Great Western Railway Co v Bater* [1920] 3 KB 266, 274 (Rowlatt J); *Edwards v Clinch* [1982] AC 845, 861-2 (Lord Wilberforce), 865 (Lord Salmon).

³⁷ *Sykes v Cleary* (1992) 176 CLR 77, 96-7 (Mason CJ, Toohey and McHugh JJ).

³⁸ *Ibid* 96.

departments of government, from membership of the legislature.³⁹

This broad interpretation applies even more clearly to the Victorian provisions, which (unlike s 44(iv) of the *Australian Constitution*) refer not only to offices, but to 'any office *or place of profit*'.⁴⁰

What makes an office one 'under the Crown'? In a memorandum for the House of Commons Select Committee on Offices or Places of Profit under the Crown, the Attorney-General summarised the situation in this way:

In considering whether an office is under the Crown one has to consider who appoints, who controls, who dismisses and the nature of the duties. If the Crown itself has the power of appointment and dismissal, this would raise a presumption that the Crown controls, and that the office is one under the Crown. If, although the Crown appoints, the duties are not duties connected with the public service, the office would not, I think, be an office under the Crown within the Act. ... If the duties are duties under and controlled by the Government then the office is, *prima facie*, at any rate, an office under the Crown, and the appointment would normally be made by a Minister or by someone who clearly held an office under the Crown.⁴¹

Until 1998, the general model followed for employment in the Victorian public service was the appointment of 'officers' to 'positions'.⁴² People employed under this scheme were readily classified as holders of offices of profit under the Crown, as Phil Cleary was in *Sykes v Cleary* (he was appointed to the teaching service under legislation that used similar language).⁴³ But later legislation brought the public service closer to the model of private sector employment, and dispensed with most references to holders of offices. The *Public Administration Act 2004* (Vic) applies that terminology only to a small number of appointments. An ordinary public servant is a 'public sector employee', although still a 'public official'.⁴⁴

Public service employment under this framework may appear somewhat different from the appointment to offices of profit under the Crown contemplated by the disqualification provisions. But the comments in *Sykes v Cleary* cited above suggest that the disqualification is broad enough to cover public service employment under the current framework.

Whatever meaning is given to 'office of profit', employees in 'the public service of Victoria' who are elected to Parliament lose their employment, and keep their seats, under the reverse disqualification provisions of s 61 of the *Constitution*

³⁹ *Ibid* 95.

⁴⁰ *Constitution Act 1975* (Vic) ss 49, 55(d), 58 (emphasis added).

⁴¹ Select Committee on Offices or Places of Profit under the Crown, above n 3, 136.

⁴² *Public Sector Management Act 1992* (Vic), pt 2, div 3.

⁴³ See *Sykes v Cleary* (1992) 176 CLR 77, 97.

⁴⁴ *Public Administration Act 2004* (Vic) s 4(1). See also *Public Sector Management and Employment Act 1998* (Vic) s 4(1); and Victoria, *Parliamentary Debates*, Legislative Assembly, 23 April 1998, 1163 (Alan Stockdale).

Act. Under s 9 of the *Public Administration Act 2004* (Vic), the public service of Victoria consists of the persons employed under Part 3 of the Act.

As for the element of ‘profit’, the opinion of the Senate Standing Committee is persuasive:

The meaning of ‘profit’ is a little more elusive and best explained negatively: it appears that an office is not one of profit if it has never had attached to it anything in the nature of a salary or fee, and no holder of the office could claim payment of such emolument under any circumstances. Payment of reasonable expenses incurred in carrying out an office does not make it one of profit. However, the fact that the holder of an office is not paid any emolument which otherwise attaches to the office does not affect his position as the holder of an office of profit.⁴⁵

Sykes v Cleary has confirmed that the taking of leave without pay does not alter the character of the office held.⁴⁶ If the holder of the position is entitled to be paid, it remains an office of profit, even if payment is not being made when the disqualification question arises.

In England, ‘office of profit *from* the Crown’ was understood to be narrower than ‘office of profit *under* the Crown’; appointment to an office from the Crown was made personally by the monarch.⁴⁷ The Victorian legislation refers only to offices ‘under’ the Crown, and decisions based on different wording will not necessarily apply. In Australia, however, the distinction made in England has not always been followed.⁴⁸

Which offices are ‘under the Crown’? The most obvious are posts in which the employer is the Crown itself. Although it is increasingly common to refer to the State as a legal entity – as the *Australian Constitution* itself does – Victorian law still reflects the traditional principle that public service heads exercise their powers as employers on behalf of the Crown.⁴⁹ ‘Employees in departments continue to be employed by the Crown, on whose behalf department heads exercise their employment powers’, the Treasurer said when introducing the precursor of the current provision.⁵⁰

The government controls, directly or indirectly, a large number of other, separate legal entities, such as statutory authorities and State-owned enterprises. It is not clear whether people working for these other entities hold offices of profit under the Crown. Some such organisations are public entities for the purposes of the *Public Administration Act 2004* (Vic), under complex criteria involving their

⁴⁵ Senate Standing Committee on Constitutional and Legal Affairs, above n 9, 39.

⁴⁶ *Sykes v Cleary* (1992) 176 CLR 77, 97 (Mason CJ, Toohey and McHugh JJ; Brennan, Dawson and Gaudron JJ concurring).

⁴⁷ Select Committee on Offices or Places of Profit under the Crown, above n 3, xiii, 135-6 (emphasis added); Samuel H Day, *Rogers on Elections* (17th ed, 1900) vol 2, 10.

⁴⁸ See, eg, *Clydesdale v Hughes* (1934) 36 WALR 73, 75 (Northmore CJ), 85 (Dwyer J).

⁴⁹ *Public Administration Act 2004* (Vic) s 20(1); *Australian Constitution* ss 75, 78, 85.

⁵⁰ Victoria, *Parliamentary Debates*, Legislative Assembly, 23 April 1998, 1162 (Alan Stockdale).

establishment, control and functions.⁵¹ Others are not. Classification as a public entity does not, of itself, apply the employment provisions of the *Public Administration Act 2004* (Vic) to the organisation, but an order by the Governor in Council may do so, in which case the disqualification provisions probably apply.⁵² Other legislation may say specifically that an organisation does or does not represent the Crown. For example, s 31A of the *Health Services Act 1988* (Vic) separates public hospitals from the Crown, while under s 5(2)(b) of the *Environment Protection Act 1970* (Vic), the Environment Protection Authority represents the Crown.

Where the legislation is silent, the court is likely to consider the degree of direct or indirect ministerial control over the appointment and the work of the officer.⁵³ This 'control test' resembles the test that determines whether an organisation is entitled to Crown immunity, or the 'shield of the Crown'.⁵⁴ Although the immunity issue is conceptually distinct from the question of categorisation as an office of profit under the Crown, the control test is relevant to both, given the purpose of the disqualification. The greater the degree of ministerial control, the greater the risk of abuse of appointments to the organisation of the kind the disqualification seeks to prevent. On the other hand, the source of funding to pay the appointee is apparently irrelevant.⁵⁵

On these principles, municipal councils should not count as agents of the Crown. However, opinions differ, and in practice candidates sometimes receive advice to resign from local councils.⁵⁶ In *Sydney City Council v Reid*, the New South Wales Court of Appeal considered a related question – whether employees of a local government authority were 'employed in the service of the Crown' for the purpose of the *Government and Related Employees Appeal Tribunal Act 1980* (NSW). The court decided that they were not. Appeal Justice Meagher commented:

Even the learned solicitor who argued the case for the respondent, Mr D M Bennett QC, did not advance so farouche a submission that a municipal council was the Crown, or an arm of the Crown, or an emanation of the Crown, or an agent of the Crown. The aldermen of a council are elected by popular suffrage, not appointed by the Crown. They neither ask for, nor, in general, receive, any assistance from the Crown in the discharge of their daily tasks. The extent to which the Crown can interfere with their activities is slight, and the extent to which it does is minimal.⁵⁷

⁵¹ *Public Administration Act 2004* (Vic) s 5.

⁵² *Public Administration Act 2004* (Vic) ss 104-5.

⁵³ Cf *Hodel v Cruckshank* (1889) 3 QLJ 141; Senate Standing Committee on Constitutional and Legal Affairs, above n 9, 40; Anne Twomey, *The Constitution of New South Wales* (2004) 438.

⁵⁴ Senate Standing Committee on Constitutional and Legal Affairs, above n 9, 40.

⁵⁵ *Ibid* 51.

⁵⁶ House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Aspects of Section 44 of the Australian Constitution: Subsections 44(i) and (iv)* (1997) 66-7; Twomey, above n 53, 438-9.

This reasoning is persuasive, and if it is correct it implies that neither council members nor council employees should come within the category of holders of offices of profit under the Crown. Nor are they caught by the other branch of the disqualification, concerning people ‘employed in the public service of Victoria’. But in the absence of legislation or a court decision to clarify the issue, candidates and political parties are understandably cautious about the possibility of disqualification. As we will see, candidates or MPs who have *contracts* with local government are in a clearer position.

Unlike members of the Commonwealth Parliament, who are disqualified by s 44(2)(b) of the *Constitution Act*, members of the Parliaments of other States are not specifically disqualified from membership of the Victorian Parliament. If the approach outlined above is correct, membership of another Parliament should not count as an office of profit under the Crown. Although backbench members receive salaries, as elected representatives they are not appointed by the Crown and have no relationship with it, beyond the allegiance they swear when they take their seats. An old example illustrates the principle. Sir Bryan O’Loughlen had the rare – perhaps unique – distinction of being simultaneously a member of the British House of Commons and the Victorian Legislative Assembly. Although MLAs were paid, it was his position as a Victorian Minister, not merely a member of the Legislative Assembly, that disqualified him from the House of Commons, on the ground that he had accepted an office of profit under the Crown.⁵⁸

C Crown in Right of the Commonwealth and Other States

The *Constitution Act* disqualifies not only those who are employed ‘in the public service of Victoria’, but also anyone who holds ‘any office or place of profit under the Crown’.⁵⁹ Do these latter words apply only to Victorian positions, or does an appointment by the Commonwealth or another State also lead to disqualification?

The Victorian Court of Disputed Returns has held that the *Constitution Act* does disqualify holders of offices of profit under the Crown in right of the Commonwealth.⁶⁰ But the Court also held that s 61 of the Act, which excuses public servants from disqualification, applies to Commonwealth officers.⁶¹ The result is that Commonwealth officers are disqualified by one section, but then excused by another, so they are eligible for election. The reasoning also applies to members who accept offices of profit after election to Parliament.

Section 60 of the *Constitution Act* indirectly supports the conclusion that s 49 disqualifies Commonwealth office-holders. It excuses part-time members of the armed forces from disqualification from membership of the Victorian Parliament. This would be unnecessary if s 49 did not apply to them. As we have seen, the

⁵⁷ *Sydney City Council v Reid* (1994) 34 NSWLR 506, 521.

⁵⁸ See Great Britain, *Hansard’s Parliamentary Debates*, House of Commons, 3rd series, 25 April 1879, vol 245, 1186–7.

⁵⁹ *Constitution Act 1975* (Vic) ss 49, 55(d), 58.

⁶⁰ *Hyams v Victorian Electoral Commissioner and Buchanan* [2003] VSC 156 [105]-[111].

⁶¹ *Ibid* [162].

intention of the Attorney-General in introducing the predecessor of s 60 was that full-time service personnel (other than those then serving in World War I) were to be disqualified, along with Commonwealth public servants.⁶²

The decision of the Court of Disputed Returns is clear, but there may still be room for argument about the position of Commonwealth employees. Earlier expert opinions were divided. In a detailed opinion on the case of Barry Jones in 1974, Richard McGarvie QC formed a 'firm view' that 'the Crown' in the disqualification provisions did not include the Crown in right of the Commonwealth.⁶³ The Victorian Solicitor-General, B L Murray QC, gave the same opinion in a submission to a parliamentary committee in 1973, although he also noted that the position was 'not beyond argument'.⁶⁴ A submission from J C Finemore QC (Chief Parliamentary Counsel) and Lewis J tentatively expressed the opposite opinion.⁶⁵

The Court of Disputed Returns also indicated, without having to decide the question, that public servants of other States are in the same position as their Commonwealth counterparts.⁶⁶ When the High Court considered the corresponding Commonwealth disqualification, it concluded that the words 'any office of profit under the Crown' in s 44(iv) of the *Australian Constitution* apply to offices under the Crown in right of the Commonwealth and the States.⁶⁷ The last paragraph of s 44 exempts State ministers from disqualification, reflecting an assumption that the disqualification extends to State offices. Some of the problems of incompatible offices and conflicting duties apply equally to State and Commonwealth public servants, so a broad disqualification serves some of the purposes of the State provisions.⁶⁸

Some difficulties remain. Although s 61 of the *Constitution Act* excuses government employees from disqualification, it preserves the purpose of the disqualification, by terminating their employment at the time of their election. When Victorian public servants are elected to Parliament, they keep their seats but lose their government jobs, and the principle of keeping current government employees out of Parliament is maintained. But s 61 is unlikely to be able to work this way in the case of Commonwealth public servants. It is probably beyond the power of the Victorian Parliament to terminate the employment of a Commonwealth public servant, either because it would be an invalid interference with Commonwealth capacities and functions,⁶⁹ or because this part of s 61 is

⁶² Victoria, *Parliamentary Debates*, Legislative Assembly, 11 October 1916, 1928–31.

⁶³ Richard E McGarvie, 'In the matter of the Constitution Act Amendment Act Section 14 and in re Barry Owen Jones: Advice', Public Record Office of Victoria, VPRS 7614/P1, Box 2, File 30/5, 13.

⁶⁴ Joint Select Committee on Qualifications, above n 9, 4.

⁶⁵ *Ibid* 6.

⁶⁶ *Hyams v Victorian Electoral Commissioner and Buchanan* [2003] VSC 156 [105], [108].

⁶⁷ *Sykes v Cleary* (1992) 176 CLR 77, 98.

⁶⁸ *Ibid*; Western Australian Law Reform Committee, *Disqualification for Membership of Parliament: Offices of Profit under the Crown and Government Contracts*, Project No 14 (1971) 10-11.

⁶⁹ *Cf Re Residential Tenancies Tribunal of New South Wales and Henderson; ex parte Defence Housing Authority* (1997) 190 CLR 410.

inconsistent with the *Public Service Act 1999* (Cth) (or equivalent Commonwealth legislation on the office of profit in question) and so invalid under s 109 of the *Australian Constitution*.⁷⁰

The likely result is that Commonwealth public servants, unlike their Victorian counterparts, can keep their government jobs while sitting in the Victorian Parliament. If, however, a Commonwealth public servant resigns to contest a State election and fails to be elected, Commonwealth law gives a right of reinstatement to the Australian Public Service.⁷¹

V CONTRACTORS

Government contractors are disqualified by s 54-5 of the *Constitution Act*. These two sections reproduce older provisions enacted at different times, and they overlap in many situations. Section 54 disqualifies any person:

- (i) who is directly or indirectly concerned or interested in a bargain or contract entered into by or on behalf of the Queen in right of the State of Victoria; or
- (ii) who participates or claims or is entitled to participate directly or indirectly in the profit of such a bargain or contract, or in any benefit or emolument arising from it.

The section makes such a person ineligible to sit or vote in either House, and states that the election of such a person is void. Under ss 55(a) and (b), disqualifications in identical words apply to sitting members. The Victorian provisions differ from the law in the three other States that retain a contract disqualification. Among other points of difference, in Victoria the contract need not be 'for or on account of the Public Service', as the New South Wales provisions require.⁷²

A Binding Contract

The disqualification does not apply unless a 'bargain or contract' exists with the Crown in right of the State of Victoria (s 56(1) of the *Constitution Act* brings ministers, departments and public statutory bodies within this expression). A court is likely to hold that a binding contract is a prerequisite for disqualification on this ground, although this can have the unfortunate effect of making the outcome depend on the technicalities of formation of contract.⁷³ It is doubtful whether the word 'bargain' adds anything to the word 'contract'. The corresponding federal provision uses the word 'agreement', which could likewise

⁷⁰ See *Hyams v Victorian Electoral Commissioner and Buchanan* [2003] VSC 156 [159].

⁷¹ *Public Service Act 1999* (Cth) s 32; *Public Service Regulations 1999* (Cth) reg 3.13.

⁷² Cf *Constitution Act 1902* (NSW) s 13; *Parliament of Queensland Act 2001* (Qld) ss 70-1; *Constitution Act 1934* (Tas) s 33.

⁷³ See *Miles v McIlwraith* (1883) 8 App Cas 120; Twomey, above n 53, 410.

imply a broader scope than 'contract', but it is implicit in *Re Webster* that the legal requirements for formation of contracts must be satisfied before that disqualification can apply.⁷⁴

The MP need not be a party to the contract; being concerned or interested in the contract, or participating in profits or benefits arising from it, is enough, as we will see. The British provisions on which the Victorian law was based were held not to disqualify an MP who could not have known that the government was a party to the contract.⁷⁵ This principle should apply equally in Victoria.

B Executed Contracts

Until its repeal, the British disqualification of contractors applied to some contracts but not to others. If performance of the agreement was complete and nothing remained for the parties to do – that is, if the contract had been executed – the disqualification did not apply.⁷⁶ It operated only in the case of an executory contract, under which the parties still had obligations to perform. As well as reducing the harshness of the rule, this interpretation conformed to its original purpose, by targeting only members who might still be subject to influence under an ongoing agreement, not those who had entered agreements that were entirely in the past. In *Re Webster*, Barwick CJ likewise limited the Commonwealth disqualification to executory contracts.⁷⁷ Citing English cases, Barwick CJ added other restrictions:

It seems to me that, upon the proper construction of the paragraph, bearing in mind the purpose of its presence in the *Constitution*, the agreement to fall within the scope of s 44(v) must have a currency for a substantial period of time, and must be one under which the Crown could conceivably influence the contractor in relation to parliamentary affairs by the very existence of the agreement, or by something done or refrained from being done in relation to the contract or to its subject matter, whether or not that act or omission is within the terms of the contract.⁷⁸

These conclusions rested largely on Barwick CJ's opinion of the purposes of s 44(v). Wider views of those purposes could produce different interpretations.⁷⁹ For the moment, what little authority there is supports the limitation of the disqualification to executory contracts, if not the further limitations that Barwick CJ suggested.

⁷⁴ See *Re Webster* (1975) 132 CLR 270, 283. See also Carney, above n 2, 110.

⁷⁵ *Royse v Birley* (1869) LR 4 CP 296, 315-16 (Willes J), 318 (Montague Smith J), 322 (Brett J). See also *Constitution Act 1975* (Vic) s 56(2)(c).

⁷⁶ *Ibid* 311-2 (Willes J), 317 (Montague Smith J), 320-1 (Brett J).

⁷⁷ *Re Webster* (1975) 132 CLR 270, 279.

⁷⁸ *Ibid* 280, citing *Royse v Birley* (1869) LR 4 CP 296 and *Tranton v Astor* (1917) 33 TLR 383.

⁷⁹ See n 89 below, and Carney, above n 2, 102-5.

C Other Exemptions

Sections 56-7 of the *Constitution Act* list eight cases in which the contract disqualification does not apply. They are:

- (i) the supply of goods or services to an MP 'on no better terms than they are supplied or provided to persons other than members who are in similar circumstances or who are otherwise similarly qualified or eligible': s 56(2)(a);
- (ii) the acquisition of an interest in a contract through a deceased estate, although the exemption is limited to twelve months: s 56(2)(b);
- (iii) 'any isolated casual sale or supply' of goods or services to the State, where the MP did not know and could not reasonably have known that the sale or supply was to the State: s 56(2)(c);
- (iv) a compromise in respect of compensation or money payable by the State: s 56(2)(d);
- (v) a bargain or contract entered into by a company, partnership or association consisting of more than twenty persons, 'where such bargain or contract is entered into for the general benefit of such company partnership or association': s 57(a);
- (vi) a lease, licence for occupation, sale, or purchase of land: s 57(b);
- (vii) an agreement for the lease, sale, purchase or occupation of land, or for an easement, or for the loan of money: s 57(c); and
- (viii) a security for the payment of money: s 57(d).

D Local Councils

For the purposes of disqualification, contracts entered into by or on behalf of the Queen in right of the State of Victoria include contracts entered into by government departments and ministers in their official capacity, and contracts 'entered into by any public statutory body'.⁸⁰ The disqualification therefore applies not only to contracts with the Crown proper, as a legal entity, but also to contracts with other, separate statutory bodies that may or may not represent the Crown. Under this branch of the disqualification, the test is not whether the contract is with the Crown, but merely whether it is with a public statutory body. Does this include contracts with local councils?

The expression 'public statutory body' appears frequently in Victorian legislation. Some Acts say explicitly that the expression includes municipal councils;⁸¹ some

⁸⁰ *Constitution Act 1975* (Vic) s 56(1).

⁸¹ See, eg, *Water Act 1989* (Vic) s 3(1); *Marine Act 1988* (Vic) s 34(1); *Victorian Urban Development Authority Act 2003* (Vic) s 3.

merely imply that this is so, by referring to public statutory bodies 'other than' councils, or to a council 'or other public statutory body';⁸² some could be taken to imply the opposite, by referring to councils and public statutory bodies in the alternative;⁸³ others are silent on the status of councils, or adopt other definitions.⁸⁴

No statutory definition governs the use of the phrase in the *Constitution Act*. The Supreme Court has considered the meaning of the expression 'public statutory body which is constituted under the law of Victoria', as it appeared (without a definition) in s 251(1)(a) of the *Local Government Act 1958* (Vic). Drawing on definitions of the phrase in other acts, the court decided that it meant 'a statutory body constituted under the law of Victoria to perform public functions'.⁸⁵

Councils plainly perform public as distinct from private functions, and they are created by statute. If the phrase in the *Constitution Act* is taken in isolation, councils fall within it, so bringing council contracts within the disqualification. This is the most likely interpretation of the provision, but the countervailing considerations make the result uncertain.

The purpose of the provision dictates no clear conclusion, but it suggests that councils should not be included, since their operations are generally outside the direct control of the government, and dealings with them are in a different position from dealings with the State. Until 1975, the corresponding provision did not extend to public statutory bodies in general, but included only the Crown, ministers, departments, and seven specified statutory authorities.⁸⁶ The *Constitution Act* was intended, for the most part, only as a consolidation, which provides grounds for an argument that the current expression in s 56(1)(b) applies to statutory bodies of the same kind – that is, those under the direct control of the government – and not to local councils. A wide interpretation of the phrase might catch other organisations, such as universities, whose inclusion would not serve the purposes of the contract rule.

It is obviously unsatisfactory that the situation of MPs dealing with local government is so uncertain. The only definite conclusions open on the current state of the law are that MPs run a risk of disqualification if they make contracts with local councils, and that legislation is needed to clarify their position.

E Concerned or Interested; Participating in Benefits

Sections 54-5 of the *Constitution Act* identify two kinds of involvement in contracts. Candidates and members are disqualified, first, if they are 'concerned or interested' in contracts of the prescribed kinds, or, secondly, if they participate in the profits, benefits or emoluments of the contracts. The second category of

⁸² See, eg, *Rural Finance Act 1988* (Vic) s 14(2)(a); *Interpretation of Legislation Act 1984* (Vic) s 56.

⁸³ See, eg, *Local Government Act 1989* (Vic) s 154(2)(b); *Heritage Rivers Act 1992* (Vic) s 17(1).

⁸⁴ See, eg, *Food Act 1984* (Vic) s 4(1); *Ombudsman Act 1973* (Vic) s 2.

⁸⁵ *Melbourne City Council v State Superannuation Board of Victoria* (1992) 77 LGRA 245, 247 (Brooking J; Fullagar J concurring). See also *Melbourne City Council v State Superannuation Board of Victoria* (1992) 77 LGRA 245, 256 (Marks J).

⁸⁶ *Constitution Act Amendment Act 1958* (Vic) ss 24-5.

involvement is easier to define. It focuses on the benefits flowing from the contract, which would usually be monetary proceeds but could take other forms. Anyone who receives part of these proceeds, or is entitled to do so, may be disqualified. If the proceeds pass through other hands before they reach the candidate or member, the link may be too distant to amount to participation in the contract, even if that person receives part of an identifiable fund derived from the contract.

Section 44(v) of the *Australian Constitution* refers to ‘any direct or indirect pecuniary interest’ in an agreement. Chief Justice Barwick suggested that the interest has to be ‘pecuniary in the sense that through the possibility of financial gain by the existence or the performance of the agreement, that person could conceivably be influenced by the Crown in relation to Parliamentary affairs’.⁸⁷ Whatever support there is for this interpretation of s 44(v), it is harder to apply to the Victorian provisions, which do not refer to ‘pecuniary interest’.

The interests caught under the first category of involvement are more difficult to specify, but some guidance can be found in decisions under similar provisions relating to municipal councils. Chief Justice Barwick distinguished these cases in *Re Webster*, saying that the purpose of the local government provisions – preventing conflicts of interest and misapplication of municipal funds – was completely different from the purpose of the parliamentary disqualification, which was to protect the independence of Parliament.⁸⁸ Others have criticised Barwick CJ’s interpretation of the intention of s 44(v).⁸⁹ These criticisms are based partly on the implications of the phrase ‘pecuniary interest’, which is not found in the Victorian provisions, but corresponding arguments apply in the Victorian case. Prevention of conflicts of interest is one of the purposes of this division of the *Constitution Act*, and the wording of the contract disqualification resembles the provisions that the local government decisions interpreted.⁹⁰ So the local government cases are at least illuminating, even though they are not decisive.

These cases suggest that a candidate need not be a party to the contract to be ‘concerned’ in it. A direct monetary advantage is not necessary, but a material and appreciable benefit is.⁹¹ Detriment from the contract should equally give rise to a disqualifying interest.⁹² After all, avoiding a detriment may be just as much a source of influence as gaining a profit. It is not enough to have an ‘interest’, in

⁸⁷ *Re Webster* (1975) 132 CLR 270, 280. Cf *Miles v McIlwraith* (1883) 8 App Cas 120; *Proudfoot v Proctor* (1887) 8 LR (NSW) 459; *Hobler v Jones* [1959] Qd R 609.

⁸⁸ *Re Webster* (1975) 132 CLR 270, 278-9.

⁸⁹ Senate Standing Committee on Constitutional and Legal Affairs, above n 9, 77-8; J D Hammond, ‘Pecuniary Interest of Parliamentarians: A Comment on the *Webster Case*’ (1976) 3 *Monash University Law Review* 91, 92-100; Peter J Hanks, ‘Parliamentarians and the Electorate’ in Gareth Evans (ed), *Labor and the Constitution 1972-1975* (1977) 166, 196-7.

⁹⁰ Submission by J C Finmore and J Lewis, above n 9, 5; *Local Government Act 1958* (Vic) s 53(1).

⁹¹ *Attorney-General for the State of Victoria v Keating* [1971] VR 719, 722. See also *Allen v Tobias* (1958) 98 CLR 367, 378.

⁹² See Carney, above n 2, 107.

the colloquial sense, arising from 'curiosity, novelty, relationship, friendship, affection, ill-will, etc'.⁹³ The underlying purposes and broad wording of the *Constitution Act* provisions support the application of this reasoning to parliamentary disqualifications.

F Company Directors

One of the High Court's early decisions on disqualification of municipal councillors, *Ford v Andrews*, raises the possibility that company directors could be 'interested' in the company's contracts.⁹⁴ Judicial authority is inconclusive so far as directors in Parliament are concerned, but an opinion of the Solicitor-General throws some light on their position.

In 1972, the new Premier, R J (Dick) Hamer, faced claims that he had lost his seat in Parliament under the contract disqualification. He was a director, but not a shareholder, of a company, Yorkshire Chemicals Pty Ltd. The Minister of Labour and Industry, Joseph Rafferty, was an alternate director. The company sold small quantities of goods, including glue and detergent, to government departments. The Solicitor-General, B L (Tony) Murray QC, wrote a detailed memorandum for the Attorney-General giving his opinion. Murray applied the cases in which the similar provisions in local government legislation had been interpreted. He concluded that a director did not generally have a direct interest in company contracts:

In my opinion, it is therefore perfectly clear that a director of a company does not have an 'interest' in a contract entered into by the company in the relevant sense. In the context in which the word is used I am inclined to the view that 'concerned', if it adds anything at all to the word 'interest', may operate to extend the operations of the section to cover cases in which a person actually takes part in the negotiation or carrying out of the contract although he does not have an interest in the contract in a strict sense of that term.⁹⁵

In some situations, then, a director's personal involvement in the negotiation or execution of the contract could amount to direct interest or concern. Hamer and Rafferty were not involved in this way, so, citing *Ford v Andrews*, Murray went on:

It thus appears clear that the Ministers were not 'interested' or 'concerned' in the sales in question and the question arises as to whether it could be said that by reason of their directorship they were indirectly 'interested' in them. In my opinion, an indirect interest must carry the same flavour as a direct interest in that the interest involved must be a pecuniary or material one. It might be argued that a director is indirectly interested in the well-being of his company

⁹³ *Attorney-General for the State of Victoria v Keating* [1971] VR 719, 723, citing *Sloane v Sambell* [1931] VLR 393, 397-8.

⁹⁴ *Ford v Andrews* (1916) 21 CLR 317, 322-3 (Griffith CJ), 324 (Barton J), 332 (Isaacs J dissenting).

⁹⁵ B L Murray, 'Constitution Act Amendment Act 1958 – Position of Directors of a Company which enters into Contracts with the Crown', Public Record Office of Victoria, VPRS 10265, Box 618, 5.

because unless his company continues to operate profitably it may not remain in existence and he will consequently lose the emoluments of his office. I do not think however that this argument is correct for the same reason as the courts have said that a creditor does not have an interest (in the relevant sense) in his debtor.

The final question then becomes as to whether by virtue of their directorship the Ministers could be said to have been indirectly 'concerned' in the contracts.⁹⁶ How to determine whether a director was concerned or interested was uncertain, Murray noted:

In the present case, however, my instructions are that the two Ministers were not shareholders of the company, had no entitlement to bonuses or commissions, took no part in the negotiation or carrying out of the sales of goods to the Government Printer and were in fact at all relevant times unaware that such sales had taken place. In these circumstances it could not, in my opinion, be said that the Ministers were directly or indirectly concerned or interested in the contracts for the sale of the goods. I am of the opinion, therefore, that they were not in breach of the provisions of Section 24 of the *Constitution Act Amendment Act 1958*.⁹⁷

The Legislative Assembly rejected the Leader of the Opposition's motion to refer the case to the Court of Disputed Returns, and there the matter rested.⁹⁸

In summary, directors who are not shareholders are unlikely to be concerned or interested in company contracts unless they are involved in negotiating them or carrying them out, or are entitled to a share of the proceeds in the form of a bonus or commission.⁹⁹

G Shareholders

The Victorian provisions contemplate that shareholders can have a disqualifying interest in contracts of their company. Section 57(a) of the *Constitution Act* specifically exempts some contracts made with companies with more than twenty members. In *Re Webster*, Barwick CJ considered the corresponding provision in s 44(v) of the *Australian Constitution*, which disqualifies people holding 'any direct or indirect pecuniary interest' in agreements with the Commonwealth public service (with some exceptions). Although it was not necessary for his decision, he stated his opinion that it must be a pecuniary interest in the particular agreement concerned. Because shareholders do not have legal or equitable interests in the assets of their company, he thought that a shareholding by itself did not give the shareholder a pecuniary interest in company transactions, although other, unspecified circumstances could create such an interest.¹⁰⁰

⁹⁶ Ibid 6-7.

⁹⁷ Ibid 8-9.

⁹⁸ Victoria, *Parliamentary Debates*, Legislative Assembly, 30 November 1972, 2732-56, 2774-86.

⁹⁹ See also the case of Kenneth M Smith: Victoria, *Parliamentary Debates*, Legislative Council, 30 March 1993, 77-8 (Haddon Storey).

¹⁰⁰ *Re Webster* (1975) 132 CLR 270, 286-7.

Chief Justice Barwick's reasoning has been criticised.¹⁰¹ The reference to direct and indirect interests in the Commonwealth and Victorian provisions, and the implication that flows from the exemption for large companies, suggest that shareholders in a company with no more than 20 shareholders can be concerned or interested in its contracts. This was the view of the Solicitor-General, Sir Henry Winneke, in his opinion on the case of Sir Arthur Warner in 1958.¹⁰² Disqualification would not automatically follow; the nature of the company's interest in the contract would have to be such as to fall within ss 54-5.

VI RAISING DISQUALIFICATION QUESTIONS

Although the qualifications for membership of Parliament are set out in law, their enforcement is affected by the traditional power of Parliament to decide questions about the qualifications of its members. The courts have limited powers to hear cases concerning members' qualifications; it may be difficult or even impossible for a court to declare that a member is disqualified, even where grounds for disqualification are clear.

A *In Parliament*

The body that has general power to decide whether a member is disqualified is the House to which the member has been elected. This long-standing privilege of the House of Commons is extended to the Legislative Council and the Legislative Assembly, along with all the other privileges, immunities and powers of the House of Commons at the time the constitution of 1855 became law, by s 19(1) of the *Constitution Act*.¹⁰³

Where no legislation applies, the Assembly and the Council can use whatever procedure they choose in order to deal with questions about the qualification of members. Until 1934, legislation required each House to appoint a Committee of Elections and Qualifications, which handled petitions disputing elections or returns and other disqualification questions referred by the House.¹⁰⁴ New laws inspired by Commonwealth and British models replaced this system, first for the Assembly and then for the Council.¹⁰⁵ Now the Supreme Court, sitting as the Court of Disputed Returns, can hear challenges to elections, and references concerning the qualifications of members of Parliament.¹⁰⁶

¹⁰¹ Hanks, above n 89, 166, 197-8; Carney, above n 2, 109.

¹⁰² Solicitor-General to Attorney-General, 7 November 1958, copy, Australian Constitutional Convention Archives, ACC 28/14/16, 1. However, Winneke took the view that shareholders in a company that owned shares in a second company were not 'interested' in the second company's contracts.

¹⁰³ See Thomas Erskine May, *Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament* (23rd ed, 2004) 90-1.

¹⁰⁴ See *Constitution Act Amendment Act 1928* (Vic) ss 349-66.

¹⁰⁵ *Electoral Act 1934* (Vic) s 27; *Constitution Act Amendment (Electoral) Act 1961* (Vic) s 8. See *Commonwealth Electoral Act 1902* (Cth); *Disputed Elections and Qualifications Act 1907* (Cth); *Parliamentary Elections Act 1868*, 31 & 32 Vict, c 125.

¹⁰⁶ *Electoral Act 2002* (Vic) ss 133, 143.

If the House chooses not to refer a case to the Court of Disputed Returns, it can take action for itself to declare the member disqualified. But a reference to the court is both more likely and more desirable in principle, if the majority in the House want to pursue a possible disqualification. If, on the other hand, they are happy for the question not to be tested (for example, because the government holds the seat under threat), they can vote to excuse the member, or choose to do nothing, as we will see.

B Court Action

Immediately after an election, s 134 of the *Electoral Act 2002* (Vic) (the '*Electoral Act*') allows individuals to challenge the results by means of a petition to the Court of Disputed Returns. Disqualification is, of course, only one of the many grounds on which an election might be challenged. Only a candidate, someone entitled to vote in the election, or the Electoral Commission can bring such a case, and a petition must be filed within 40 days of the return of the writ for the election.

Outside this 40-day period, individuals are generally powerless to raise disqualification questions in court, although a private criminal prosecution may be possible. But s 143 of the *Electoral Act* allows each House of Parliament to refer questions concerning a member's qualifications or a vacancy in the House to the Court of Disputed Returns at any time. A reference under s 143 depends on a resolution of the House, which might be passed or rejected on party lines. Any government would be reluctant to refer the qualifications of one of its members to the Supreme Court, if it could settle the question in the House.

When the ALP questioned the Premier's qualification to sit in 1972, the government voted down a motion to refer the case to the Court of Disputed Returns, after the Solicitor-General gave an opinion that he was not disqualified. In its turn, the ALP defeated the motion of Jeff Kennett, then the leader of the opposition, for a reference on the case of Labor member Theo Sidiropoulos in 1986. The Liberal-National coalition government defeated reference motions when the Australian Labor Party ('ALP') questioned the qualification of Ken Smith, a member of the Legislative Council, in 1993, and Bruce Atkinson, another MLC, in 1997. In 1972 and 1986, the government produced a legal opinion supporting the member, but not in the Atkinson case.¹⁰⁷ The last reference to the Court of Disputed Returns was in 1970, in the case of Ronald 'Bunna' Walsh. The court held that he was disqualified by reason of an old criminal conviction in the Children's Court.¹⁰⁸

Under s 133 of the *Electoral Act*, the validity of an election or return may be disputed by a petition to the Court of Disputed Returns but not otherwise. This

¹⁰⁷ Victoria, *Parliamentary Debates*, Legislative Assembly, 30 November 1972, 2732-56, 2774-86; Victoria, *Parliamentary Debates*, Legislative Assembly, 15 April 1986, 1081-111; Victoria, *Parliamentary Debates*, Legislative Council, 30 March 1993, 77-91; Victoria, *Parliamentary Debates*, Legislative Assembly, 15 October 1997, 166-88.

¹⁰⁸ *Re Walsh* [1971] VR 33.

provision would prevent members of the public challenging an election by petition to Parliament (formerly the standard procedure). But such provisions do not extinguish the power of the relevant House to deal with qualification questions.¹⁰⁹

Certainly, the exclusive jurisdiction provision does not mean that a member's election is immune from challenge once the period for lodging an election petition has expired. Under the corresponding Commonwealth provisions, which are very similar, a later parliamentary reference to the Court of Disputed Returns can raise the question of whether a member was duly elected.¹¹⁰ It is less clear whether the legislation prevents the House dealing with the question while a petition to the Court of Disputed Returns is possible or under way. Old authority suggesting that it does so depends largely on the special position of the New South Wales Parliament, which lacks an express grant of the privileges of the House of Commons (including the privilege of controlling its membership).¹¹¹ The Houses of the Victorian Parliament are more likely to retain their powers, with the result that s 133 limits the capacity of members of the public to dispute an election but does not restrict the House in which the member sits. In practice, the House is more likely to leave the matter to the court if proceedings begin there, except, perhaps, where the House considers a resolution to excuse the member under s 61A of the *Constitution Act* after an elector has disputed an election.

VII GENERAL JURISDICTION OF THE SUPREME COURT

Do the courts have jurisdiction to rule on the qualifications of members independently of the procedures under the *Electoral Act* for petitions and references to the Court of Disputed Returns? This question takes on particular importance if a member's qualifications are brought into question outside the period during which an individual can petition the Court of Disputed Returns. If a petition by an individual to the Court of Disputed Returns is not possible under these provisions, is the only remaining possibility for court action a reference to the court by the House concerned?

The ALP opposition encountered these problems in 1997 when it challenged the qualification of a member of the Legislative Council, Bruce Atkinson. In *Ellis v Atkinson*, an unsuccessful ALP candidate who had stood against Atkinson joined other plaintiffs in applying for a declaration that his seat was vacant.¹¹² The grounds were that Atkinson's work as a consultant for local councils had disqualified him under s 55 of the *Constitution Act*.

¹⁰⁹ See *Re Wood* (1988) 167 CLR 145, 158; Butterworths, *Halsbury's Laws of Australia*, vol 5 (at 10 July 2005) 90 Constitutional Law, '2 State Parliaments' [90-695].

¹¹⁰ *Re Wood* (1988) 167 CLR 145, 160-2.

¹¹¹ *Martin v Nicholson* (1850) 1 Legge 618, 627-33. Cf Enid Campbell, *Parliamentary Privilege in Australia* (1966) 97-8.

¹¹² *Ellis v Atkinson* [1998] 3 VR 175. See generally Enid Campbell, 'Ellis v Atkinson' (1997) 21 *Melbourne University Law Review* 693.

The action failed owing to lack of jurisdiction. Because the Legislative Council, like the Legislative Assembly, has the privileges of the House of Commons as they stood in 1855, it has jurisdiction to decide questions concerning members' qualifications. Justice Vincent implied that the Supreme Court shares that jurisdiction only where an Act of Parliament specifically gives it the power. Several statutory provisions do this, but none of them applied to the action brought by Sharon Ellis. Nor did s 85(1) of the *Constitution Act*, which gives the Court 'unlimited jurisdiction', make up this deficiency. That expression merely encapsulated the various heads of jurisdiction listed in more detail in s 85's predecessors, and did not create a new power to deal with claims such as this. Justice Vincent concluded that the Court did not have jurisdiction to hear the case.¹¹³

VIII CRIMINAL PROCEEDINGS

Independently of proceedings in the Court of Disputed Returns, disqualified members expose themselves to criminal prosecution under provisions in the *Constitution Act*. Such a prosecution is another possible way to bring a qualification question to court, since the member's entitlement to sit will be a critical question in the case, as it has been in actions brought under the related 'common informer' provisions in other jurisdictions.¹¹⁴

Under s 45(2) of the *Constitution Act*, if a person who is not qualified is elected and returned and sits or votes in either House, that person is guilty of an offence against the Act carrying a penalty of A\$500. This provision applies to disqualifications that exist at the time of election, but not to any that arise later.

Section 58 of the *Constitution Act* makes it an offence for any serving member of Parliament to accept an office or place of profit under the Crown, other than office as a minister. Under the 'reverse disqualification' provision, s 61, a person is not disqualified from being a *candidate* or being *elected or returned* as a member by reason only of holding an office or place of profit, but the exemption does not apply to members who accept offices of profit after election. Section 58 thus applies to members after election without interference from s 61.

More generally, under s 59 of the *Constitution Act*, anyone who 'wilfully contravenes or fails to comply' with ss 49-58 is also guilty of an offence against the Act, and incurs a A\$500 penalty. What counts as a contravention or failure to comply with these provisions? They contain several express prohibitions that a member might contravene:

¹¹³ *Ibid* 185-6.

¹¹⁴ *Miles v McIlwraith* (1883) 8 App Cas 120; *Proudfoot v Proctor* (1887) 8 LR (NSW) 459; *Forbes v Samuel* [1913] 3 KB 706; *Bird v Samuel* (1914) 30 TLR 323; *Hobler v Jones* [1959] Qd R 609. Cf *Stott v Parker* [1939] SASR 98 (not a common informer action).

- (i) Public servants and holders of offices of profit shall not sit or vote in either House: s 48.
- (ii) Ministers must not hold office for longer than three months without becoming members of Parliament: s 51.
- (iii) Government contractors shall not sit or vote in either House: s 54.

Parliamentary privilege should not prevent prosecutions under these provisions, since persons disqualified from sitting would not be entitled to immunity for their actions in Parliament.

Contravention by itself is not enough to attract criminal liability under s 59; it must be 'wilful', or done with knowledge and intention.¹¹⁵ In this context, knowledge at least of the facts giving rise to the disqualification appears to be essential. For instance, cases of inadvertent breach of the provisions concerning contractors (which occur from time to time) are most likely beyond the scope of the offence. Even apart from the use of the word 'wilful', the presumption of a requirement of intention in criminal offences may take inadvertent breaches of the disqualification provisions beyond the reach of the criminal sanctions.

The offences created by s 45, 58 and 59 are summary offences, with the result that any person can commence a prosecution by laying a charge in the Magistrates' Court.¹¹⁶ The significance of the possibility of a private prosecution is that it leaves open an avenue, albeit an unlikely one, for court consideration of a member's qualification to sit in cases where the Court of Disputed Returns does not have jurisdiction. However, the criminal standard of proof will apply (this is not the case in Court of Disputed Returns proceedings). The element of intention required explicitly by s 59, and perhaps implicitly by the other sections, may lead to an acquittal even where the Court of Disputed Returns would have found the member disqualified, if it had had jurisdiction.

Sections 45, 58 and 59 replaced earlier, so-called 'common informer' provisions, which did not create criminal offences, but allowed any member of the public to recover a penalty, plus costs, from anyone who infringed them.¹¹⁷ In one of its few substantive changes to the law, the consolidating *Constitution Act* replaced the common informer provisions with the current criminal offences, a fact that attracted attention in Parliament at the time.¹¹⁸ The common informer provisions had the fault of giving a windfall to any member of the public who successfully sued a disqualified MP. This prompted calls for reform, and appears to have made

¹¹⁵ See *Iannella v French* (1968) 119 CLR 84, 95 (Barwick CJ), 99 (McTiernan J), 109 (Windeyer J).

¹¹⁶ See *Sentencing Act 1991* (Vic) s 112; Richard G Fox, *Victorian Criminal Procedure: State and Federal Law* (12th ed, 2005) 53-4.

¹¹⁷ *Constitution Act Amendment Act 1958* (Vic), ss 27(1), 31, 74(2). See also *Australian Constitution* s 46; *Common Informers (Parliamentary Disqualifications) Act 1975* (Cth).

¹¹⁸ Victoria, *Parliamentary Debates*, Legislative Assembly, 1 May 1975, 5833.

courts reluctant to find in favour of common informers.¹¹⁹ But the provisions had the countervailing merit of allowing any individual to challenge a member's qualification to sit, even after the election period. Where a petition to the Court of Disputed Returns is not possible, the ability of anyone other than the House concerned to take such a question to court is now less clear.

IX CONFLICT BETWEEN HOUSE AND COURT

What if a court and a House of Parliament reach different conclusions about a member's qualification to sit? The situation is unlikely to arise, but, if it did, the interaction of statutory provisions and parliamentary privilege is likely to determine the outcome.

Under s 129 of the *Electoral Act*, a decision of the Court of Disputed Returns on a petition or a reference is final. This provision operates most naturally to prevent appeals by the parties, but may also prevent the House in question subsequently reaching a different conclusion. The same result may follow from other provisions that set out the effects of a decision by the court; they are likely to prevent inconsistent action by Parliament in the situations to which they apply.¹²⁰

In other cases – that is, in prosecutions under the criminal provisions of the *Constitution Act* – a parliamentary resolution for or against the member is unlikely to bind the court, which could impose a fine based on its own judgement of the qualification issue. In *Bradlaugh v Gossett*, Stephen J commented on what the court would do if such a case arose:

We should have said that, for the purpose of determining on a right to be exercised within the House itself, and in particular the right of sitting and voting, the House and the House only could interpret the statute; but that, as regarded rights to be exercised out of and independently of the House, such as the right of suing for a penalty for having sat and voted, the statute must be interpreted by this Court independently of the House.¹²¹

If, on the other hand, the House resolved that the member was disqualified and the seat was vacant, the court is unlikely to prevent the presiding officer from issuing a writ for a new election, regardless of the judges' opinion about the member's qualification.¹²² As explained below, if the House resolved to excuse the member under s 61A of the *Constitution Act*, the resolution would remove any liability imposed by the *Constitution Act*, although it could not reverse the effect of a verdict if the court had already imposed a penalty.

¹¹⁹ Submission by J C Finemore and J Lewis, above n 9, 7; Select Committee on Offices or Places of Profit under the Crown, above n 3, xxxi; Gareth Evans, 'Pecuniary Interests of Members of Parliament under the Australian Constitution' (1975) 49 *Australian Law Journal* 464, 472-3.

¹²⁰ *Electoral Act 2002* (Vic) ss 132, 146. See also Campbell, *Parliamentary Privilege in Australia*, above n 111, 106-8.

¹²¹ *Bradlaugh v Gossett* (1884) 12 QBD 271, 282.

¹²² Campbell, *Parliamentary Privilege in Australia*, above n 111, 108.

X APPEALS

The *Electoral Act* attempts to prevent all appeals against decisions of the Court of Disputed Returns. Section 129 of the Act provides that decisions and orders of the Court are final and 'cannot be appealed against or otherwise called in question'. This provision reduces the risk that protracted litigation could delay the results of an election.

This provision is clearly effective to prevent appeals from the Court of Disputed Returns to the Court of Appeal, but it runs into difficulty in preventing appeals to the High Court. The difficulty is that s 73 of the *Australian Constitution* guarantees the jurisdiction of the High Court to hear appeals from all decisions of State Supreme Courts. If a decision of the Court of Disputed Returns is a decision of the Supreme Court, an appeal to the High Court must be available under s 73.

For the present, High Court authority supports the proposition that a decision of the Supreme Court sitting as the Court of Disputed Returns is not a decision of the Supreme Court for the purposes of s 73, with the result that the *Electoral Act* can successfully prevent appeals. This was the outcome of *Holmes v Angwin*, in which an unsuccessful party in disputed election proceedings in Western Australia attempted to appeal to the High Court.¹²³

The High Court confirmed *Holmes v Angwin* in *Webb v Hanlon*¹²⁴ (in which it applied the decision to an Elections Tribunal constituted by a single judge of the Queensland Supreme Court). More recent comments from the High Court, though, have raised doubts about whether the decision would be followed in future.

In *Sue v Hill*, the High Court considered, not the jurisdiction of a State Supreme Court in cases of disputed returns, or appeals from such a decision, but the jurisdiction of the High Court itself in cases arising from federal elections.¹²⁵ The context of the judgments was therefore different from *Holmes v Angwin*, and concerned the separation of federal judicial power under Chapter III of the *Australian Constitution*. Chief Justice Gleeson, Gummow and Hayne JJ quoted Barton J's opinion, in *Holmes v Angwin*, that jurisdiction over election petitions was purely incidental to legislative power, and noted that it had 'not gone without comment in this Court'.¹²⁶ They held that such jurisdiction was not necessarily outside the exercise of Commonwealth judicial power.¹²⁷ Justice Gaudron held that the determination of a candidate's right to sit or vote in Parliament involved, prima facie, the exercise of judicial power, unless it was made by a House of Parliament or someone acting as its delegate.¹²⁸

¹²³ *Holmes v Angwin* (1906) 4 CLR 297.

¹²⁴ (1939) 61 CLR 313, 319 (Latham CJ), 323 (Starke J), 327-8 (Dixon J), 330 (Evatt J), 334-5 (McTiernan J).

¹²⁵ *Sue v Hill* (1999) 199 CLR 462.

¹²⁶ *Ibid* 483.

¹²⁷ *Ibid* 483-4.

¹²⁸ *Ibid* 517.

The Supreme Court of South Australia has held that the jurisdiction of the Court of Disputed Returns is exercised by the Supreme Court, not by a judge as *persona designata*.¹²⁹ In the course of rejecting a challenge to the jurisdiction of the Court of Disputed Returns based on the reasoning in *Kable v Director of Public Prosecutions (NSW)*,¹³⁰ Bleby J concluded: ‘the exercise of this Court’s jurisdiction still undoubtedly requires the Court to act judicially and constitutes the exercise of judicial functions which cannot be repugnant to or incompatible or inconsistent with the conferral of or exercise by this Court of the judicial power of the Commonwealth’.¹³¹ Justice Williams supported the reasoning in *Holmes v Angwin*, and the other members of the court did not deal with the question of appeals under s 73.¹³²

The more closely the functions of the Court of Disputed Returns are equated with the ordinary jurisdiction of the Supreme Court, the weaker the reasons for denying appeals under s 73 appear. For the present, however, *Holmes v Angwin* remains good law, and provisions barring appeals from the Court of Disputed Returns remain effective.¹³³ If future decisions hold that s 73 does provide a right of appeal to the High Court, by overriding State limitation provisions, the Commonwealth Parliament could bar appeals by legislating under s 73 itself to make appeals in disputed election cases an exception to the High Court’s jurisdiction.

XI EXCUSING BREACHES

Parliament has the power to remove a member’s disqualification by special legislation, but this extreme remedy will be rare. In 1976, doubts had arisen about the qualification of seven MPs from both Houses and both sides of politics. All faced a greater or lesser risk of losing their seats, after holding State government appointments in the public service and on Wages Boards, the Pharmacy Board, the Consumer Affairs Council, and the Albury-Wodonga Consultative Council. All had resigned from their government positions and refused or repaid any fees they were entitled to.¹³⁴ The *Constitution (Validation of Elections) Act 1976* (Vic) deemed each of them not to have been incapable of being elected or of sitting or voting as a member, and relieved them of any penal consequences they might otherwise have suffered.

¹²⁹ *Featherston v Tully* (2002) 83 SASR 302, 306 (Williams J), 321 (Bleby J; Mullighan J concurring). See also *Hyams v Victorian Electoral Commissioner and Buchanan* [2003] VSC 156 [1].

¹³⁰ (1996) 189 CLR 51.

¹³¹ *Featherston v Tully* (2002) 83 SASR 302, 345 (Bleby J; Mullighan J concurring).

¹³² *Ibid* 306-9.

¹³³ See generally Legal, Constitutional and Administrative Review Committee, Parliament of Queensland, *Issues of Electoral Reform Raised in the Mansfield Decision: Regulating How-to-Vote Cards and Providing for Appeals from the Court of Disputed Returns* (1999) 38-44. Cf *Skyring v Electoral Commission of Queensland* [2002] 1 Qd R 442, in which Chesterman J distinguished *Holmes v Angwin* and held that Part 8 of the *Electoral Act 1992* (Qld), which provided that the Supreme Court was the Court of Disputed Returns, conferred jurisdiction on the Supreme Court for the purposes of the *Vexatious Litigants Act 1981* (Qld).

¹³⁴ Victoria, *Parliamentary Debates*, Legislative Assembly, 24 November 1976, 4762 (Robert MacLellan).

As a result of these problems, the government introduced legislation to set up a permanent procedure for excusing minor breaches of the qualification provisions, now found in s 61A of the *Constitution Act*. It allows the relevant House to deem by resolution that, for the purposes of the *Constitution Act*, the 'act matter or thing' that may have caused the member's disqualification never occurred. The House may pass such a resolution if it is satisfied that the 'act matter or thing':

- (i) has ceased to have effect
- (ii) was in all the circumstances of a trifling nature, and
- (iii) occurred or arose without the actual knowledge or consent of the person or was accidental or due to inadvertence.

In Britain, the House of Commons may likewise order that a disqualification be disregarded, where it appears to the House that the grounds of disqualification have been removed and that it is 'otherwise proper so to do'.¹³⁵

The Legislative Assembly has used this power twice. In 1984, it excused Valerie Callister, ALP member for Morwell, from the consequences of her membership of the Environment Council, and in 1994 it passed a similar resolution to excuse the Premier, Jeff Kennett, from a disqualification that might have arisen from work of his family's advertising agency involving government authorities.¹³⁶ In the case of Ms Callister, the Solicitor-General advised that her seat had become vacant, but the Speaker, at the Premier's request, deferred the issue of a writ for a by-election until the Assembly had dealt with the case. Section 61A(2) allows for this delay. In the case of Mr Kennett, the government obtained advice from three senior counsel that he had not breached the *Constitution Act* and that his seat was not vacant; the ALP opposition obtained contrary advice. The opposition did not vote against the 1984 resolution, but it strongly opposed the 1994 resolution.

It is possible that a petitioner to the Court of Disputed Returns will have challenged the member's qualification by the time the House passes a resolution under s 61A(1). The effect of the resolution is that the grounds of disqualification disappear, thus determining the outcome of the court proceedings, so far as those grounds are concerned. The resolution will likewise remove the grounds for a prosecution of the member under the *Constitution Act*. But the petition may have cited other grounds, not covered by the resolution. These remain unaffected for the purposes of the court proceedings.

It is doubtful whether the House could pass a resolution after the court has handed down a decision. As mentioned above, the *Electoral Act* prescribes the effects of a decision by the Court of Disputed Returns, and these effects would be inconsistent with a different decision by the House. In the unlikely event that the court makes its decision during a parliamentary recess (unlikely because it has

¹³⁵ *House of Commons Disqualification Act 1975* (UK) c 24, s 6(2).

¹³⁶ Victoria, *Parliamentary Debates*, Legislative Assembly, 4 September 1984, 1-26; 9 March 1994, 105-89.

jurisdiction only immediately after an election or on a reference from the House), s 61A(2) may allow a writ for a new election to be deferred until the House can consider a resolution to excuse the member.

The Court of Disputed Returns can absolve a member from a potential breach in the same circumstances, when determining a reference from the House about a qualification or vacancy.¹³⁷

XII JUDICIAL REVIEW

The 1994 proceedings mentioned above showed how highly-charged a disqualification question can become. It may involve the seat of the Premier or a party leader, or (if the numbers are finely balanced) it may affect control of the House where it arises. A thwarted opposition might want to turn to the courts to challenge a resolution passed under s 61A of the *Constitution Act* to support a government member.

If standing orders alone set out the preconditions for a resolution excusing a member, the courts could not intervene, because of the House's exclusive jurisdiction over its internal proceedings.¹³⁸ Is the outcome different because legislation sets out the requirements for a resolution under s 61A? The prerequisites prescribed by legislation are not merely internal, and the complete absence of judicial review would compound the problems that may arise from party control of Parliament's jurisdiction in qualification questions. Judicial review would provide a check on abuse of the power to excuse members.

Despite these considerations, a court challenge to a s 61A resolution is unlikely to prevail against the immunity given to parliamentary proceedings. Little direct authority provides guidance, but it is interesting that in 1994 three senior counsel (all of whom later became judges) gave a joint opinion that the House's satisfaction as to the matters required by s 61A was 'clearly unjudicial'.¹³⁹

In *Bradlaugh v Gossett*, the Queen's Bench Division decided that it could not intervene if the House of Commons passed a resolution in breach of an Act of Parliament. Justice Stephen said, 'I think that the House of Commons is not subject to the control of Her Majesty's Courts in its administration of that part of the statute-law which has relation to its own internal proceedings'.¹⁴⁰ This dictum must be qualified in the case of Australian parliaments by the courts' willingness to enforce constitutional requirements for the passage of legislation, but it retains considerable force as a description of a privilege of the House of Commons applicable to both Houses of the Victorian Parliament.

¹³⁷ *Electoral Act 2002* (Vic) s 146(3).

¹³⁸ See Enid Campbell, *Parliamentary Privilege* (2003) 177-8.

¹³⁹ Stephen P Charles, John S Winneke and Alex Chernov, 'The Honourable the Premier and The Constitution Act 1975: Joint Opinion as to Section 61A, Constitution Act', 9 March 1994, 4.

¹⁴⁰ *Bradlaugh v Gossett* (1884) 12 QBD 271, 278. See also May, above n 103, 102-3.

Even if the Court had jurisdiction to review the validity of the resolution, it would be unlikely to overturn the House's judgement that the prerequisites have been met. Section 61A says that the resolution may be passed when the House concerned is satisfied of the preconditions. It is only where the power to pass the resolution is clearly being abused, if at all, that the Court would intervene. If there are grounds on which the House could reasonably have concluded that the preconditions were met, that is likely to be enough to satisfy the Court, if it is prepared to review the resolution at all.

In summary, the courts can deal with qualification questions only in the following cases:

- (i) through an individual petition immediately after an election, to the Supreme Court sitting as the Court of Disputed Returns;
- (ii) under a reference by the relevant House to the Supreme Court sitting as the Court of Disputed Returns; or
- (iii) in prosecutions for summary offences under the Constitution Act.

Where none of the avenues for court challenge are open, only the House in which the member sits has authority to deal with the case. It can excuse the member by passing a resolution under s 61A of the *Constitution Act*, refer the matter to the Court of Disputed Returns, resolve that the seat is vacant (with the result that the Speaker of the Legislative Assembly or the President of the Legislative Council issues a writ for a by-election), or choose to take no action.

XIII CONCLUSION

The disqualification provisions in the *Constitution Act* present a classic case for law reform. They are obscure and serve their purposes badly. They can cause the disqualification of a member without good reason, and conversely (through the technicalities of the contract disqualification, for instance), they can allow members to remain in Parliament when the purposes of the provisions suggest they should be disqualified.

Responsible government and the modern party system have greatly changed the circumstances in which the disqualification provisions once operated, but at least some of their original rationale remains intact. Most importantly, they guard against the rare case in which a government might try to buy a member's vote with the offer of a contract or a paid position. Party discipline has almost completely removed uncommitted members since the 1850s, but the vote of an independent or a waverer could still be crucial in a finely-balanced Parliament. Other legal sanctions might apply to such a deal, but automatic disqualification on acceptance of a government position is an extra safeguard.

Disqualification does not, of course, stop a government giving an independent or an opposition member a job in order to bring about a resignation at a propitious time for a by-election. In 1992 the New South Wales Independent Commission Against Corruption investigated claims that the Premier (Nicholas Greiner) and the Minister for the Environment had arranged for the appointment of an independent MP to a senior government post in such circumstances. Premier and Minister both resigned, but the Court of Appeal later overturned the Commission's finding that they had engaged in corrupt conduct.¹⁴¹

The disqualification provisions apply to all paid government offices, large or small, unless they are exempted by the *Constitution Act* itself or by other legislation. The Act in no way singles out corrupt or questionable appointments, but disqualifies all office-holders, no matter what the circumstances, except where the statutory exemptions apply. Because of this, the operation of the corresponding British provisions was modified and restricted in 1957.¹⁴² Western Australia adopted reforms on roughly similar lines in 1984, incorporating a schedule of officers who were automatically disqualified and a wider class of positions subject to reverse disqualification, or forced resignation from the office of profit rather than from Parliament.¹⁴³ The disqualifications thus became more specific and easier to modify, since the schedules can be changed without a new Act of Parliament. Ease of amendment could, however, become a disadvantage if the government was willing to manipulate the system.

The *Parliament of Queensland Act 2001* (Qld) resolves conflict between paid State employment and membership of Parliament by ending the employment rather than the membership of Parliament. Holders of listed government appointments must resign on becoming candidates, while other holders of paid State appointments must take leave during the election period, and lose their government appointments if elected.¹⁴⁴ Holders of other paid public appointments (in jurisdictions other than Queensland), members of other legislatures and local government councillors cannot take seats in the Queensland Parliament until they cease holding their other appointments.¹⁴⁵

The disqualification of contractors is harder to justify. 'The existing law is archaic and full of anomalies', the British enquiry of 1956 concluded, and these words apply even more strongly now to the Victorian provisions. A member involved in large government contracts that raise serious questions of conflict of interest may escape unscathed (at least so far as the disqualification is concerned) because the contracts are made through a company with more than 20 shareholders, while another member signing a much less valuable and entirely

¹⁴¹ New South Wales Independent Commission Against Corruption, *Report on Investigation into the Metherell Resignation and Appointment* (1992); *Greiner v Independent Commission Against Corruption* (1992) 28 NSWLR 125.

¹⁴² *House of Commons Disqualification Act 1957*, 5 & 6 Eliz 2, c 20.

¹⁴³ *Acts Amendment and Repeal (Disqualification for Parliament) Act 1984* (WA). See now *Constitution Acts Amendment Act 1899* (WA) ss 33-8.

¹⁴⁴ *Parliament of Queensland Act 2001* (Qld) ss 65-7.

¹⁴⁵ *Parliament of Queensland Act 2001* (Qld) ss 68, 72(1)(f).

innocent contract may be disqualified unless the House concerned chooses to excuse the default.

The concentration on contracts puts undue weight on conclusions about formation and parties, as the reported cases show. Outcomes may be determined by considerations that seem to have little or nothing to do with the principles of independence and conflict of interest that underlie the disqualification provisions. The disqualification of contractors was repealed altogether in Britain in 1957, and it no longer applies in South Australia and Western Australia.¹⁴⁶ In Queensland, members who 'transact business' with entities of the State lose the benefit of the transactions but keep their seats, unless the House resolves otherwise.¹⁴⁷

For all its clumsiness and shortcomings, the disqualification of contractors does throw light on MPs' business dealings with government. It remains an obvious target for reform, but it would be risky to delete it without introducing other, more effective anti-corruption mechanisms. Disqualification is (where enforced) a highly effective sanction, even if it does not always conform well to its underlying purposes.

When a petition to the Court of Disputed Returns is not possible, each House has the power effectively to silence questions about a member's right to sit. In many cases, the fate of a member who may have been disqualified will be in the hands of the majority in the House concerned. They may refuse to take action even if the grounds for disqualification are clear. Limitations on justiciability may hand the dominant party control over the qualifications, not only of its own members, but also of its opponents. Recent history provides several examples of qualification questions decided by a vote on party lines.

Justice Vincent concluded his judgment in *Ellis v Atkinson* by commenting on this undesirable situation:

[I]t is, to put it mildly, unfortunate that the entitlement of a member of the Legislature of this State to sit and vote on matters of great public importance cannot be determined through some independent and impartial process, and may ultimately depend upon the balance of political power within the House itself.¹⁴⁸

Over twenty years earlier, the Solicitor-General, too, asked whether there should not be 'some provision to enable a reference to the Court in cases in which there appears to be a genuine question to be resolved and which the House has refused to refer'.¹⁴⁹

¹⁴⁶ *House of Commons Disqualification Act 1957*, 5 & 6 Eliz 2 c 20, s 9; *Acts Amendment and Repeal (Disqualification for Parliament) Act 1984* (WA) s 10, repealing *Constitution Acts Amendment Act/Statutes Amendment (Constitution and Members Register of Interests) Act*

¹⁴⁷ *Parliament of Queensland Act 2001* (Qld) ss 71, 72(1)(h).

¹⁴⁸ *Ellis vs Atkinson* [1998] 3 VR 175, 186.

¹⁴⁹ Submission by BL Murray, Solicitor-General, in Joint Select Committee on Qualifications, above n 9, 5.

In Britain, opportunities to raise qualification questions outside Parliament are less restricted. Under s 7 of the *House of Commons Disqualification Act 1975* (UK) c 24, anyone claiming that an MP is disqualified under the Act can take the case to the Privy Council. Applications are not limited to the period immediately following an election, but the procedure applies only to disqualifications imposed by the Act itself, and not to those imposed by other legislation.¹⁵⁰ Under s 18(1) of the *Scotland Act 1998* (UK) c 46, any person who claims that a person purporting to be a member of the Scottish Parliament is disqualified can apply to the Court of Session for a declarator (a declaration) to that effect.

The capricious nature of the Victorian disqualification provisions may make members less willing to open themselves to challenge by adopting a similar procedure for raising such questions. But the consequence is a dangerous potential for disqualified members to continue sitting at the will of the dominant party. The best solution would be rationalisation of the disqualification provisions, coupled with wider opportunities for qualifications to be tested in court.

¹⁵⁰ May, above n 103, 59-60.