

# PUBLIC DUTY AND PRIVATE INTEREST

Report of the Committee of Inquiry

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# Public duty and private interest

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Report of the Committee of Inquiry  
established by the Prime Minister  
on 15 February 1978

JULY 1979

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COMMITTEE OF INQUIRY CONCERNING PUBLIC DUTY  
AND PRIVATE INTEREST

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July 1979

Dear Prime Minister,

We have the honour of presenting the Report of the Committee of Inquiry concerning Public Duty and Private Interest established following the letters which you addressed to us on 23 February 1978.

Yours sincerely,

(N.H. Bowen)  
Chairman

(C.T. Looker)

(E.T. Cain)

The Rt Hon. Malcolm Fraser, C.H., M.P.,  
Prime Minister,  
Parliament House,  
CANBERRA. A.C.T. 2600



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# Foreword

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The Committee wishes to place on record its appreciation of the assistance it has received from Mr R. J. Linford, Secretary to the Committee, Mr W. T. Chapman, his administrative assistant, Mr P. D. Luck and Ms Ann Pickering. Mr Linford and Mr Luck were seconded from the Department of the Prime Minister and Cabinet, Mr Chapman from the Department of Administrative Services and Ms Pickering from the Public Service Board. The Committee has to thank them not only for the efficient organisation of its work but also for their efforts in research and in the preparation of drafts of the Report.

The Committee is grateful too for the assistance given to it by Dr C. Hughes and Dr R. Cranston, as consultants. They were kindly released by the Australian National University and worked closely with the Committee during 1978, being involved in research and in the preparation of draft sections of the Report. The Committee also wishes to express its thanks to Mr H. D. Brass, who gave advice to the Committee on matters concerning the media.

The Committee has been fortunate in having available the services of a highly competent and enthusiastic secretarial staff to whom it is greatly indebted for the assistance willingly given.

It only remains to say that the views expressed in the Report are entirely those of the Committee and are not to be taken as reflecting the views of those who have assisted the Committee in its work.



# 1. The terms of reference for the Inquiry and the Committee's approach to its task

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**1.1** The Government's intention to establish the Committee of Inquiry was announced in a press statement issued by the Prime Minister on 16 December 1977. The statement mentioned the difficult position in which a Prime Minister finds himself when he is called upon to pass judgment on colleagues with whom he has worked closely, particularly as the Prime Minister must act as a judge and jury when allegations of impropriety are raised. It went on to say that a far more satisfactory procedure must be found to resolve these situations which can have such an impact on an individual's career and on the life of his family.

**1.2** Continuing, the Prime Minister said:

A whole new approach is required. I do not regard the Report of the Parliamentary Committee on Pecuniary Interests as putting forward adequate solutions.<sup>1</sup> In my view, a statement of pecuniary interests to the Parliament does not provide an adequate procedure.

Because of that view, I intend to appoint a judge or Queen's Counsel, to be assisted by a businessman and an accountant, who will need to be familiar with modern commercial practice and procedures, to make recommendations to the Government on what interests should be disclosed.

They will also be asked to recommend what procedures should be followed to determine whether there has been any breach of the high standards which are properly required of those in public office. The Committee will also be asked to recommend the method which should be used to determine whether there has been a breach.

They will be asked to examine whether or not a register under judicial supervision should be instituted and maintained in such a way that, in the event of allegations of impropriety or on the judge's own initiative, it will allow for expeditious and proper judicial examination of such allegations.

**1.3** Formation of the Committee of Inquiry was announced by the Prime Minister in a second press release, on 15 February 1978.

**1.4** In this announcement, the Prime Minister stated that the membership of the Committee would comprise the Chief Judge of the Federal Court of Australia, the Hon. Sir Nigel Bowen, K.B.E., Sir Cecil Looker, and Sir Edward Cain, C.B.E. The Prime Minister said that the Inquiry had been asked to consider whether principles and measures can be drawn up to promote the avoidance and, if necessary, the resolution of conflict of interest situations. It would have access to a large amount of information already available on policies, practices and attitudes in Australia and overseas.

**1.5** As detailed by the Prime Minister, the terms of reference for the Inquiry were:

1. To recommend whether a statement of principles can be drawn up on the nature of private interests, pecuniary or otherwise, which could conflict with the public duty of any or all persons holding positions of public trust in relation to the Commonwealth.

2. To recommend whether principles can be defined which would promote the avoidance and if necessary the resolution of any conflicts of interest which the Inquiry may, under paragraph (1) above, find to be possible.
3. In the event of a finding under paragraph (2) above that principles can be defined, to recommend what those principles should be.
4. Without limiting the scope of paragraph (3) above, to recommend whether or not a register under judicial or other supervision should be maintained so that, in the event of allegations of impropriety, the allegation may be open to judicial investigation and report.
5. For the purposes of paragraph (1) above, 'persons holding positions of public trust in relation to the Commonwealth' to include the following:
  - (a) Ministers;
  - (b) Senators and Members of the House of Representatives;
  - (c) Staff of (a) and (b);
  - (d) Members of the Australian Public Service; and
  - (e) Such other persons or classes of persons which in the opinion of the Committee ought to be included.

## Expansion of the terms of reference

**1.6** Subsequently, in different ways, these terms of reference were given greater precision and, to a degree, expanded by the Prime Minister.

**1.7** In the House of Representatives on 7 March 1978, dealing with the resignation of a senior officer of the Department of Social Security to take up employment with Facom Australia Ltd, the Prime Minister referred to the practice under which the British Government requires that, save with express permission, no senior public servant may take up certain positions within two years of leaving the British Civil Service. He said that the Government had decided that the question of post-separation employment should be one of the matters expressly referred to the inquiry on conflicts between public duty and private interests.<sup>2</sup> Subsequently in a letter dated 14 March 1978 to the Chairman of the Committee, he confirmed the Government's wish to have the question examined by the Committee.

**1.8** On 8 March 1978, the Prime Minister wrote to the Chairman of the Committee on the interpretation of item (e) of paragraph 5 of the terms of reference, relating to 'Such other persons or classes of persons which in the opinion of the Committee ought to be included'. In his letter, the Prime Minister stated:

The Government envisaged that, in dealing with part (e) of that paragraph, the Inquiry might appropriately consider and report on the case for inclusion within its recommendations of each of the classes of persons who have been mentioned in recent literature and discussion on the subject. In particular, we imagined that you might wish to look at the case for including within your Inquiry each of the classes of persons dealt with in the Report of the Joint Committee on Pecuniary Interests of Members of Parliament.

The question whether to make specific recommendations relating to each of these classes is, of course, a matter for your judgment. But we felt that the question of inclusion of the various classes of persons would warrant consideration and report, and therefore framed the terms of reference accordingly.

As the only classes of persons considered by the Joint Parliamentary Committee on Pecuniary Interests of Members of Parliament and not specifically mentioned

in the terms of reference for the Inquiry were statutory officeholders and members of statutory bodies and their staffs, and directors, executives, editors and journalists of media organisations, the Committee interpreted the Prime Minister's letter as requiring it to consider the desirability of including these within the scope of its investigations.

**1.9** In an electorate talk on the integrity and honesty of Government on 12 March 1978, the Prime Minister again referred to the action taken to call for fresh tenders in the computer contract involving Facom Australia Ltd. He explained that 'The Government, in this case, was not convinced that justice had been done. We were sure that justice had not been seen to be done. Accordingly, we took the only proper course—the course we would take again in the same circumstances—we recalled tenders.' He then added: 'At the same time, we referred this whole question of Government employees working in the tendering process to Sir Nigel Bowen's inquiry into public duty and private interest.'

**1.10** Further elaboration of the Government's views of the scope of the terms of reference for the Inquiry appeared in the response given by the Prime Minister on 5 April 1978, to a Parliamentary Question in the House of Representatives, when he indicated that the situation of persons such as one who was a director of a foreign-owned company both while he was a Minister of the Crown and while he was an Ambassador would be considered by the Inquiry.<sup>3</sup>

**1.11** The Prime Minister's expectations of the Committee in the matter of post-separation employment of public servants were detailed further in his reply to another Parliamentary Question on 2 May 1978, when he said that the issues which formed the basis of Recommendation 24 of the Committee of Inquiry into Government Procurement Policy, under Sir Walter Scott, in which that Committee proposed an investigation into acceptance by government officers of employment with firms which have contractual relations with the Government, would be examined by the present Committee of Inquiry.<sup>4</sup>

### **Preliminary consideration of the persons or classes of persons to be covered by the Inquiry**

**1.12** When framing an advertisement in the press inviting submissions from the public on the matters covered by the terms of reference for the Inquiry, the Committee gave preliminary attention to the persons or classes of persons to be covered by item (e) of paragraph 5 of the terms of reference.

**1.13** It was decided that, in the advertisement, the Committee should state its position publicly that, under item (e), it would need to consider whether all or any of the following persons or classes of persons ought to be covered by the Inquiry:

- Members of the Legislative Assembly of the Northern Territory;
- Members of the Legislative Assembly of the Australian Capital Territory;
- Members and staff of statutory bodies established by the Commonwealth;
- Members of the Defence Services;
- Directors, executives, editors and journalists of media organisations.

This decision was taken on the basis that, notwithstanding what appeared in the advertisement, other categories of persons considered to hold positions of trust in relation to the Commonwealth might be added to the list if this was thought desirable. Advertisements were placed in the metropolitan and provincial newspapers during the latter part of April 1978.

## Evidence presented to the Inquiry

**1.14** The evidence presented to the Inquiry came from a number of sources. Comparatively few written submissions were received as a result of the April 1978 advertisements. The majority of written submissions were received in response to letters of invitation to present views extended to a wide range of persons who the Committee considered might be in a position to assist with comment on the matters covered by the terms of reference. Apart from written submissions, evidence was received in oral form from those persons who appeared as witnesses before the Committee.

**1.15** The various classes of persons or organisations who contributed to the work of the Committee by presenting evidence either in writing or orally may be summarised as follows:

Members of the Commonwealth Parliament	
Ministers . . . . .	7
Other Senators and Members of House of Representatives . . . . .	26
Staff of Commonwealth Ministers . . . . .	2
Permanent Heads of the Australian Public Service, Chiefs of Defence Force Staff, or their representatives . . . . .	28
Members of the Northern Territory Legislative Assembly . . . . .	3
Members of the Australian Capital Territory Legislative Assembly . . . . .	5
Holders of statutory offices and representatives of statutory authorities established under Commonwealth legislation . . . . .	27
Representatives of non-government media organisations . . . . .	12
Members of State Parliaments and representatives of State Government departments or authorities . . . . .	13
Staff of academic institutions . . . . .	5
Representatives of staff organisation peak councils and of staff organisations . . . . .	4
Other persons or organisations . . . . .	18

**1.16** As previously indicated, oral evidence was received in hearings before the Committee. This was taken in both public and private sessions and, although usually in elaboration of written submissions, sometimes without the background of a submission. Hearings were held in: Canberra, over the period 12 to 29 September 1978, on 23 and 24 November 1978, and on 8 December 1978; Sydney, 19 October and 14 to 15 November 1978; Melbourne, 23 to 27 October 1978; Perth, 6 November 1978; Adelaide, 8 November 1978.

**1.17** Appendix 1 contains a list of persons and organisations lodging written submissions with the Committee. Appendix 2 lists the persons who gave oral evidence.

**1.18** Apart from the material contained in the written and oral evidence presented to it, the Committee was able to draw on information and comment in reports published in a number of inquiries on matters covered by the terms of reference. Additionally, it was assisted by studies of legislation and procedures either in force or in prospect both in Australia and elsewhere. References to these sources are given at appropriate points in the report, and in Appendixes 3 to 6. A short bibliography of published material on the subject of conflict between public duty and private interest appears at Appendix 7.



## The Committee's approach to its terms of reference

**1.19** The Committee has not felt required to address itself to the facts of any particular case except in so far as these provided a basis for testing proposals considered or advanced in this report. Certainly it has not regarded itself as having an inquisitorial role, one for which it has not been equipped nor for which it has been sufficiently empowered. Rather, its concern has been with principles and the machinery by which those principles may be translated into practice and given proper protection.

**1.20** In developing its response to the first of the items listed in its original terms of reference, the Committee found it necessary to proceed in stages—firstly, by identifying those categories of persons who may be regarded as holding positions of public trust in relation to the Commonwealth; secondly, by making some broad generalisations concerning the public duty of those persons; and thirdly, by determining those private interests which could be regarded as at least having the potential to give rise to conflict with public duty. Chapter 2 of the report deals with these questions.

**1.21** From this consideration of what might be regarded as the parameters within which it was required to work, the Committee moved to the particular tasks allocated to it by the second, third and fourth items of the original terms of reference. It found that, while it was able to discuss in general terms the principles involved in measures to avoid or to resolve conflict of interest situations, the application of those principles to particular categories of persons required more detailed treatment. Accordingly, Chapters 3 to 6 of the report deal with principles and options, whilst Chapters 7 to 11 relate to the application of those principles to the various categories of persons.

**1.22** The possible introduction of a register of officeholders' interests is raised for consideration in the fourth item of the Committee's terms of reference. While acknowledging that this is a device which in certain quarters has received a wide measure of support as a means of combating conflict of interest situations, the Committee, as a result of its work, found itself unable to recommend its general adoption for Commonwealth purposes at this stage. It has, however, taken the course of setting out in Chapter 6 and in the associated Appendix 6 its views on the type of register which it would regard as most effective for the purpose—given its views on the limited value of registers—and the administrative arrangements necessary for the maintenance of such a register, should it be decided to introduce one.

**1.23** Arising from its consideration of principles and options and their application to the various categories of officeholders, dealt with in Chapters 2 to 11, the Committee found it necessary to consider the question of enforcement machinery to ensure that measures which it was proposing would be observed. The results of its deliberations on the matter are incorporated in Chapter 12.

**1.24** Because it involved considerations somewhat different from those involved in the other topics with which it was concerned, the Committee made the post-separation employment of officeholders the subject of special investigation. The findings and recommendations on the matter are set out in Chapter 13. The remaining topics on which the Committee's views were sought by the Prime Minister, additional to those contained in the original terms of reference, have been dealt with in appropriate places in Chapters 7 to 10.

**1.25** During the course of its work, the Committee met with a number of questions of criminal law which it did not regard as falling within its terms of reference. Accordingly, apart from two particular matters, there is no discussion of them in the report. The exceptions concern the provisions in the *Crimes Act 1914* relating to bribery of Commonwealth officers, and the misuse of official information. These are subjects which the Committee believes are of sufficient relevance to the matters on which it has been called upon to report to require comment. Chapter 13 contains these comments.

**1.26** The Committee's conclusions concerning the matters covered by its terms of reference and the recommendations it sees as flowing from them are incorporated at the appropriate places in the chapters which follow. Bold type in the printing has been used to point out where recommendations have been made. However, for ease of reference, the conclusions and recommendations have been brought together in Chapter 15, with an indication of where the conclusion or recommendation is to be found in the main body of the text.

1. Australia, Parliament, *Declaration of Interests: Report of the Joint Committee on Pecuniary Interests of Members of Parliament* (J. M. Riordan, Chairman), AGPS, Canberra, 1975.
2. Australia, House of Representatives, *Debates* 1978, no. 3, p. 462.
3. Australia, House of Representatives, *Debates* 1978, no. 5, pp. 1078–9.
4. Australia, House of Representatives, *Debates* 1978, no. 7, p. 1678.

## 2. Public duty and private interests of officeholders

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**2.1** The Committee's terms of reference require a recommendation 'whether a statement of principles can be drawn up on the nature of private interests, pecuniary or otherwise, which could conflict with the public duty of any or all persons holding positions of public trust in relation to the Commonwealth'. It appeared to the Committee that it should begin by identifying those persons who could properly be thought to be holding 'positions of trust in relation to the Commonwealth'. This, in turn, would lead to a consideration of their public duty, and thence to the topic of conflict with private interests.

### Categories of persons

**2.2** The terms of reference specify certain categories of persons holding positions of trust in relation to the Commonwealth: Ministers; Senators and Members of the House of Representatives (who are collectively referred to in this report as Members of Parliament); the staffs of Ministers and Members of Parliament; members of the Australian Public Service (referred to in this report as public servants); and such other persons or classes of persons as the Committee was of the opinion should be included.

**2.3** The terms of reference draw a distinction between Ministers and Members of Parliament. Obviously there is a degree of overlap between the two groups in that, except in the most unusual circumstances, Ministers must be Senators or Members of the House of Representatives. The Committee has found, however, that, for reasons discussed later in this report, there is advantage in maintaining the distinction.

**2.4** As stated in the previous chapter (para. 1.12), the Committee determined to specify certain other classes of persons in its advertisement inviting submissions. One of these classes, statutory officeholders, is, in the Committee's opinion, of sufficient significance in respect of conflict of interest to require attention in this report on the same scale as is given to the three major categories identified in the terms of reference—Ministers, Members of Parliament and public servants.

**2.5** The members of statutory bodies established by the Commonwealth, and their staffs, play an important part in Australian government. As a group, statutory bodies comprise a large and significant element in the machinery of government, with their position complicated by the fact that their members may serve on a full-time or a part-time basis, with different channels of responsibility to the Parliament or to the executive.<sup>1</sup> For purposes of discussing the broad areas of potential conflict between public duty and private interest, the Committee has, therefore, had regard to the duties of statutory officeholders and members of statutory bodies as well as persons falling within the three main categories designated in the terms of reference.

**2.6** The Committee will call the four categories collectively 'officeholders', a briefer term than 'persons holding positions of trust in relation to the Commonwealth'.

**2.7** The exclusion of other categories of persons from consideration at this point in the report does not, of course, mean that the four groups named are the only ones holding positions of public trust in relation to the Commonwealth. There are others in this situation and their roles and responsibilities are discussed in Chapter 11. In addition, there is the special case of the media, whose representatives have somewhat different conflict of interest problems and whose relationship to the Commonwealth is markedly different. The discussion in Chapter 11 also covers their position.

## Public duty

### *Members of Parliament and Ministers*

**2.8** Statements of public duty tend to display diversity around a common theme. The public duty of a Member of Parliament has been the most fully elaborated, commencing over a century ago with a judicial statement (which referred to a member of the House of Lords):

In the framing of laws it is his duty to act according to the deliberate result of his judgment and conscience, uninfluenced, as far as possible, by other considerations, and least of all by those of a pecuniary nature.<sup>2</sup>

In Australia, the duty of a Member of Parliament to be independent was extended to 'watching on behalf of the public all the acts of the Executive'. It was stated that he 'must be free to exercise those powers and discretions [entrusted to him] . . . in the interests of the public unfettered by considerations of personal gain or profit.'<sup>3</sup> Finally, the Member's duty to preserve his independence of judgment was carried into a third sphere, the representation of constituents in dealings with the executive.<sup>4</sup>

**2.9** Notwithstanding the constraints of party, in the last resort the Member of Parliament must retain his own judgment, and his duty to exercise that judgment independently. If he cannot in conscience follow the dictates of his party in a particular matter, he must decide whether it is better, perhaps for other reasons, for him to remain in the party and endeavour to effect changes in party attitude from within, whether to vote against party policy in the Parliament, to resign from the party to allow himself freedom of action in the matter or even, in the extreme case, whether to resign from the Parliament.

**2.10** The important point is that the constraints of party have to be recognised because they arise inevitably from the nature of modern politics. Mass electorates are most effectively represented through democratic political parties. But the constraints of private interest may be avoided and should be.

**2.11** The Qualifications Committee of the Victorian Parliament, after considering the problem of a Code of Conduct for Members of Parliament, concluded:

As long as Members continue to conduct and involve themselves in community, business and professional activities whilst holding public office, there must always be the risk that their private and public activities may become intermingled. However, it must be recognised that the knowledge and experience gained by Members in these activities may very well assist and, in some cases, make them better equipped to perform their duties as Members of Parliament.

The Committee is of the opinion that Members could not be expected to completely divorce themselves from outside activities, but that there should exist some guidelines to prevent any possible conflict of interest.<sup>5</sup>

**2.12** Members of Parliament who are not Ministers exercise influence. They do so—in theory at least—by their speeches and votes in the Parliament and its committees. In practice, they exercise influence by their activities in the party room and party committees, and by their representations to Ministers and their advisers. Ministers, in sharp contrast, can exercise power. Individually they do this by directing the activities of their departments, and collectively through the decisions of Cabinet. Because they have direct access to the means of power—the preparation of legislation, the allocation of funds in the budget, and the application of general policies to particular cases—Ministers’ public duty makes demands upon them of a higher order than is the case with Members. This difference is such as to justify a distinction being made between Members and Ministers.

#### *Public servants*

**2.13** The Minister and the Member of Parliament have public duties in which independence is crucial, but the duty of public servants is complicated by a conflicting element of subordination—subordination both to the elected government and to superiors within a hierarchical service. The *Draft Guidelines on Official Conduct of Commonwealth Public Servants* prepared by the Public Service Board refer to a public servant’s primary responsibility to the executive.<sup>6</sup> The public servant’s duty, just like that of the elected Minister or Member of Parliament, is to preserve his independence of judgment and action from *improper* influence coming from his personal interests, pecuniary or otherwise, direct or indirect.

**2.14** Most aspects of the duty of public servants are set out in statute, much more so than for Ministers or Members of Parliament. The *Public Service Act 1922*, the *Crimes Act 1914* and *Secret Commissions Act 1905* are examples. More recently the Public Service Board has begun setting down the duties of public servants in their Draft Guidelines. (For further details, see Appendix 4.)

#### *Statutory officeholders*

**2.15** Statutory officeholders are likely to be constrained by formulation of their duties in very specific terms. Their offices may well have been created by the Parliament to enable certain responsibilities to be discharged with some degree of independence of the political executive. Many are not subject to the same controls, powers of direction or accountability to Ministers as are public servants. In some cases they have been appointed to represent the views and interests of certain groups. Their position is often more comparable to the situation of Members of Parliament than that of Ministers or public servants.

#### Private interest

**2.16** Against the obligations of public duty may be set the claims of private interest. Both pecuniary and non-pecuniary private interests may conflict with public duty.

**2.17** The Joint Committee on Pecuniary Interests of Members of Parliament defined pecuniary interest as ‘any direct or indirect financial concern, stake or right in, or title to, any real or personal property or anything entailing an actual or potential benefit’<sup>7</sup>, and made such interests the object of its recommendations. But other, non-pecuniary, interests may also conflict with public duty. The City of New York Bar Association Special Committee on Ethics in the Executive Branch in 1960 noted that ‘man is driven by many motivations’, and asked why should ‘simple economic ties’ be singled out for study and regulation.<sup>8</sup> In

what follows, the Committee makes a preliminary examination of which private interests, pecuniary or not, are likely to create conflicts and when it is appropriate to attempt to regulate such interests.

### *Non-pecuniary interests*

**2.18** Many demands directed to government do not seek to advance pecuniary interests. The concerned citizen may want a threatened species of wildlife to be saved or an historic building to be preserved. He may want the courts to punish offenders more rigorously, and so on.

**2.19** The benefit sought may go, not directly to the person seeking to influence the decision or to his immediate dependants, but perhaps to some person or group with whom he has, to use the City of New York Bar Association Committee's example, 'religious or family affiliations'. The officeholder who would find it abhorrent to feather his own nest by improper gifts or dubious decisions may be tempted to assist a co-religionist or a product of his old school. At the very least, the suspicion that he had done so might exist.

**2.20** Which such interests should be regulated? Earlier inquiries facing this problem have tended to look to practicality rather than to theoretical purity. The City of New York Bar Association Committee, contemplating a statute to prevent abuses, wrote:

Restrictions on outside economic affiliations can be written with reasonable particularity and enforced with moderate predictability; no one has yet devised a method of sorting out acquaintances, friends, relations, and lovers for purposes of a rule permitting official dealings with some and not with others.<sup>9</sup>

The British Royal Commission on Standards of Conduct in Public Life (the Salmon Commission) also doubted that it would be practicable to employ a statute to compel disclosure of non-pecuniary interests because 'they are too nebulous to be legally codified and made subject to a criminal sanction'.<sup>10</sup>

**2.21** This Committee believes that a wide range of non-pecuniary interests *could* conflict with the public duty of officeholders. At least they might raise a presumption or a reasonable suspicion that they were doing so. Indeed any private interest could in some circumstances cause conflict. Therefore some device is necessary to decide which private interests should be regulated because of the probability that they will, in some circumstances, cause conflicts. The problem of identifying interests which should be regulated is made more difficult because often it is the context which determines whether an interest is likely to create conflict. Absolute rules may not be possible.

**2.22** Other bodies which have attempted to lay down rules in the area of conflict of interest have seen appearance, or, put differently, public acceptability, as the criterion in deciding which interests should be regulated. Is it thought likely that possession of any amount of that sort of pecuniary interest will be suspect? Or an amount in excess of a certain figure of cash value? If so, that measure becomes the threshold. Frequently the answers to such questions have been arbitrary and appear to be such.

**2.23** Attempts to lay down rules in relation to non-pecuniary interests have floundered because of the problem of defining adequately an interest which may be regarded as creating an actual or potential conflict with duty. This problem of definition creates difficulties for both the officeholder bound by such rules and

the authority responsible for his conduct. In the absence of any clear guidance, an officeholder may well be uncertain about his obligation to his public duty in respect of an interest. Those responsible for enforcing proper conduct in respect of that obligation may equally be uncertain as to what is proper in the circumstances.

**2.24** However, there is a test which the Committee believes is likely to be applied in practice by such officeholders, or those responsible for their conduct, in judging what is proper in particular circumstances: the test of appearance. Does that interest look to the reasonable person the sort of interest that may influence?

**2.25** It may well be that the inherent difficulties of definition will make any rules in respect of non-pecuniary interests less satisfactory than those in respect of pecuniary interests. Those responsible for making or enforcing rules may have to be prepared to counsel or caution rather than reprimand or punish, at least until precedent and familiarity have built up some consensus on how such rules should operate in a 'grey' area. The precedents initially may draw quite arbitrary lines through the original uncertainty. Eventually its area is likely to be reduced.

**2.26** The Committee believes that, in judging whether a particular non-pecuniary interest could create conflict in certain situations, or whether rules should be laid down in relation to a certain type of non-pecuniary interest, the test is the likelihood that the person possessing the interest could be influenced in the independent judgment which his public duty requires be applied to the matter in hand, or that a reasonable person would believe that he could be so influenced.

#### *Pecuniary interests*

**2.27** With pecuniary interests, it is possible to be more exact. Here the Committee sees three areas requiring consideration—assets and liabilities, 'outside' income, and gifts, hospitality and sponsored travel.

**2.28** As regards *assets*, at the one extreme are those that are particularly personal in their use: residence, furniture, means of personal transport, perhaps a holiday home and recreational transport such as a boat. Such assets might be termed domestic assets. Most systems for the regulation of conflicts of interests exclude domestic assets, either because they are unlikely to engender conflicts of interest or because regulation of them would be particularly intrusive of privacy. Only in exceptional circumstances do they create significant conflicts of interest. Nevertheless, for most persons in public life their home is the largest asset they ever acquire and a mortgage on it the largest liability they ever assume. The motor car may be the next most substantial asset or occasion for indebtedness. Further, for the substantial group of persons in public life who are also engaged in primary production, private residence and source of income may be directly connected. Thus a blanket exclusion of domestic assets from any system of regulation would leave a great many problems unresolved.

**2.29** At the other extreme are those assets which have a particularly close relationship with the duties of the officeholder in question. The case for regulating these is clearest. These might be termed sensitive assets and are of especial importance when the possibility of requiring divestment of interests has to be considered.

**2.30** In between these two fairly restricted categories are most of the forms which personal and real property may take in a complex modern economy, and it is here that there is most room for debate as to when regulation is appropriate and what form it should take. The Committee's judgments on these matters will become clear in later chapters.

**2.31** The Committee does not believe that there is any significant demand in Australia at the present time for limits to be placed on the total amount of private wealth which a Member or a public servant or other officeholder may possess. The focus of Australian public concern is, it believes, on conflicts of interest, not on the possession of private property *per se*. The recommendations of this report are directed to the prevention and control of conflicts of interest, and not to the creation of a class of public officeholders whose commitment to the common good is sought to be assured by their being forbidden any significant amount of personal wealth.

**2.32.** The Committee's impression of Australian political life is that few very wealthy persons choose to offer for election. By comparison, political life in the United States contains some persons of very considerable personal wealth. The size and complexity of their fortunes frustrate attempts to avoid or regulate conflict of interest. Such personal fortunes create problems of conflicts of interest on a scale unknown to Australia, and may require remedies not needed here.<sup>11</sup>

**2.33** As to *liabilities*, the Committee believes that these should be treated in the same way as corresponding assets. So, for example, a mortgage on the home should be treated as would be the ownership of the home—disclosed only when giving rise to a conflict of interest or giving the appearance of so doing. Similarly, a liability that touched closely on the officeholder's duties, for example a loan from a firm whose profitability was influenced by his department, should be regarded as any sensitive asset would be—a matter for concern which might require action to regulate the conflict.

**2.34** It is sometimes suggested that *future assets and liabilities* could be a subject for regulation. Perhaps an officeholder could be influenced by the expectation that at some future time he would possess a certain interest. Predictability should be the determining factor here. An interest which is being purchased or otherwise acquired may very well qualify for regulation, even though title to the asset itself has not yet formally passed. But an expectation that an elderly relative will not alter a testamentary disposition and will predecease the officeholder, who will then be possessed of a certain asset, may be too remote to worry about. Common sense suggests that, as long as there is a real possibility of the acquisition of the interest not being completed, it would be inappropriate to treat such an interest in the same way as those already possessed. Once that possibility has passed, then it would be as well to bring the interest within the ambit of whatever controls are imposed. One witness raised the problem of contingent liabilities, such as guarantees afforded to other people or organisations, which might have influence on an individual's conduct. The Committee noted that just such a matter had figured in the inquiries of the British House of Commons Select Committee on Conduct of Members 1976–77.<sup>12</sup> As in the case of assets, it would appear unnecessary to regulate a liability until it is certain that it will become operative.

**2.35** Another major type of pecuniary interest which may give rise to conflict with public duty is 'outside' *income*. For most public officeholders, their duties are full time and they have no legitimate opportunity to earn income over and



above the salaries paid by virtue of their offices. There are some exceptions to this: authorisation may be granted to public servants for part-time employment outside the public service provided their official duties are not adversely affected; officeholders may be entitled to retain earnings from writing or broadcasting, and the like. Private payment for carrying out official duties may constitute bribery. It may be caught by the criminal law, and, in respect of public servants, by Public Service Regulation 38, whilst the Australian Constitution by s. 45 (iii) prohibits Members of Parliament taking any fee or honorarium for 'services rendered to the Commonwealth, or for services rendered in the Parliament to any person or State'.

**2.36** There are two separate issues involved in the question of 'outside' income. One is the demand made on the officeholder's time and energy by extramural activities. The other is the conflict of interest which may result from misuse of confidential information received in an official capacity so as to further the source of that income, or from the influencing of government activity so as to benefit the source of income. Regard must also be had to the possibility that the appearance of misuse of information or improper influence may be created. The principal thrust of the Committee's recommendations is to the second issue: regulating conflict of interest. Nevertheless it should be recognised that the first issue, intrusion by private interests on the officeholder's time and energy, is also a legitimate concern which should be dealt with firmly as it is in the Code of Conduct proposed in this report. The Remuneration Tribunal fixes ministerial and parliamentary salaries on the basis of a full-time commitment to official duties.

**2.37** It may be argued that it is not only the type of pecuniary interest but the amount or size of the interest held which is relevant in drawing up rules in relation to pecuniary interests. Other bodies considering this matter have been prepared to set thresholds at which temptation might be thought to begin, or to fix levels of interest below which the rules should not apply on grounds of administrative practicability. Others have supposed that possession of an interest, however small—the single share or the first dollar—should be sufficient to invoke regulation. It has been argued that setting thresholds avoids both trivialising the whole question of conflicts of interest and swamping the machinery which administers any rules. At the same time an undue burden is not imposed on officeholders who might otherwise be required to compile a great deal of detail about their affairs. The Committee is reluctant to accept the use of thresholds in rules relating to conflicts of interest except, as will be discussed later, in respect of token gifts. The arbitrariness of any decision as to what threshold to set is evident. One need only compare the cash limits on gifts which may be accepted that have been set in different countries at different times or the differences in the rules governing acceptance of gifts by Ministers and by public servants in Australia (see Appendixes 3, 4 and 6). The intention of such cash limits is to identify the gift that may influence, or may appear likely to influence, but the answer given has varied widely in different circumstances.

**2.38** As a starting point, the Committee believes it preferable to suppose that any pecuniary interest, whatever its cash value, *may* be sufficient to create a conflict of interest. In practice the susceptibility of different persons will vary. No threshold can be set on the basis of an immutable calibration of human nature, although attempting to fix some limits may be warranted by administrative convenience.

**2.39** The question of thresholds does have some relevance in relation to another category of pecuniary interests, *gifts, hospitality and sponsored travel*. These interests raise different issues from either assets or earned income, even though there is some obvious overlap. There is also some overlap between the issues raised by the receipt of gifts, and bribery which is a subject discussed in Chapter 14. Conflict of interest generally differs from bribery because it does not require a transaction between two parties. It needs only one person, the officeholder possessing the interest in point. The distinction between bribery and this third category of pecuniary interests is that, whilst a benefit conferred as a bribe is directed to a particular transaction or series of transactions, gifts, hospitality or travel may be provided to create a general climate of goodwill on the part of the beneficiary. The 'debt' might not be called in for years or ever.

**2.40** The concern here is very much with appearances, and the possibility that undue influence could be suspected. Yet it is also a fact of life that the giving and receiving of favours, some small but some not so small, is common. A total prohibition on all such exchanges where public officeholders were involved might produce difficulties. For example, the working lunch needs to be separated from hospitality on a more extravagant scale. Seasonal token gifts have to be distinguished from costly presents. The case for an arbitrary threshold in this area becomes more convincing.

#### *Family interests*

**2.41** One final question that complicates any attempt to avoid or regulate conflict of interest situations is whether the interest must be possessed directly by the officeholder. Will possession by some other person to whom he is linked be sufficient to establish a conflict? In particular, does the officeholder have so close a coincidence with the interests of his spouse and dependent children that any system of control and regulation, to be effective, must extend over their affairs as well? Such coincidence of interests might exist because of a legal obligation to support or an affection for family members, or because of the ease with which interests could be formally transferred to family whilst remaining effectively under the control of, or at least operating for the benefit of, the officeholder himself or his family group. These considerations can also extend beyond the nuclear family to other relatives and even to persons in 'de facto' relationships.

**2.42** The affairs of persons who have not chosen to enter public life with its inherent vulnerability to public scrutiny may nevertheless be brought before the public gaze by reason of their connections with someone who has opted for office. There is the possibility that partners in a profession or business associates may be affected, perhaps adversely, by the extent to which their enterprises have to be revealed to the public because they are intertwined with the past or present interests of a public figure. An officeholder's professional association with a client may have to be made a matter of public record because that past association (if the officeholder has been obliged to give up such activities) or present association (if he has not) could influence him in the discharge of his public duty.

**2.43** The Committee has been very conscious of the need to preserve, as far as possible, the privacy of persons whose interests are intermingled with the interests of officeholders. But it was also well aware of the ease by which scrutiny of the affairs of officeholders could be avoided through the transfer or concealment of such interests. Such evasion of proper scrutiny could discredit any system established to regulate conflicts of interest.

**2.44** On balance, the Committee has concluded that it would be proper to require officeholders themselves to disclose such of the affairs of other persons as were relevant to the scrutiny and regulation of their own interests in respect of conflict of interest and of which they had knowledge. A Member of Parliament would be required to disclose during a parliamentary debate interests of close associates of which he had knowledge and which might be thought likely to influence his contribution to the debate. A public servant would be required to disclose to his superiors any similar interests which could be regarded as influencing the decision he was taking or the recommendations he was making. But in both cases every effort should be made to ensure that the intrusion into the privacy of other persons is minimised. This opinion differs from that of the Joint Committee on Pecuniary Interests of Members of Parliament, which decided against requiring Members to disclose the interests of their immediate families of which they were aware. Wider aspects of privacy are discussed in Chapter 3.

### Committee's conclusion on Item 1 of terms of reference

**2.45** The Committee has concluded that it would not be possible to draw up a completely comprehensive and satisfactory statement of principles on the nature of private interests, pecuniary or otherwise, which could conflict with the public duty of any or all persons holding positions of public trust in relation to the Commonwealth. The difficulties of so doing are especially great as regards non-pecuniary private interests. As regards pecuniary private interests, definition of principles poses fewer problems, although, as discussed, some of those remaining present difficulties of a substantial kind; practical considerations suggest that, even where pecuniary private interests which could give rise to conflict with public duty are capable of satisfactory definition, it may be desirable to limit the coverage.

1. cf. Australia, Parliament, Senate Standing Committee on Finance and Government Operations, *Statutory Authorities of the Commonwealth, First Report* (P. E. Rae, Chairman), Canberra, 1978, Chapter 2.
2. *Egerton v. Brownlow* (1853) 4HLC 1; 10 ER 359 at p. 423, per Lord Lyndhurst. But Members of Parliament also bear in mind the fate of Edmund Burke, who, having adopted the position that, in his Parliamentary duties, a Member should be guided by the general good, not by local purposes nor local prejudices, found himself at odds with his electors.
3. *Wilkinson v. Osborne* (1915) 21 CLR 89 at pp. 98–9, per Isaacs, J; *Horne v. Barber* (1920) 27 CLR 494 at pp. 500–1, per Isaacs J, and pp. 501–2 per Rich J.
4. *R. v. Boston* (1923) 33 CLR 386 at pp. 400–3, per Isaacs and Rich JJ.
5. Victoria, Parliament, *Progress Report from the Qualifications Committee upon the Question of Conflicts of Interest of Members of Parliament and Ministers of the Crown* (V. F. Wilcox, Chairman), Government Printer, Melbourne, 1974, p. 3.
6. Public Service Board, *Discussion Paper: Draft Guidelines on Official Conduct for Commonwealth Public Servants*, Public Service Board, Canberra, 1978.
7. Australia, Parliament, *Declaration of Interests: Report of the Joint Committee on Pecuniary Interests of Members of Parliament* (J. M. Riordan, Chairman), AGPS, Canberra, 1975, p. 2.
8. Association of the Bar of the City of New York, Special Committee on the Federal Conflict of Interest Laws, *Conflict of Interest and Federal Service*, Harvard University Press, Cambridge, Mass., 1960, p. 17.
9. *ibid.*
10. Great Britain, Royal Commission on Standards of Conduct in Public Life 1974–1976 (Lord Salmon, Chairman), *Report*, Cmnd. 6254, HMSO, London, 1976, pp. 40, 64.
11. See Appendix 3, paras 61–2.
12. Great Britain, House of Commons, *Report from the Select Committee on Conduct of Members* (M. Stewart, Chairman), 1976–77 H.C. 490, HMSO, London, 1977.



### 3. General observations on the regulation of conflicts of interest

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**3.1** It seems desirable to raise at this stage some general issues on which views formed have influenced subsequent conclusions and recommendations. This chapter therefore considers five topics. The first concerns the need for additional measures for the regulation of conflicts of interest. The second is what can be learned from the ideas and experience of other countries. Third is a comparison of self-regulation by the various categories of officeholders with a general, all-embracing system of regulation. Fourth is a review of the suitability of different sanctions for the enforcement of particular solutions. Fifth is the problem of privacy in relation to the disclosure of private interests.

#### The need for additional measures for the regulation of conflicts of interest

**3.2** One of the questions to which the Committee addressed itself early in its work was the need for additional measures for the regulation of conflicts of interest involving officeholders. Assessment of this called for a listing of existing measures for the regulation of conflict of interest situations, study of past experience in individual cases involving allegations of conflicts of interest, consideration of evidence given to the Committee orally and in writing, review of comments and proposals made in newspaper and other published sources, and a weighing of the effectiveness of the presently available regulatory arrangements in situations of conflict such as have occurred in the past or might conceivably occur in the future.

**3.3** The importance of the results of this assessment for the Committee's work may be shortly stated. If it were found that honesty and integrity amongst officeholders were at such a low ebb that public duty was being regularly disregarded in favour of private interests, then clearly strong additional regulatory measures would be required. If, on the other hand, the finding was that few cases of conflict of interest escaped the regulatory net, lesser additional measures would be necessary. A finding that existing arrangements were sufficient to meet all conflict situations would lead to the conclusion that no changes were necessary.

**3.4** Appendixes 4 and 5 summarise the measures presently in force in Australia for the regulation of conflicts at the various levels of government. They contain detailed information on those measures directly applicable to the categories of officeholders dealt with in this report, and reference is made to them at points throughout the report, but especially in Chapters 7 to 10.

**3.5** As explained in paragraph 1.19, the Committee has not attempted to investigate in any detail individual cases. It has, however, used information on a number of these cases for testing, amongst other things, the adequacy of the existing legislative and administrative arrangements for dealing with conflicts.

**3.6** The impression gained from the Committee's studies of individual cases is that there is a good deal of uncertainty about what is expected of officeholders and former officeholders. Such formal rules as exist provide only partial guidance. Convention is often more important and here there is opportunity for misunderstandings and misinterpretations. In the older cases, the issue has frequently centred around the post-separation employment of officeholders and the associated possibility for misuse of information. More recently the questions have concerned investments by officeholders, and even of their families, as the practice of investment in family companies and family trusts has developed; outside employment, especially amongst elected officeholders; and the acceptance of favours in the form of gifts, hospitality and concessional travel. Clearly in these areas there is a need for greater guidance to be provided to officeholders and for a strengthening of the regulatory machinery available to enforce whatever requirements are laid down.

**3.7** Much of the evidence presented to the Committee, and, indeed, much of the contemporary writing on the subject of regulation of conflicts of interest, has been directed towards the advancement of proposals designed to further one or both of two objectives, summarised in the New South Wales Parliament's 1978 *Report from the Joint Committee of the Legislative Assembly upon Pecuniary Interests* as:

. . . [to] ensure that not only is the institution of Parliament, [and] the Public Service . . . upheld in the highest traditions, but those who are entrusted with the administration of the public domain will be capable of being seen by the electorate at large to maintain conduct of an unimpeachable order.<sup>1</sup>

But there has been no real agreement on what would be the most effective measures to achieve those objectives.

**3.8** The Committee's overall conclusion regarding the need for additional measures for the regulation of conflicts of interest is that there is an established need and that this is accepted by the community. It remains, therefore, to consider what action should be taken.

## The experience of other countries

**3.9** The Committee has devoted a substantial part of its efforts to examining the experience (summarised in Appendix 3) of other countries, such as Britain, Canada and the United States of America, with measures designed to regulate conflicts of interest in officeholders. It has concluded that three lessons may be drawn:

- Many of the remedies introduced to stop abuses in the conflict of interest area have come in response to particular incidents or scandals even though their effect did not match the problem disclosed by that incident or scandal. Even when the main elements in the conflict were pecuniary, there was no close correspondence between the defects revealed in existing machinery and procedures and the remedy brought forward.
- Rarely has there been any attempt to bring the various remedies together in a comprehensive system which deals with all aspects of conflict of interest problems and regulates the affairs of all categories of officeholders. This has been in part due to the problem of identifying interests that do or may give rise to conflicts of interest—it is much easier to draw up rules governing pecuniary interests. In part it has been a consequence of constitutional principle. Under the Westminster system, the executive and the

legislative branches—and the judiciary as well—are separate and the legislature enjoys a certain paramountcy in principle and experiences a degree of subordination in practice. In the United States they are separate and co-equal by design and the upper levels of the executive branch are manned by relatively short-term political appointees. In the Westminster model Ministers have the characteristics of the elected Members of Parliament from whose ranks they are selected, and some of the characteristics of public servants who form the peak of a party-neutral, career public service pyramid. Therefore, it has been difficult to lay down common measures for all categories of officeholders. It is not surprising that, given these constitutional difficulties, the regulatory machinery and procedures, even when related only to pecuniary interests, are often patched together and offer at best incomplete solutions.

- There appears to have been a continuing escalation in the extent of disclosure and in the severity of penalties being introduced. At an early stage in the latest American cycle of reform Professor Bayless Manning wrote of ‘the purity potlatch’ in which a public duel took place in the sphere of morality:

All such duel systems are inflation-prone. They tend to escalate.

. . . The general improvement in government fiscal responsibility poses something of a problem to American political practitioners. How can the Outs convincingly demonstrate the perfidy of the Ins when thieves, grafters, and suborners stubbornly refuse to reveal themselves to be actively at work in the In-administration?

There are only two avenues open. One is to blow up isolated instances of impropriety so that they appear as illustrations of massive, pervasive hidden corruption. This is attempted regularly. The other avenue is more subtle. If the facts will not make out a case of moral deficiency by accepted standards, the standards must be escalated to a point where facts can be found that *will* make out a deficiency; and the public must be educated to be horrified by the resulting new sins in substantially the same degree that they were horrified by the old. The process is constantly going on about us.<sup>2</sup>

**3.10** The Committee believes that there are dangers to good government in such a process of moral escalation. Intrusion into the privacy of those in public life and those connected with them grows. Censorial authorities are created with ever wider powers to ensure that the rules are being obeyed. Increasingly draconian penalties are imposed to deter anyone who might consider breaching those rules. Yet whenever a violation of the rules is uncovered, there is a further diminution in the respect the public feels for those in public life, who, it is likely to believe, must be so dishonest that no system of controls however fierce can prevent their wrongdoing. In such circumstances, not only are the individuals engaged in public office affected, but public institutions as well. The Committee holds that there is little wrong today with Australian public life. The country has been fortunate in the probity of the men and women who become officeholders. The exceptions to their high standards have been isolated. They have been conspicuous because they have been exceptional.

## Self-regulation

**3.11** This fortunate situation has been brought about in the main in the absence of formal regulation of conflict of interest, at least for elected officeholders. It is true that Commonwealth public servants are subject to provisions of the *Public Service Act* 1922 and to Regulations made under that Act and that statutory officeholders in some cases are covered by provisions in their own Acts which go

part of the way towards formal regulation. But the high standards of conduct in Australian public life depend in essence upon understandings evolved in our society concerning the service to the community expected of a public officeholder.

**3.12** Traditionally in Australia responsibility for standards of conduct in public officeholders has been vested in those responsible for their management. The Salmon Commission, writing in the British context where the traditions of public service are similar to our own, said:

one of the main safeguards against corruption in any institution is the standard set and required by the management from the top downwards. This depends on *esprit de corps* which can be seriously damaged by systems of regulation and scrutiny so rigorous that they inhibit leadership by management and imply that people working in the organisation are unworthy to trust.<sup>3</sup>

The Committee agrees, and believes that the point is valid whether the officeholders concerned are elected or appointed. It would go further and say that if a group of officeholders is incapable of ensuring that its members adhere to a set of prescribed or clearly understood standards of right conduct, there is little likelihood that an alien authority can successfully impose those standards on them.

**3.13** If required to express a preference as between the two basic alternatives of self-regulation with non-criminal sanctions and external regulation with criminal sanctions, the Committee would have no hesitation in preferring the first. It does recognise that some uniformity is appropriate for all officeholders. All groups should aspire to the highest standards of probity. How that is to be demonstrated in practice will, however, depend to a considerable extent on the nature of the public duty of the category of officeholder or even the group within a single category. The 'black' area of bribery and corruption is, experience shows, amenable to the exact definitions, strict procedures and the heavy penalties of the criminal law. The 'grey' area of conflict of interest is not. Frequently it is a question not of proscribing conduct, 'thou shalt not', but rather of requiring conduct of a certain sort: for example, avoiding a situation in which it might reasonably be thought that a conflict existed.

**3.14** Accordingly the regulatory process should be one in which:

- the desired standard is set in general terms;
- performance against that standard is ordinarily assessed by those familiar with the context because they work there themselves; and
- to the extent that performance falls below the desired standard, they decide whether a penalty is appropriate and what the penalty should be.

**3.15** The Committee has noted that this is the approach underlying the provisions of the 1978 amendments of the *Public Service Act 1922* which define 'misconduct' as 'a failure of the officer to fulfil his duty as an officer', a concept which is elaborated subsequently in s. 56 into seven categories of behaviour. These provisions leave considerable scope for the informed judgment of colleagues.

**3.16** This degree of flexibility is, the Committee believes, desirable in an area where no legislative draftsman could hope to anticipate all possible circumstances. That point was made effectively in a Circular Letter issued by the Canadian Treasury Board on standards of conduct for Public Service employees:

Any attempt to identify the totality of potential areas of conflict would be a task of great magnitude, could never be totally comprehensive and would require constant review and interpretation. Instead a more workable approach has been taken to identify certain principles, the violation of which would clearly establish a situation of conflict of interest.<sup>4</sup>



**3.17** This approach has its dangers. Self-regulation may be abused to the point that there is no regulation at all. Undoubtedly one of the factors encouraging the move for imposition of statutory obligations enforced by the court on Members of Congress in the United States was a belief that in the past Congress was not prepared to discipline its own members.<sup>5</sup> This was so even when facts showing serious misconduct were widely publicised.

**3.18** The Committee recognises that among elected officeholders there will be loyalties, political loyalties to a colleague of the same party, and personal friendships and loyalties to Parliament or a particular chamber, which will discourage taking up or pursuing investigation or discipline. The very fact that political hostilities can generate and sustain accusations of misconduct may induce a reaction in which the conflict of interest question is swamped by partisan point scoring. Similarly within the public service generally, or in a department or statutory body, there will be organisational and personal loyalties or enmities which may impair commitment to the principles setting out the highest standards of conduct.

**3.19** Further, there is the important matter of the extent to which the public is prepared to place its confidence in self-regulation. Traditionally there have been two approaches to dealing with conflict situations:

- definition of a conflict situation in a criminal statute which identifies the behaviour in question as repugnant, and provides appropriate sanctions of fines or imprisonment;
- because of the limitations of the first approach, adoption of a code of conduct, formally or informally, possibly carrying sanctions, possibly not, but involving the notion that each situation will have to be considered on its merits, and requiring some sort of enforcement system which is closely involved with the area of activity in which the conflict arises.

The Committee is aware of the defects inherent in the first approach, but notes that this is what some are now demanding in Australia. It believes that the second approach is in practice more effective in avoiding and resolving conflicts of interest. It also believes that the public is more likely to put its trust in a system where there is independent, back-up machinery which can be invoked to ensure that the second approach is applied with the same firmness and independence as could be expected of the processes of the criminal law. In Chapter 12 the Committee spells out the procedures and machinery which, in its opinion, are best suited for this back-up role.

**3.20** If self-regulation is tried, and does not work satisfactorily, no doubt demands will grow for imposition of external regulation. This would entail the creation of machinery to deal directly with conflicts of interest and to bring those who violate the rules before the criminal courts. Some witnesses advised the Committee that the time had already come when such machinery was necessary. The Committee does not think that the case has been proved. It believes that adoption of the proposals made in this report can remove the threat of escalation leading to external regulation.

## Sanctions

**3.21** As has been said earlier, the Committee believes that responsibility for the operation of any new rules relating to conflicts of interest should, in the first instance, be given to the bodies already charged with disciplinary responsibilities for their particular category of officeholders. There may be a small

class of matters involving allegations of conflict of interest which are of such public importance that special investigatory machinery is called for. This subject is discussed in Chapter 12. The Committee also believes that the nature and scale of sanctions available for the enforcement of the new rules should be the same as those previously applying to the particular category of officeholders.

**3.22** This would involve:

- A Minister would be liable to private or public reprimand by the Prime Minister, to demotion to a less important portfolio, or, in the last resort, to a request that he resign or else his commission will be terminated by the Governor-General.
- A Member of Parliament would be liable to censure by the chamber to which he belonged, or in the last resort to expulsion.
- A public servant would be liable to the sanctions provided by the *Public Service Act* 1922, as amended in 1978, namely admonition, transfer or dismissal, and, for officers other than those in the First Division, to a salary deduction, or reduction of salary for a period not exceeding twelve months.
- A statutory officeholder would be liable to either private or public reprimand by the chairman of the statutory body or the responsible Minister, or to removal from office by the appropriate procedure.

**3.23** Sanctions should be discretionary rather than automatic. The constitutional or statutory provisions which provide for automatic vacation of an office by reason of a disqualification are, in the Committee's opinion, unsuitable for conflict of interest situations because they fail to allow for the varying degrees of seriousness of the conflict or the intent of the officeholder. Apart from the possibility of withholding a modest sum from the salary of a public servant, which already exists by statute, the Committee does not contemplate imposition of pecuniary penalties as such. Obviously dismissal or expulsion from an office will entail a pecuniary loss, indeed quite a substantial loss, but the prime purpose is to remove an unsuitable person from an office and deter others. If the offence is not sufficiently serious to warrant dismissal or expulsion then reprimand or admonition should be a sufficient warning to the offender and an adequate reaffirmation for other officeholders of the standard of conduct in issue.

**3.24** Because the ultimate sanction against elected officeholders lies in the hands of the electorate, it is necessary to require public disclosure of any proved transgression to allow the electors to have the final say. Such a requirement is not so necessary for appointed officeholders who are subject to dismissal, as well as other sanctions, at the hands of superiors, according to clearly defined rules.

**3.25** The Committee has noted with interest a comment by an Assistant Attorney-General of the United States that statistics on federal prosecutions of public officials in that country over the period 1970–76 showed 'that one of the more common reasons for declining to prosecute conflict cases was the lack of criminal intent and the resulting concern that a jury would refuse to convict'. The penalties were too severe, and prosecutions might have been pursued had milder penalties been available.<sup>6</sup> The Committee believes that it is essential, if a system of regulation of conflicts of interest is to be effective, that the range of available sanctions is sufficiently wide to encompass the many forms conflict situations may take.

## Privacy

**3.26** The final topic to be considered is the need to strike a proper balance between the public accountability of officeholders and their right to privacy in respect of their private interests, including pecuniary interests. One witness put the problem in a broad context:

(W)hen I read the history of the evolution of parliamentary democracy, it seems to me that the recognition of a right to privacy, a right to personal property and freedom of opinion have been an essential part of the solution of this broad problem. In recognising and, indeed, in protecting these rights, we have developed a faith that civilised man, who necessarily lives in society as one of the essential conditions of civilisation, will observe his obligations to society and will act honourably and show consideration for his neighbours. The corollary is that his neighbours and any authority acting in the name of the whole society will only intervene in his private affairs if and when it appears he is deliberately acting otherwise.

**3.27** The benefits from any requirement for the disclosure of private interests which conflict with public duties must be weighed against the harm resulting from the intrusion upon the privacy of those whose interests would be disclosed. In recent years privacy as a human right has been given increasing recognition, as evidenced by its inclusion in codified lists of human rights and freedoms and by the development of remedies for breach of privacy under common law systems. But it is never an unequivocal declaration of privacy as the highest value. There are always qualifications. When a privacy right has been stated in a declaratory list, it has been subjected to qualifications so extensive as virtually to destroy its effectiveness save as an aspiration.

**3.28** Although the idea of a right to privacy has been gathering strength in Australia, the bases on which such a right might rest have, perhaps, not been sufficiently considered by many of those who affirm its existence. One writer recently has identified two bases which would be relevant to the Committee's concerns:

The first is related to the conception of moral personality and individuality, to a person's need for freedom from intrusion in order to manage and cultivate his relations with other persons. The second relates to freedom, to the fact that someone able to assemble a great deal of information about another person almost certainly acquires a measure of power over him.<sup>7</sup>

The Committee would be most reluctant to recommend new measures which would invade the privacy of any category of officeholder without having sufficient justification for them.

**3.29** But, on the other side of the balance, what of public accountability? If officeholders are to be accountable to the public, it has been argued, members of the public will require information about the interests of the officeholders. The public need to 'be able to form independent judgments as to the integrity of government officials'. They have 'an interest in assuring that conflicts of interest are fully avoided by public officials'.<sup>8</sup>

**3.30** If one wishes to recognise the principle of public accountability while at the same time minimising the intrusion upon the privacy of those involved, *what* information should be disclosed and *how*? The first criterion should be that private interests should be disclosed if they are relevant to the officeholder's suitability for office or to the decision he makes. But some information potentially relevant on this criterion may still be especially sensitive. The interest may not

be pecuniary. It may, for example, involve religious or political affiliations. Recently the Victorian Government's *Members of Parliament (Registers of Interests) Act 1978* introduced a requirement for the registration of membership in such bodies as political parties, trade unions, professional bodies and various non-profit organisations such as hospital boards and charities. The Committee doubts whether registration is the appropriate means of regulating conflicts of interest in such cases. It recognises that there may be occasions when a conflict of interest is real and immediate, in which case declaration would be necessary. But to hold that any and all organisational connections which an officeholder has are relevant to his suitability for office and should be made known in a publicly accessible register seems to the Committee an unnecessary and alarming invasion of his privacy. It may be significant that in the United States, where there are constitutional guarantees of freedom of speech and freedom of association, provisions for the registration of interests have carefully avoided intruding on such areas unless they generate a pecuniary interest as well.

**3.31** Disclosure of some pecuniary information may have consequences outside the sphere of public duty. Disclosure of liabilities may affect credit worthiness. Again, the extent of the intrusion upon privacy will depend on who has access to the information, what use can be made of it, and what degree of security is maintained against unauthorised access to, or misuse of, the information.

**3.32** The Committee expects that the interests to be disclosed will be mainly pecuniary interests. It recognises that there is need for adequate protection of privacy in provisions requiring disclosure. Three means of reconciling a general entitlement to privacy with the requirements of public accountability have been noted.

#### *'Public life'*

**3.33** One is to distinguish the case of persons who have entered 'public life' and argue that as a result their privacy has been diminished relatively. Thus a Member of Parliament stated in his submission:

Politicians live in a goldfish bowl because they choose to do so. Electors have a right to expect certain standards from their elected representatives, and I believe that full public disclosure is simply an institutional safeguard which allows the public to have some confidence that politicians are not simply looking after their own interests.

The same point was made by the Joint Committee on Pecuniary Interests of Members of Parliament.<sup>9</sup> Against this point of view it could be argued that although politicians have been subject to public scrutiny for a long time, this has not involved the consequences that they have been required to make public their assets and liabilities. What is now in question is whether they are to be made subject to a different kind of scrutiny from the one to which they have been accustomed.

**3.34** Much depends on what is meant by 'public life'. Some officeholders can be described as being in the public eye, which means in practice that the media pay attention to what they say and do and identify them publicly. Others hold offices on behalf of the public without such exposure being a natural or inevitable consequence. For example, senior officers in the public service give advice to and act on the direction of elected Ministers. Thus there is less reason for the media discussing their personal attributes or interests as a determinant of government policy.

**3.35** Fashions change in this regard. There is more attention in the media today to a few top public servants than there was ten or twenty years ago. But the media-worthy public servant, the officer who is truly in the public eye, is still the exception. The overwhelming majority remain anonymous, and they would be placed 'in a glass bowl' only to their surprise and, possibly, to their indignation. The tradition of public service neutrality is still jealously guarded. Neutrality is closely connected with anonymity; reducing the latter might well bring the former into question.

**3.36** The Law Reform Commission, in its paper on *Privacy and Publication*, considered the distinction drawn in the United States law as to defamation of 'public figures' in contrast with the rest of the population, but was not persuaded:

A public man will necessarily have less private life than an ordinary citizen simply because so many of his activities are in the public realm. Anything that relates to his public life, his suitability for public office or the position he may take on a public issue is a legitimate matter of public discussion; his relationship with his family and friends, his home or sexual activities and his minor illnesses will normally be no business of the community at large.<sup>10</sup>

**3.37** The Law Reform Commission's comments do not dispose of our problem, although perhaps they narrow its scope. It appears that information relating to conflicts of interest would lie outside the protected sphere. Such information relates to positions taken on public issues and it relates to suitability for office. But must the conflict be real and immediate, or would it be sufficient to override privacy considerations if the conflict were no more than hypothetical or possible? That question is at the heart of this inquiry.

#### *Financial interests*

**3.38** The second means is to distinguish financial interests and activities from other, more personal, interests and activities which would fall within the protected area whilst the financial did not. As the right of privacy has been developed in the United States courts following the decision in *Griswold v. Connecticut* (1965)<sup>11</sup>, the tendency has been to restrict the protection to intimate personal and family relationships.

**3.39** A series of cases involving challenges to state legislation or local government ordinances requiring financial disclosure on the part of public officials for themselves and their immediate families has upheld such requirements on the ground of a 'compelling state interest' in avoidance of conflict of interest sufficient to override the right to privacy: *Stein v. Howlett* (1972)<sup>12</sup>, *Fritz v. Gorton* (1974)<sup>13</sup>, and *Montgomery County v. Walsh* (1975).<sup>14</sup> However, alongside those cases should be noted two others: *City of Carmel-by-the-Sea v. Young* (1970)<sup>15</sup>, when a requirement of disclosure in respect of spouse and dependents was struck down as over-broad, and *Lehrhaupt v. Flynn* (1974)<sup>16</sup>, which held that dismissal or other punishment of an official for non-disclosure of information which he did not control (relating to his spouse's assets) was excessively harsh.

**3.40** Australian courts are not faced with the problem of defending a constitutionally guaranteed right to privacy. Nevertheless the Committee believes that the extent to which the American courts have been able to accommodate financial disclosure requirements alongside protection of privacy suggests privacy is not an absolute bar to the development of a system for disclosure of pecuniary interests, but rather a matter for concern in shaping such a system. It will be

appreciated that the American cases concerned disclosure of financial interests. Requirements for disclosure of non-pecuniary interests might well have met with a different response on the basis of other constitutional guarantees of civil liberties, just as in Australia the absence of such provisions from the Constitution still leaves the law-maker with equivalent problems of legal and political philosophy.

### *Controlled access*

**3.41** The third means of resolving the clash between freedom of information and privacy is by controlling access to the information which intrudes upon privacy. The Joint Committee on Pecuniary Interests of Members of Parliament, in advancing proposals for the registration of Members' interests, commented:

the Committee . . . considers the real aim of any register is to be a means of reassuring the people that public decisions are made in the public interest. If the people are to be so assured they must be permitted a *degree of access* to the information to be registered.<sup>17</sup> (emphasis added)

**3.42** The mechanics of this compromise were to require anyone seeking access to make written application to the Registrar having custody of the information, showing that 'a bona fide reason exists for such access'. The Registrar would then notify the Member of Parliament to whose entry access has been sought, and the Member might oppose the application. In that event the matter would be decided by the Registrar 'with the approval of the President or Speaker'.

**3.43** The Judiciary Committee of the United States House of Representatives, considering a comparable arrangement, commented that the solution to the dilemma was a balance which furnished 'some assurance to reporting individuals that there will be some control over the dissemination of sensitive information while avoiding the possible chill of overregulation.'<sup>18</sup>

**3.44** The Committee will deal with restricted access in a later chapter, when the possible institution of registers of interests for various categories of officeholders will be discussed, but it should be said at once that the Committee has not been convinced that this would be a satisfactory solution.

### *Family interests*

**3.45** Requirements for the disclosure of interests held by members of the officeholder's family cause particular concern. It might be asked whether any mechanism for accountability through disclosure of private interests can ever be really effective if it excludes 'family' interests. The Committee has already considered in Chapter 2 whether officeholders have so close a coincidence with the interests of their spouses and dependent children that any system of control and regulation must extend over their affairs as well. There are considerations which move in the other direction. The nature of matrimonial property has changed. Women in contemporary Australia have greater economic independence. There is the apparent unfairness of subjecting to public scrutiny a person who has not chosen to enter public life and accept public duties.

**3.46** On balance, the Committee favours *ad hoc* disclosure of certain family and other analogous interests as necessary to the effectiveness of public accountability. It believes that such information should be given a degree of privacy protection at least equal to that provided for the officeholder. One could accept the view of the Joint Committee on Pecuniary Interests of Members of Parliament that inclusion of the pecuniary interests of members of the immediate family, even in a restricted access register, 'would involve an invasion of privacy which is more difficult to

justify than with respect to Members of Parliament themselves'.<sup>19</sup> As far as is possible, an extra degree of care should be displayed in protecting the privacy of persons other than the officeholders who are brought under requirements for the disclosure of interests.

**3.47** The Committee noted the provision of the Victorian *Members of Parliament (Register of Interests) Act* 1978, s. 6 (2) (i), requiring each Member to register 'any other substantial interest whether of a pecuniary nature or not . . . of a member of his family of which the Member is aware *and which the Member considers* might appear to raise a material conflict between his private interest and his public duty as a Member' (emphasis added). Such a formulation appears to the Committee to open too wide a discretion for Members in an area of some sensitivity. If some family interests are to be disclosed, the rules for disclosure should not provide what could be to many Members an unwelcome degree of discretion as to whether a particular interest should be registered or not. It should be an accepted rule that when a member of his family possesses a private interest which conflicts or might reasonably be thought to conflict with a Member's public duty, and the Member is aware of it, he has a duty to disclose that interest in relevant circumstances.

#### *Amounts*

**3.48** Requirements for disclosure of the mere fact that interests exist, rather than their quantity or monetary value, provide further examples of compromise. The Committee finds doubtful the employment of such devices to mitigate intrusion upon privacy. Far more important, in the Committee's opinion, is establishing the relevance to the officeholder's public duties of the interest and of its disclosure.

#### *Records*

**3.49** Privacy as an issue does not end when a decision has been taken that there should be declaration or registration of interests. If there is to be disclosure, then there will be records of the disclosures made. Systems will have to be designed with privacy criteria in mind, and at this point guidance may be sought from the many contemporary policy statements on the protection of privacy in official records. Because of the wide variation in the circumstances in which disclosure systems should operate for different classes of officeholder, most of this discussion can best be left to Chapters 7 to 10.

**3.50** The Committee records at this point its recognition of the merits of criteria identified by the New South Wales Privacy Committee as seven basic principles:

1. A personal data system should exist only if it has a general purpose and specific uses which are socially acceptable.
2. Personal data should only be used when it is relevant to the particular decision being made, and its use for this decision is socially acceptable.
3. The minimum necessary data should be collected, using fair collection methods, and from appropriate sources.
4. Standards should be established and maintained regarding data integrity, data security and the period for which identified personal data is retained.
5. Personal data should only be accessed consistently with the system's socially acceptable uses, and for additional uses by consent or by law.
6. The interested public should be able to know of the existence, purpose, uses and methods of operation of personal data systems; to object to any feature of a system; and where appropriate to have change enforced.
7. Every person would be able to know of the existence and of the content of data which relates to himself; to complain about any feature of that data or its use; and where appropriate to have changes enforced.<sup>20</sup>

Although devised for different questions than have faced this Committee, these basic principles are a useful guide.

### *Conclusion*

**3.51** The Committee does not think that the right to privacy forms a complete and automatic bar to the imposition of any disclosure requirements, provided that a sufficient case can be established for obtaining the information. But that case should rest on a real and substantial need and on an adequate probability that disclosure of the information will match that need. The Committee recognises that disclosure may impose costs. In addition to the emotional response to the intrusion, which may range from irritation to outrage, there may be the expenditure of time and money in compiling the information to be disclosed. It was put to the Committee that there could be heightened risk of verbal abuse, or even the risk of physical violence, consequent upon the public exposure of financial affairs. Several witnesses expressed their concern at the possibility that criminals could use information about wealth from a publicly accessible register to identify office-holders who might be targets for kidnapping or extortion. The Committee will try to follow a course which recognises both objectives, public accountability and protection of privacy. It assigns both considerable weight, but it does not regard either one as paramount over the other.

1. New South Wales, Parliament, *Report from the Joint Committee of the Legislative Council and Legislative Assembly upon Pecuniary Interests* (Keith O'Connell, Chairman), Government Printer, Sydney, 1978, p. 6.
2. Bayless Manning, 'The Purity Potlatch: Conflict of Interests and Moral Escalation', reprinted from *Federal Bar Journal* 24 (1964) in Arnold J. Heidenheimer (ed.), *Political Corruption: Readings in Comparative Analysis*, Holt, Rinehart and Winston, New York, 1970, pp. 309, 311.
3. Great Britain, Royal Commission on Standards of Conduct in Public Life 1974-1976 (Lord Salmon, Chairman), *Report*, Cmnd. 6524, HMSO, London, 1976, p. 12.
4. Canada, Treasury Board, Circular No.: 1973-183, File No.: 7000-4-4, p. 3.
5. See, for example, Sanford Watzman, *Conflict of Interest: Politics and the Money Game*, Cowles, Chicago, 1971, at pp. 77-8 and James C. Kirby Jr, *Congress and the Public Trust: Report of the Association of the Bar of the City of New York Special Committee on Congressional Ethics*, Atheneum, New York, 1970, at Chapter 7.
6. United States, House of Representatives, Committee on Post Office and Civil Service, Subcommittee on Employee Ethics and Utilization, *Hearings on Federal Ethics and Financial Disclosure June 16 and 23, 1977*, Serial No. 95-19, Washington, 1977, pp. 78-9.
7. Stanley I. Benn, 'Human rights—for whom and for what?', in Eugene Kamenka and Alice Erh-Soon Tay (eds), *Human Rights*, Edward Arnold, London, 1978, p. 63.
8. United States, House of Representatives, Committee on the Judiciary, *Ethics in Government Act of 1977*, Report No. 95-800, Washington, 1977, pp. 24, 106.
9. Australia, Parliament, *Declaration of Interests: Report of the Joint Committee on Pecuniary Interests of Members of Parliament* (J. M. Riordan, Chairman), AGPS, Canberra, 1975, p. 15.
10. Australia, Law Reform Commission, *Privacy and Publication—Proposals for Protection*, Sydney, Australian Law Reform Commission, 1977, pp. 15-16.
11. 381 US 479.
12. 52 Ill. 2d 570, 289 NE 2d 409.
13. 83 Wash. 2d 275, 517 P. 2d 911.
14. 274 Md. 489, 336 A.2d 97.
15. 466 P.2d 225.
16. 129 NJ Super. 327, 323 A.2d 537.
17. Riordan, *Declaration of Interests*, p. 26: emphasis added.
18. United States, House of Representatives, Committee on the Judiciary, *Ethics in Government Act of 1977*, p. 25.
19. Riordan, *Declaration of Interests*, p. 25.
20. New South Wales, Privacy Committee, *Guidelines for the Operation of Personal Data Systems*, N.S.W. Privacy Committee, Sydney, 1977, p. 2.



## 4. Principles for the avoidance and resolution of conflicts of interest: a Code of Conduct

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**4.1** The Committee's terms of reference require it:

2. To recommend whether principles can be defined which would promote the avoidance and if necessary the resolution of any conflicts of interest which the Inquiry may . . . find to be possible.
3. In the event of a finding under paragraph (2) above that principles can be defined, to recommend what those principles should be.

**4.2** In Chapter 2 the problems of defining the nature of private interests which could conflict with the public duty of Commonwealth officeholders were discussed. It was concluded that there were major difficulties in the way of providing a completely satisfactory definition. Despite this, the Committee believes that it is possible to define principles that comply with the requirements of items 2 and 3 of the terms of reference in the sense that their adoption would promote the avoidance of conflicts of interest and would provide a basis for their resolution where necessary. A statement of such principles would constitute a Code of Conduct for all persons holding positions of public trust in relation to the Commonwealth, having special reference to their obligations in respect of conflicts of interest. The principles which the Committee considers should be included in such a Code are set out later in this chapter.

**4.3** The case for having such a collection of rules of conduct was made, with a necessary qualification, by the Prime Minister's Committee on Local Government Rules of Conduct (the Redcliffe-Maud Committee) in Britain:

Rules of conduct cannot create honesty; nor can they prevent deliberate dishonest or corrupt behaviour. Rather, they are a framework of reference embodying uniform minimum standards. Their special value is in situations which are intrinsically complicated, or are new to the individual concerned, where they provide a substitute for working out the right course of action from first principles on each occasion.<sup>1</sup>

This view of the nature and purpose of a Code of Conduct has the Committee's endorsement. Here it may be noted that the Joint Committee on Pecuniary Interests of Members of Parliament, although commenting in a somewhat different context, expressed the opinion that:

. . . a precise and meaningful code of conduct should exist . . . By specifying a set of basic principles which Members of Parliament should observe, Members would be reminded that their ethical obligations to the community do not cease merely by declaring their interests.<sup>2</sup>

**4.4** Given its terms of reference, the Committee has been concerned with the formulation of *principles*, that is, fundamental sources from which more detailed rules and guidelines may be developed. Because conflict of interest has been

a 'grey area' of uncertainty, largely unregulated by statute law previously, there has been relatively little overlap with existing legal provisions. When there has been such an overlap, the Committee has not regarded it as a bar to including appropriate items in the Code of Conduct which it proposes for adoption.

**4.5** Paragraph 4.9 recommends adoption of a Code of Conduct which the Committee considers would be generally appropriate to deal with conflict of interest situations involving officeholders. A brief explanation as to the procedure by which the Code was compiled might be helpful. The Committee examined a substantial number of statements coming from Australia and other countries (including Britain, Canada, India, New Zealand, Papua New Guinea, the United States and West Germany) going back in time more than fifty years, although the great majority were the products of approximately the last ten years. The Committee found one proposed code particularly helpful, even though it related to a category of officeholders outside its sphere of inquiry: that produced by the Redcliffe-Maud Committee in Britain in 1974. It also derived considerable assistance from the investigations of various committees such as the Salmon Royal Commission on Standards of Conduct in Public Life and the 1977 Select Committee on Conduct of Members in Britain, and the various Congressional Committees considering codes of conduct and analogous legislation in the United States. Appendix 3 to this Report sets out a brief history of the development of codes of conduct in a number of overseas countries and Appendix 5 the code of conduct recently adopted in Victoria.

**4.6** An annotated text of the Code of Conduct proposed in this chapter could point to numerous precedents, drawn principally from the experience of the countries mentioned above, for each of the items it contains. But, in selecting and shaping particular portions of the Code, the Committee has tried to remain conscious of Australian traditions and Australian practices and procedures. It has also looked at what the record suggests have been the Australian malpractices and defects in procedure which it is hoped the Code would assist in curing.

### The contents of a code of conduct

**4.7** The Code formulated in this report concerns itself with matters relating to conflicts of interest, pecuniary or otherwise, and only with such matters. There are, of course, many other matters which might suitably be included in a code of official conduct. For example, the *Draft Guidelines on Official Conduct of Commonwealth Public Servants* prepared by the Public Service Board cover a range of other matters not discussed in this report.

**4.8** The Committee's concern has been with those private interests which are not widely shared. Many of these are likely to have a pecuniary component. Several of the items in the Code are therefore intended to deal primarily with conflicts of interest that concern a direct pecuniary benefit for the officeholder and his immediate connections. However, guidance is also provided for those conflict of interest situations which are analogous, even though the pecuniary benefit may not be conferred upon the officeholder but goes instead to some wider group or organisation with which he has a close involvement.

**4.9 The Committee recommends that the following Code of Conduct be adopted for general application to all officeholders:**

**CODE OF CONDUCT**

*Under the system of government which operates in Australia the main legislative and executive functions of government are carried out by Ministers, Members of Parliament, public servants and statutory officeholders. Each category of officeholder has a duty to discharge responsibilities entrusted by the Constitution and the laws made under the Constitution according to the highest standards of conduct. The public is entitled to have confidence in the integrity of its government. Officeholders may be required by the nature of public office to accept restrictions on certain areas of their private conduct beyond those imposed on ordinary citizens.*

*The following Code of Conduct embodies principles which should be observed by all four categories of officeholders.*

- 1. An officeholder should perform the duties of his office impartially, uninfluenced by fear or favour.*
- 2. An officeholder should be frank and honest in official dealings with colleagues.*
- 3. An officeholder should avoid situations in which his private interest, whether pecuniary or otherwise, conflicts or might reasonably be thought to conflict with his public duty.*
- 4. When an officeholder possesses, directly or indirectly, an interest which conflicts or might reasonably be thought to conflict with his public duty, or improperly to influence his conduct in the discharge of his responsibilities in respect of some matter with which he is concerned, he should disclose that interest according to the prescribed procedures. Should circumstances change after an initial disclosure has been made, so that new or additional facts become material, the officeholder should disclose the further information.*
- 5. When the interests of members of his immediate family are involved, the officeholder should disclose those interests, to the extent that they are known to him. Members of the immediate family will ordinarily comprise only the officeholder's spouse and dependent children, but may include other members of his household or family when their interests are closely connected with his.*
- 6. When an officeholder (other than a Member of Parliament) possesses an interest which conflicts or might reasonably be thought to conflict with the duties of his office and such interest is not prescribed as a qualification for that office, he should forthwith divest himself of that interest, secure his removal from the duties in question, or obtain the authorisation of his superior or colleagues to continue to discharge the duties. Transfer to a trustee or to a member of the officeholder's family is not a sufficient divestment for the purpose. If immediate divestment would work significant hardship on the officeholder, possession of the interest should be disclosed to colleagues or superiors and authorisation obtained for temporary retention pending divestment.*
- 7. An officeholder should not use information obtained in the course of official duties to gain directly or indirectly a pecuniary advantage for himself or for any other person. In particular, an officeholder should*

scrupulously avoid investments or other transactions about which he has, or might reasonably be thought to have, early or confidential information which might confer on him an unfair or improper advantage over other persons.

8. *An officeholder should not:*
  - (a) *solicit or accept from any person any remuneration or benefit for the discharge of the duties of his office over and above the official remuneration;*
  - (b) *solicit or accept any benefit, advantage or promise of future advantage whether for himself, his immediate family or any business concern or trust with which he is associated from persons who are in, or seek to be in, any contractual or special relationship with government;*
  - (c) *except as may be permitted under the rules applicable to his office, accept any gift, hospitality or concessional travel offered in connection with the discharge of the duties of his office.*The impression should be avoided that any person can improperly influence the officeholder or unduly enjoy his favour.
9. *An officeholder should be scrupulous in his use of public property and services, and should not permit their misuse by other persons.*
10. *An officeholder should not allow the pursuit of his private interest to interfere with the proper discharge of his public duties.*

## Introducing and enforcing a Code of Conduct

**4.10** The Committee considered the means by which a Code of Conduct might be brought into effect and how it might be enforced. One possibility was to recommend the inclusion of equivalent provisions in a single statute. Such a statute might impose on various categories of officeholders the sorts of obligations to disclose or divest already contained in a number of statutes which create statutory bodies and require their members to disclose or divest specified classes of interests. Enforcement of these obligations could be the responsibility of the ordinary courts, or else a special quasi-judicial body such as the Ombudsman Commission of Papua New Guinea or the Integrity Commission of Jamaica.

**4.11** The Committee would not wish to see the ordinary courts brought into a regulatory role in the conflict of interest field. It believes that, for the great majority of cases, an instrument as flexible as possible is required. The maximum degree of flexibility will be provided if provisions for the avoidance and resolution of conflicts of interest, and for the enforcement of the Code of Conduct generally, are built into the existing disciplinary procedures of the various categories of officeholders. These provisions will be explained in detail in later chapters.

**4.12** Broadly, the Committee expects statements of principle, such as are embodied in a draft Code of Conduct applicable to officeholders, to be manifest in such forms as the Standing Orders, resolutions and conventions of a legislative body, or the staff rules and guidelines of an executive body. They may require supplementing by additional rules, sometimes reflecting minimum standards more onerous or restrictive than the general principle, sometimes explaining or enlarging upon a qualification to the general principles already incorporated in the Code of Conduct, to make them fit more satisfactorily the cases of particular groups of officeholders within wider categories.

**4.13** The Committee believes that the Code of Conduct which it has drawn up is expressed in sufficiently broad terms to stand the test of time. Without trying to make unjustified claims for the merit of this particular text, the Committee would argue that any Code of Conduct should remain constant in its main provisions for substantial periods of time. It should recognise and embody values about which there is a high and enduring degree of consensus, both within society at large and within the particular organisations to the members of which it applies. **The Committee recommends that when decisions have been taken on the final text of the Code of Conduct to be adopted for each particular category of officeholder, every effort be made to secure the widest possible familiarity with and observance of the Code and the ancillary rules and guidelines which are necessary to expand and apply its basic provisions.**

1. Great Britain, Prime Minister's Committee on Local Government Rules of Conduct (Lord Redcliffe-Maud, Chairman), *Report*, Cmnd. 5636, London, HMSO, 1974, p. 6.
2. Australia, Parliament, *Declaration of Interests: Report of the Joint Committee on Pecuniary Interests of Members of Parliament* (J. M. Riordan, Chairman), AGPS, Canberra, 1975, p. 12



## 5. Measures available for buttressing the proposed Code of Conduct

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**5.1** The Code of Conduct set out in the previous chapter is basic to the recommendations contained in this report.

**5.2** As a preliminary to making recommendations on the measures to supplement the Code, the Committee decided to examine in some detail the procedures and mechanisms adopted elsewhere, but particularly in overseas countries, for the avoidance and resolution of conflicts of interest. The present chapter summarises the results of the Committee's investigations and expresses some views on the measures adopted.

**5.3** The countries whose experience the Committee found most helpful have governmental institutions resembling Australia's—in other words the Westminster model comprising parliament, cabinet, and a neutral, career public service. In addition, the Committee found the United States record relevant, although, because of the differences between the United States political system and those of countries cast in the Westminster mould, that record must be interpreted with caution. For example, in Washington the Ministers, that is, the heads of the major administrative departments, are not members of the Congress. The executive can continue to govern for the President's full term, whether or not the party he represents has a majority in the Congress. One consequence of this is that it often happens that when an item of legislation is before the Congress, efforts are made by the executive or its opponents to 'persuade' members to vote for or against it. Since the executive's continuance in office is not affected by defeat on the floor of Congress, there is considerable scope for 'persuasion'. In Canberra, by contrast, if there is an important piece of legislation put before the Parliament by the Government and sufficient supporters of the Government vote to defeat it, the Government commonly resigns and an election follows. The Member who is persuaded to vote against the measure finds himself immediately fighting for his political life in an election. It is clear that the American phenomenon of 'persuasion' and inducement is not reflected in the Canberra scene, and therefore argument from the American experience on conflicts of interest and duty can be misleading.

**5.4** Much of the comparative overseas material, summarised in Appendix 3, derives from the past decade. In some instances it has been necessary to look further back in time to trace the antecedents of arrangements which are still operative, and in some cases have been adopted in Australia. Recently five of the Australian States and the Northern Territory have given public consideration to conflict of interest problems. The Committee studied the proposals put forward by their governments and by parliamentary or other committees. Details of Australian experience in relation to the regulation of conflict of interest at the Commonwealth and State levels are set out in Appendixes 4 and 5.

**5.5** At an early stage the Committee recognised the distinction between the 'black' area of conduct traditionally illegal and generally subsumed under the label of bribery and corruption, and the 'grey' area of conflict of interest where the line between legality and illegality is much less certain and standards of proper conduct are controversial. The Committee directed its inquiries almost entirely to the second area. It does not have any reason to think that the criminal law is defective to any significant extent. Consequently it makes few recommendations in respect of the 'black' area (see Chapter 14).

**5.6** Within the 'grey' area, conflict situations may be avoided or they may be resolved. The principle that a person should avoid situations where his personal interest may conflict, or may reasonably be thought to conflict, with his duty is a sound one. It is well known in the law of equity, particularly in its application to trustees, and in company law in its application to directors, who are regarded as occupying fiduciary positions. Its main application is in relation to the ownership or administration of property. It should also be mentioned that in these areas of the law the principle applies also where there is a conflict of duty and duty. Indeed, the view is taken that in some cases this may be a more intractable conflict. Although a person may be able and willing to waive a personal interest which he has in favour of a conflicting duty, he has no right to waive the interest of a beneficiary for whom he is a trustee in favour of another conflicting duty, at least without the consent of his beneficiary.

**5.7** The Committee believes it appropriate by analogy to apply similar principles to conflict situations in which the various categories of officeholder find themselves. The principle is based upon the view that the pursuit of self-interest is a powerful motivation for human beings, and needs to be guarded against where it may conflict with some duty.

**5.8** Conflicts of interest can be avoided by action taken by the officeholder, perhaps encouraged by exhortations contained in a code of conduct or deterred by the possibility of punishment for improper conduct. The officeholder may avoid acquisition of interests which engender conflict or assuming duties or offices which will conflict with his private interests. He may disqualify himself from duties which conflict with his private interests. The responsible authority may cause the conflict situation to be avoided by specific prohibitions, disqualifications or refusals to authorise the officeholder to continue to act in the situation. Or it may issue rules which constitute standing prohibitions, expressed absolutely or requiring authorisation if action is to be permitted.

**5.9** Conflicts of interest, once they have emerged, can be resolved either by removing the source of the conflict situation or by neutralising it. The conflict may be removed either by removing the interest through divestment, or by removing the officeholder from particular duties or from a particular office by disqualification. It may be neutralised by the declaration or registration of the interest so that it is no longer secret, or by a specific act of authorisation. Moreover declaration or registration of the interest can alert the officeholder or the responsible authority to the need for further action to avoid or resolve conflict situations.

**5.10** The Committee's studies suggest that the diversity of ways in which conflicts of interest can be avoided or resolved comes down in the end to six principal options—prohibition, declaration, registration, authorisation, divestment and disqualification. These six options are not mutually exclusive. They can be adopted



either separately or in combination. Indeed reliance on a single option by itself can give rise to a piecemeal approach that fails to resolve or avoid conflicts adequately. For example, it may not always be enough to disclose an interest and the conflict it creates—authorisation or disqualification may also be necessary.

## Prohibition

**5.11** Prohibition involves the avoidance by forbidding, for example, a certain sort of officeholder from possessing a particular type of interest, or forbidding his acting in his official duty if he does possess it.

**5.12** It can occur in a number of forms, ranging from automatic disqualification from office occasioned by possession of some interest to an item in a code of conduct without sanctions, which merely cautions against holding such an interest. An associated possibility may be that actions undertaken by an officeholder who holds a prohibited interest would be rendered void or voidable. Examples of absolute prohibition are the Constitutional provisions relating to Members of the Commonwealth Parliament holding offices of profit (s. 44 (iv)), being government contractors (s. 44 (v)), or taking fees or honoraria for services rendered to the Commonwealth or in the Parliament (s. 45 (iii)).

**5.13** Comparable prohibitions affect certain statutory officeholders. They may forbid appointment, for example the *Insurance Acts* 1973, s. 12 (2). There have also been prohibitions against acquiring an interest while in office, for example the *Public Service Act* 1922, s. 15 (2).

**5.14** Generally prohibitions, when expressed in absolute terms, are inconveniently rigid. Because of this, they tend to receive excessively narrow interpretations which often nullify their effectiveness. Automatic disqualification from office may be too severe a sanction for an innocent oversight or a misreading of obscure law. Antiquated provisions relating to offices of profit and government contractors are notoriously pits into which the most upright may stumble.

**5.15** There may, however, be instances where it is necessary to retain an absolute prohibition against holding certain types of interest in respect of appointment to certain specialised statutory offices. Perhaps the strongest case would be that of adjudicatory or regulatory bodies, where the appearance of fairness between competing applicants or the absence of private interest is essential, for example the Australian Broadcasting Tribunal, which must choose between competing applicants for a licence, and the Australian Film Commission, which must choose between competing applicants for financial support.

**5.16** There is also the reverse situation when a statutory officeholder is required to possess an interest as a qualification for appointment, and is disqualified from holding office if he fails to retain it. For example, the *Honey Industry Act* 1962, s. 11 (2A), requires members who represent honey producers to own at least two hundred hives of bees, otherwise they shall be removed from office. This is a case in which the wish to have expert and representative members of the statutory body overrides the potential conflict of interest. It does not, of course, obviate the need for the member to act without regard to his personal interests. The fact that the private interest is public knowledge helps to make it acceptable.

**5.17** In addition to the Constitutional and legislative provisions already mentioned, there is one form of prohibition to be noted which, on the face of it at least,

would appear significant. Standing Order 196 of the House of Representatives provides:

No Member shall be entitled to vote in any division upon a question (not being a matter of public policy) in which he has a direct pecuniary interest not held in common with the rest of the subjects of the Crown. The vote of a Member may not be challenged except on a substantive motion moved immediately after the division is completed, and the vote of a Member determined to be so interested shall be disallowed.

There is no equivalent in the Senate Standing Orders.

## Declaration

**5.18** Declaration is the written or oral disclosure of a relevant interest at the relevant time, and for this reason may be conveniently called *ad hoc* declaration.

**5.19** Declaration of an interest is a statement that the officeholder has an interest which might, or might be thought likely to, influence his actions or advice. It is made to his colleagues, in respect of a decision they are currently making jointly, or to other officeholders to whom he is providing advice. It discloses to them information with which they can assess his motives in relation to that decision or advice. There may be occasions when an officeholder's interests are patent and formal declaration is unnecessary. Similarly, the officeholder in whom is vested the power to make a decision in his own right should disclose to the relevant authority any private interests by which his motives in arriving at the decision might be affected. In each case the purpose is to allow informed judgment as to whether personal interests might have conflicted with and prevailed over public duty.

**5.20** The Committee believes that there is a widespread expectation of openness and honesty in government. Those who carry the burden of public office should be able to rely on their colleagues' arguments and representations as being honest and free of bias induced by personal interests. Where there is a possibility that personal interests might influence advice and decisions, those involved in the decision-making process need to know that possibility and be able to weigh its likelihood.

**5.21** The advantage of *ad hoc* declaration of interests is that the information is available when it is required. It is made available to those who need to know. The value of the information is correspondingly enhanced, for there is no need to search for one meaningful item in a register containing a general disclosure of all interests. What might matter is immediately to hand. Unlike registration, declarations of interest do not require additional staff and expense. They are dealt with by the ordinary processes of recording the advice and decisions with which they are connected. The responsibility for dealing with the conflict of interest is placed where it belongs, with the officeholder. It trusts him to do the proper thing. When the ultimate goal is the encouragement of mutual trust and honesty within an organisation, that is the best way to go about it. Because only so much information as is relevant to a real and immediate question is disclosed, the invasion of privacy is minimised.

**5.22** It is frequently alleged that a requirement for the *ad hoc* declaration of interests is too easy to ignore or to avoid. It is argued that declarations would be so limited in their scope and so infrequently made that, even were the practice followed conscientiously, little would be done to increase public confidence in the processes of Australian government. The Committee disagrees.

If a requirement for declaration was introduced for all categories of officeholders, this should result in a widespread awareness that interests have to be disclosed, especially if such a requirement was reinforced by the opportunity to know what interests had been disclosed by Members of Parliament. Particularly when associated with a strong system of investigation of allegations of conflict of interest, such a requirement should go a long way towards assuring the public that government decisions are free from the taint of self-seeking personal interests.

## Registration

**5.23** Registration is the written disclosure of specified interests at regular intervals, without the regard to the immediate circumstances of the officeholder which characterises declaration.

**5.24** Registration of interests is another form of disclosure, but registration and a requirement for declaration are by no means mutually exclusive. Any requirement for registration of interests would, in the opinion of the Committee, still require *ad hoc* declaration of interest because of its relevance and immediacy. Even in the case of Ministers and Ministerial staff, for whom there is already a registration procedure and in respect of whose interests it recommends continued registration, the Committee believes that there should also be an obligation to declare interests at the time when any conflict of interest situation arises or might reasonably be thought to be present. The existence of a register somewhere else, one that may have been consulted weeks or months earlier, if at all, is no substitute for the reminder at the moment when an officeholder is speaking or acting that he has an interest which may conflict with his public duty.

**5.25** The forms of a register and the way it operates can vary. At one extreme, if *ad hoc* declarations of interest were recorded as they were made and the resulting records accumulated at some central point, they could be said to constitute a partial register of the interests of those who had been making the declarations. Registers of this type are kept by boards of company directors and by certain statutory authorities. At the other extreme would be a comprehensive register of all members of an organisation, showing the widest possible list of both pecuniary and non-pecuniary interests they possessed, frequently updated, and with the monetary values of all pecuniary interests expressed.

**5.26** A register may be open to the public, perhaps even turned into a government publication for ease of dissemination, but it may also be a confidential document, accessible in respect of each entry only to the superior or colleagues of the officeholder disclosing his interests, or to the small group or single official responsible for maintaining the register.

**5.27** Arguments for and against the principle of registration have been set down many times, with numerous variations on the basic propositions. Most of the debate has taken place with reference to elected officeholders, primarily Members of Parliament. Considerable interest in registration as the principal, and quite possibly the only, means for resolving conflicts of interest was exhibited in the evidence placed before the Committee. Where the matter of conflict between public duty and private interest has been subject to legislative proposals in the Australian States, the main thrust has been towards registration.

**5.28** The Committee's terms of reference require it to recommend whether or not a register under judicial or other supervision should be maintained so that,

in the event of allegations of impropriety, the allegation may be open to judicial investigation and report. Accordingly the Committee decided to provide at an early point in this report a comprehensive account of the arguments for and against a register, and a statement of the conclusions reached by the Committee as to whether or not a register should be maintained. This is done in the next chapter.

## Authorisation

**5.29** Authorisation, as a means of resolving conflict of interest situations, is usually tied to disclosure and involves the agreement of parties, colleagues or superiors to allow an officeholder to act or to retain an interest in a situation where there is conflict.

**5.30** Thus, the officeholder with an interest which might, or might be thought likely to, engender conflict discloses that interest to the appropriate person(s), and then is authorised to continue to act in the matter in question and to retain an interest—or else is advised to stand aside from it or divest the interest. For example, in the case of a Cabinet meeting, a Minister may explain the interest which he thinks might disqualify him from taking part in a particular discussion and the decision is then taken whether or not he should participate. In the public service, an officer may refer the matter to his superior, who decides whether he may properly continue or not. Authorisation may also be given so as to operate continuously within certain bounds; for example to accept gifts up to a fixed limit but not beyond it.

**5.31** This option leaves the initiative with the officeholder and usually operates only when the interest is relevant. But because it is usually handled fairly informally, there may be a lack of established precedents and unwarranted differences in practice. Arrangements for authorisation may or may not be accompanied by provision of sanctions to be applied when the person seeking authorisation fails to accept the judgment of his colleagues or superiors. Even if it is formal, a legal requirement to secure permission may operate arbitrarily. If there is a rule, there should be adequate criteria for its exercise.

## Divestment

**5.32** Divestment is the disposal by an officeholder, either permanently or temporarily, of an interest which creates or may be thought to create conflict with his public duty.

**5.33** The practice of using the option of divestment as a means of avoiding or resolving conflict of interest situations has been developed mainly in North America. There the drastic remedy of complete divestment has been supplemented by the use of blind trusts and frozen trusts, which seek to spare the officeholder the costs of divesting at what might be an inopportune time, whilst removing the immediate cause of conflict of interest.

**5.34** Under a blind trust, the assets in question are transferred to a trustee who, without consulting the officeholder and indeed being explicitly precluded from doing so, deals with them and may dispose of them. The officeholder, so the theory goes, cannot know whether he is still beneficially interested in this block of shares or that parcel of land, and therefore has no incentive to misuse his public responsibilities to advantage those assets. Neither does he have power to trade in them, thereby possibly misusing confidential information received in his official capacity.

A compromise version of the blind trust can be constituted where there is an official trustee who does not accept directions from the beneficiary, but regularly renders accounts which would indicate the assets subject to the trust at those times.

**5.35** Under a frozen trust, the trustee is forbidden to buy or sell, and consequently the officeholder has no opportunity to misuse information. However he does know that his beneficial interest remains and therefore that an advantaging of those assets will accrue to him.

**5.36** The Committee believes that such trusts could be a facade behind which the conflict of interest would survive, for it can see no effective way by which a trust could be rendered completely 'blind'. Unless the assets were diversified the officeholder could easily ascertain whether the trustee still retained them and, in practice, might find it nearly impossible to avoid knowing. If a public official were designated the trustee for such purposes, there might be greater confidence in the 'blindness' of the arrangement than if the officeholder were allowed to select a relative or former business associate. On the other hand, an officeholder obliged to transfer assets to an official trustee might be doubtful whether the trustee's commercial acumen would guarantee the income or capital growth which his own or commercial management might have produced over the same period. As for the frozen trust, its impact on a conflict of interest situation is so limited that the Committee doubts that it would have the effect on public confidence which has been claimed for it.

**5.37** The Committee does not regard either the blind trust or the frozen trust as a satisfactory alternative to complete divestment when sensitive assets are involved. Further, there would be significant administrative difficulties in operating blind trusts if it was accepted that the attempt was worthwhile. For example, special income taxation provisions would probably be required to maintain the confidentiality of the trust operations from the officeholder who was its beneficiary and at the same time ensure that the trust income bore its appropriate rate of tax.

**5.38** The Committee believes that divestment is appropriate in the Australian context only for certain types of interest. Where there is so close an association between the interests and the officeholder's responsibilities that the other options of disclosure and avoidance are not appropriate, divestment may be required. Ministers administering their own departments often act by themselves without convenient opportunity to disclose and seek authorisation such as would be available to them in Cabinet. Those public servants who have to make frequent, perhaps daily, decisions in a particular area may find it impractical to arrange for someone else to act for them when a conflict of interest arises, or to have the authorisation of a superior on each occasion. In both cases, it is better to divest the interest which causes the difficulty and get on with the job.

## Disqualification

**5.39** Disqualification is the avoidance by breaking, permanently or temporarily, the connection between the officeholder and the interest which creates conflict by removing him from his office or the duties in the conflict situation.

**5.40** Disqualification is an option primarily for public servants and occasionally for Ministers and statutory officeholders. It supposes that personnel are interchangeable and that there is someone who is in authority to direct or arrange

the change. The arrangement may be quite informal, simply a matter of assigning duties differently once or for a brief period. It may have to be formal if the duty is imposed by statute upon a designated officeholder, so that it is necessary to make an acting appointment to the post. A number of witnesses before the Committee saw it as preferable to divestment as a means of resolving conflicts of interest within the public service. Transfers and reallocation of duties are a daily occurrence with which everyone is familiar. A power given to a senior officer to require a public servant to divest himself of a private interest would be novel and probably unpalatable.

## 6. Registration of interests

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**6.1** The Committee's terms of reference require it to recommend 'whether or not a register under judicial supervision should be maintained so that, in the event of allegations of impropriety, the allegation may be open to judicial investigation and report'.

**6.2** A strict reading would suggest that the Committee is required to consider whether one register should be established to cover the interests of all officeholders. The practical problems of maintaining such a register would be enormous. The Committee has taken the view that this was not the intention. Rather, so it appeared to the Committee, the intention was that consideration was required of the question whether the principle of registration of their private interests should be extended to all categories of officeholders, and, if the conclusion was in the affirmative, the nature of the registers to be adopted, the form of supervision and the machinery for investigation and report in the event of allegations of impropriety.

**6.3** The soundness of this view was reinforced as the Committee's work proceeded. There were, it was found, differences in the roles of the various categories of officeholder which would justify differences of approach as to how the registration principle should be applied to each and, in particular, as to the form of supervision and the machinery for investigation and report in the event of allegations of impropriety. Reference to some of the issues involved is to be found in Chapter 3. The proposals in Appendix 6 reflect the Committee's attitudes to them.

**6.4** The question whether registration of interests should be introduced has proved to be one of the most difficult questions with which the Committee has had to grapple. A great deal has been written on the subject and a good deal has been done, in other countries and in Australia. After lengthy study, and after considering the written submissions and the oral evidence, the Committee has concluded that it should recommend against a register for officeholders as a general requirement. As will appear later, this conclusion is subject to some qualification.

**6.5** It should be stressed that the Committee's conclusions regarding registration do not reflect any fundamental objection to disclosure of interests. Items 4 and 5 of the Code of Conduct recommended in Chapter 4 call for disclosure when an officeholder possesses, directly or indirectly, an interest which conflicts, or might reasonably be thought to conflict, with his public duty or when known interests of members of his immediate family are involved. But there are important differences between *ad hoc* disclosure and the registration of interests, hinging on the two factors of relevance and immediacy. How much importance the Committee attaches to these two factors will be apparent in later paragraphs.

**6.6** In considering the arguments for and against the registration of interests, it is well to bear in mind what has been done in other countries and in Australia.

The fact that there has been widespread support for registration is in itself a reason for giving the closest consideration to this question. Appendixes 3, 4 and 5, which deal with overseas and Australian practice and experience generally, set out in brief the extent to which registers of interests are used to govern conflict situations in the countries for which details are given.

**6.7** Likewise, it is well to bear in mind the different types of register which have been discussed. They vary according to what is required to be disclosed and the degree of public access (if any) which is to be afforded. It is convenient to divide them into three classes: limited registers, middle-range registers and extensive registers. In Appendix 6, paragraphs 3 to 14, there are set out what are seen as the characteristics of each of these three classes of register.

**6.8** While consideration of the information to be registered and the access to be granted to it is necessary for intelligent discussion of the question whether registers should be introduced for persons in positions of public trust in relation to the Commonwealth, it has been felt that to set forth the comments upon them in the body of this chapter would unduly interrupt the discussion.

**6.9** Most of the public debate on the registration of private interests has related to Members of Parliament. Accordingly, a deal of emphasis is given in this chapter to the position of Members. In other chapters, some additional questions relating to registration by other categories of officeholder are raised.

## Arguments for and against compulsory registration

### *The arguments for*

**6.10** *It is said that democratic institutions are under attack and that there is a loss of public confidence in Members of Parliament. It is then argued that it is necessary to remedy this situation and finally that the introduction of a register would remedy it or, at least, go some way towards remedying it.*

**6.11** The Committee has no quarrel with the proposition that democratic institutions are under attack. Modern advances in literacy, education and means of communication have produced an era when all forms of political institutions are under critical appraisal. It sees no reason to attempt to reverse this process.

**6.12** The proposition that there is a loss of confidence in Members of Parliament is difficult to assess. Although some witnesses discussed this matter, the Committee finds it impossible to say whether confidence in Members of Federal Parliament is higher or lower today than it was in, say, the 1920s or the 1930s or any other decade. There are so many factors involved. It believes that the Federal Government is expected to enter into a far wider range of public affairs affecting private citizens than ever before. In so far as it falls short of meeting the wishes and aspirations of the people there is, no doubt, a degree of disillusionment.

**6.13** As for the regard in which Members of Parliament are held, this presents two aspects. As individuals, there are many politicians, perhaps most, regardless of party, who are regarded by people in their own electorates, who actually meet them, with respect and even affection. As a group, 'politicians' are regarded with a considerable degree of cynicism and distrust.



**6.14** The fact appears to be that the reputation of Members of Parliament, the view which the community has of them, depends upon the standard of their actual performance from time to time. It is not something which in the long term can be manipulated by the introduction of some device or some form of window dressing. Politicians as a group, like any other substantial group in the community, will in the ordinary course of human affairs have their small quota of black sheep. When a scandal occurs, confidence drops. All politicians suffer a loss of regard. When there is a period free from scandal, confidence rises.

**6.15** It appears to be part of the conventional wisdom in federal politics in Australia that if what is called the 'credibility' of an opponent can be damaged or destroyed, this is worth votes. A consequence of this is that there is on both sides of Federal Parliament a search for ammunition to be fired at this target and an almost constant barrage of denigration proceeding both ways. Members of Parliament appear to spend a good deal of time denigrating other Members of Parliament. Perhaps this has always been so, but because the Committee has spent upwards of a year looking at the question of loss of confidence in politicians, it was constantly forced upon its attention. Furthermore, when such allegations are made, the media naturally enough report the progress of the debate. Perhaps, fifty years ago, such news would have permeated the community more slowly. Today, through newspapers, radio and television, the whole Australian community is bombarded with it almost instantly as it occurs. It is not to be thought that Members are uniformly unsuccessful in denigrating each other. They are, in fact, pretty successful. Any suggestion that a device such as the introduction of a register will restore the confidence of the public requires to be weighed in the light of this and in the knowledge that the process of denigration will doubtless continue. Indeed, it seems plain enough that a register might well be treated by some as a welcome additional source of ammunition, not only as regards the information disclosed in the register, but as a basis for allegations of culpable deficiencies in the disclosures.

**6.16** Another matter which has troubled the Committee is that even those who advocate the introduction of a register of interests as a means of restoring public confidence do not seriously suggest that, had such a register been in force, it would have had any relevance to the alleged scandals which have occurred. From the studies made, it believes that in most cases information contained in a register, however extensive, would have had little or no relevance to the matters forming the basis for the allegations.

**6.17** The Code of Conduct which the Committee has recommended in Chapter 4 recognises the need to guard against the situation where private interests conflict with public duty. However, it is necessary to keep matters in perspective. Important though the principle is, there are public requirements at least as important. Many of the political affairs of the nation are basically material matters. It may well be an advantage to the nation to be able to attract into the Parliament persons having experience and knowledge of such matters. If they are attracted to enter Parliament it is almost inevitable, if they are competent successful people, that they will have present or residual interests in those areas. It would be foolish to assume the affairs of the nation would be better looked after by persons having no interest, knowledge or experience in these fields, notwithstanding it might be said of them that there was no likelihood of a conflict of interest and duty arising. Indeed, if the principle is treated as

paramount, it would lead to the conclusion that the affairs of the nation should be placed in the hands of persons with no assets and with no connections with any area in which the government might be concerned. Such persons at least might be said to be free of any taint of conflict of interest. On the other hand, it might then be said that such people, elected only for a three-year term in the House of Representatives, would be vulnerable to every sort of influence. There is something to be said for having in Parliament some persons who have already demonstrated, in the world of practical affairs corresponding with politics, their intelligence, competence and imaginative grasp.

**6.18** It would be an error to make a general assumption that Members have entered Parliament in order to feather their own nests and then to conclude that, in order to protect the public against their depredations, they should be required to register their interests.

**6.19** Witnesses did not suggest a register would be relevant to any except a very limited number of cases which might arise. Rather, the case for a register was put on the basis of reassuring the public so they could regain their confidence in Members of Parliament. One Member, who gave evidence, has expressed this thought as follows:

... personal duty cannot override public duty. It is only by full financial disclosure that Members can demonstrate that they are motivated by public duty and not by private gain. Some witnesses spoke of the register as being not so much a practical as a 'symbolic' act; others spoke of it as having 'cosmetic' value. These latter suggestions, although put forward in good faith, appear to the Committee to reveal an attitude which would assert that there was value in giving the public a sense of security or assurance which could well prove to be unwarranted. The Committee's view is that, if a register was introduced for this reason and had this effect, then, if and when the next scandal occurred, the sense of being let down by the Members and by the institution of Parliament would be even greater.

**6.20** In taking oral evidence, the Committee sought the views of witnesses on the extent to which the alleged loss of public confidence in Members of Parliament and in the democratic institutions extended to the public service and to statutory bodies. The evidence regarding the latter was small, but, as far as the public service was concerned, it was uniformly accepted that the integrity of the public service is of high repute. The introduction of a system of registration of private interests would be unlikely to change the level of community esteem in which the public service is held.

**6.21** *It is argued in favour of a register that it would enable the public to attach proper weight to the arguments put forward in debate by a Member of Parliament.* This argument echoes material advanced in the United States in favour of a register. In the United States there is more scope for a member of Congress to be persuaded, or induced, to speak or vote in a particular way. Party lines are more loosely drawn and the sanctions against crossing them are slighter. The executive may suffer defeat in Congress without being compelled, as a result, to resign. The position in Australia is different.

**6.22** In practice there is smaller scope for influence of the type suggested upon an individual Member's arguments in the Federal Parliament, or his vote. The influence of party and the consequences of defeat of the Government on the floor of the House are powerful countervailing factors. Anyone who attempted to weigh

the disclosed assets or liabilities of a Member against his arguments or his votes recorded in *Hansard* over a period of, say, a year would be likely to get little return for his time spent on it. This is not to say a case could not occur where a Member had a personal pecuniary interest in the subject matter of debate. But this would be much more pointedly and efficiently dealt with from everyone's point of view by *ad hoc* declaration of interest at the time. A register prepared simply for general disclosure, containing information which everyone may have forgotten, would be a clumsy form of machinery to deal with such a situation.

**6.23** If a Member has an independent point of view to put, he has the opportunity and often the duty to put it in the party room, where it may well have some influence. However, it is idle to speak of the public being enabled by a register to weigh those arguments, because the party room is private and the public will not know of his arguments. His fellow Members will obviously be more effectively warned by an *ad hoc* declaration tailored to the circumstances.

**6.24** Likewise it may be suggested a Member may be influenced by private interest in making representations to a Minister, but this is private between them. Even if there were a register, the public could do no weighing in relation to it. The proper way to deal with the matter between the Member and the Minister would appear to be for the Member specifically to direct the Minister's attention to the interest, that is *ad hoc* declaration. To rely upon the Minister's having noticed or remembered some item in a public register would be clumsy and in many cases ineffective.

**6.25** *It is argued that the potentially dishonest Member of Parliament would tend to be deterred from misconduct by the requirement of disclosing his assets and liabilities in a register.* The Committee is unable to accept this argument. A Member who is prepared to act dishonourably in order to serve his own financial interests, provided he can get away with it, is simply not going to be deterred by the requirement for registration. The Committee has not yet seen a register proposed which could not quite easily and even lawfully be circumvented. It would regard a register as having virtually no deterrent effect.

**6.26** *It is argued that a register would 'remove the innuendo surrounding political debate'.* Innuendo is a method of making allegations by way of oblique hint or insinuation. It is a method often used in the past in politics, when it has been considered likely to be effective. It is obvious it will continue to be used in the future, when it is thought to be appropriate. It is used occasionally in relation to assets and liabilities of a Member, but this is only part of a much wider ranging use. The statement that the introduction of a register will 'remove the innuendo surrounding political debate', if taken in an absolute sense, is plainly ridiculous. Clearly it will not. Perhaps what is meant is that, in so far as innuendo has been directed at the possession of particular assets or liabilities by a Member, his disclosure of them in a register will place them outside the realm of innuendo. This may be so, though the extent of innuendo so removed would appear to be minimal. Indeed, the register would clearly furnish a fishing ground for those minded to employ innuendo, both as to what is disclosed and what it may be alleged is not disclosed. On balance, it seems likely the use of innuendo would not only continue to flourish but could well, in the net result, increase.

**6.27** *It is argued that the conscientious Member would be spared much anxiety by publication of his assets and liabilities in a register.* It appears to the Committee that a Member would be very ill-advised to rely upon disclosure in a

register to shed his anxieties. He might do so by frank disclosure at the appropriate time in terms appropriate to the circumstances, that is *ad hoc* declaration, and rightly feel he had discharged his obligation of frankness and that he was protected. But this would mean the register was not only unnecessary for the purpose of relieving the Member of anxiety but actually somewhat dangerous in giving him a false sense of security. Disclosure in general terms in a register could well prove to be insufficient to afford any protection to the particular Member concerned in the particular circumstances.

**6.28** *It is argued that the public have a 'right to know' those influences which operate upon Members in the discharge of their public duties. So expressed, the proposition seems unexceptionable. However, clearly that would be met by a requirement of public ad hoc disclosure of relevant interests at the precise time when it is material for the public to have and assess the relevant information. The Committee's recommendations regarding the Code of Conduct are directed to ensuring the public will have this right.*

**6.29** What troubles the Committee is that some witnesses regarded this 'right to know' as supporting the need for a register. But a register, in its compilation, has no reference to any specific conflict situation. It is a procedure which would require all Members periodically to disclose assets and liabilities. Many Members who would be required to register would come in and out of Parliament without a situation ever having arisen where there was any relevant connection between their assets and liabilities and the discharge of their duties. Those Members staying in Parliament for several terms would be required by a registration procedure to disclose their assets and liabilities regularly when, for most of them, no relevant situation would arise when the public had any interest in knowing those facts beyond the pleasure of satisfying a lively curiosity. So far, the public has had no right, where no relevant situation has arisen, to know the assets and liabilities of Members. The question before us is whether the public should now have it conferred upon them. It is obviously of no assistance in deciding whether the public should be given this right, to assert that they should be given the right to know because they have the right to know.

**6.30** *It is argued that the introduction of a register would constitute protection for Members against what is said to be the operation of a principle of the common law relating to persons in public office invalidating what they do in conflict situations. Reference is made to the legal cases *Dimes v. Grand Junction Canal* (1852) (voidable) and *Horne v. Barber* (1920) (void).<sup>2</sup> No case where this had occurred in the last fifty years was suggested to the Committee; indeed, no case where it had ever occurred in relation to Members of the federal Parliament was raised. For this reason alone, to suggest federal Members require protection in this area is a flimsy argument. But more than that, supposing such cases had occurred, or it was thought they might occur, a general disclosure of assets and liabilities, even in a register fully accessible to the public, would appear to be a clumsy and possibly wholly inadequate form of protection. It is not in all circumstances that a Member could validate the transaction involving conflict by disclosing to the other party and gaining his consent to proceed. Assume, however, that he could. The Member could only be assured of protection if he disclosed all information about his interest relevant to the impugned transaction directly to the relevant persons concerned at the relevant time. Assuming disclosure of any kind would protect the Member in the circumstances, it is clear that an *ad hoc* declaration would be his only sure way of making that disclosure effectively. Clearly, this is not an argument in favour of the introduction of a general register.*

**6.31** The arguments for the registration of private interests set out above do not, of course, have the same degree of application to registration by public servants and statutory officeholders. It could be argued that the public would be more reassured of the integrity of persons in these categories of officeholders and of the impartiality of the decisions they make if they were required to register their interests. But the Committee has not been convinced of a need for this, nor has it been persuaded that there are such deficiencies in the present system of control over the public service and statutory bodies that drastic action in the form of compulsory registration of interests is warranted.

*The arguments against*

**6.32** *It is argued that a requirement placed upon Members to disclose their personal assets and liabilities would be an unjustifiable invasion of privacy.* If the system, as it would need to do if it were to be at all effective, imposed an obligation to disclose information relating to the Member's family or other persons, the intrusion into privacy would be even greater.

**6.33** The Committee has discussed the question of privacy in general terms in paragraphs 3.26 to 3.51. But there are two arguments advanced against the attachment of much weight to the notion of privacy for Members which should be noted. The first is that this requirement is justifiable because no Member will object to it unless he has something to hide and, therefore, little account should be taken of any such objection. The Committee considers this argument misconceives the nature of privacy. It could equally be argued that the public had a right to know everything about its elected representatives and, therefore, their telephones should be tapped, and that no Member will object unless he has something to hide, so little account should be taken of any such objection. The fact is that privacy is greatly and quite properly valued by all citizens, including Members of Parliament, not because they have something to hide, but because it relates to the conception of personality and individuality, to a person's need for freedom from intrusion in order to manage his own affairs and to manage and cultivate his relations with other persons.

**6.34** The second argument is that Members by seeking election to public office have already waived their right to privacy. There is some substance in this argument. Certainly they have subjected themselves and their affairs to close scrutiny by those who are responsible for deciding upon their pre-selection as the endorsed candidate of a particular party, by the voters in the electorate in which they are candidates, and, if elected, by their opponents in the Parliament, by the press and by the public generally. Thus, it is said, they have chosen to live in a 'goldfish bowl'. But the truth is that this subjection to public scrutiny has not in the past involved them in the necessity of making an annual disclosure of their assets and liabilities. The question is whether they should now be required to make this disclosure. The answer must depend upon whether any good which may be seen as flowing from such a disclosure should be regarded as outweighing what in federal politics would be a novel intrusion. Clearly this must be a matter of judgment. The Committee would not regard considerations of privacy as sufficient of themselves to lead to the rejection of a register, if it were persuaded a register was required by the public interest. It has not hesitated to recommend *ad hoc* disclosure when it is relevant to a particular conflict situation.

**6.35** *It is argued that a requirement of registration will deter suitable persons who might otherwise have entered public life.* This argument is difficult to assess. The persons who enter public life have a wide range of backgrounds and, no

doubt, a wide range of differing motivations. For some, who have no assets and nothing but their Parliamentary salary to support them, the requirement of registration would not constitute a deterrent at all; unless they were sensitive about disclosing their impecuniosity, which may be regarded as unlikely. For others, who have been successful in the material aspects of life and who have wide experience in practical affairs, the position may be different. Many of them, by entering Parliament and accepting the salary paid to Members, may well be making a substantial financial sacrifice. It is possible that a requirement of registration of the assets and liabilities of such a person and of his family might act to some degree as a deterrent to his entry into Parliament.

**6.36** It is likely, more likely than cynics would expect, that a substantial number of all classes of persons who seek election have as one of their major motivations a desire to serve their community. The community needs them. It needs both the Chifleys and the Menzies.

**6.37** It is difficult to judge whether the requirement of registration would deter anyone from entering politics. It should be added that this matter has to be considered upon the assumption that a system of registration can be devised which will be successful in ensuring a full and accurate disclosure, which is something which cannot be said of systems so far introduced or advocated. But on this assumption would anyone be deterred? The disadvantages suffered by those who enter politics are well known. They include dislocation of family life, intense scrutiny of one's affairs, constant subjection to criticism whether well founded or not, the requirement of being constantly available to hear and to serve the interest of one's constituents, substantial pressure of work, and severe limitation of material rewards. As things stand, only the stout-hearted will offer themselves for election. It may be argued that the requirement of registration would be insignificant as a factor in this situation.

**6.38** In the result, the Committee finds itself unable to form any confident opinion whether registration would operate to deter anyone. It can only say that, if it did, it would, in its view, be a heavy price for the community to pay for something which might well prove to be of little practical value to them.

**6.39** *It is argued that registration should not be introduced because it would be too easy to avoid the requirements of disclosure by lawful rearrangement of a Member's affairs.* The Committee agrees with the view expressed in the Report of the Joint Committee on Pecuniary Interests of Members of Parliament that a register of interests would not be effective to expose fraud by Members of Parliament. It also agrees with the view expressed in that Report that the discovery and elimination of dishonesty is not the principal aim, if an aim at all, of the introduction of a register. It is, however, unable to follow the argument adopted in that Report that, because the discovery and elimination of dishonesty is not the purpose of introducing a register, ease of avoidance is not a factor to be seriously considered in deciding whether a register should be introduced.<sup>3</sup>

**6.40** Existing registers which have been introduced appear to us to be open to fairly simple avoidance by lawful rearrangement of the affairs of Members. It may be noted that in the last published register in Great Britain more than seventy Members made a 'nil' return and, in the case of many who made some disclosure, little useful information is given. The most recent form of register,

that provided for by the Victorian *Members of Parliament (Register of Interests) Act 1978*, though tighter in its provisions than the register in Great Britain, could still fairly easily be avoided by lawful rearrangement of Members' affairs.

**6.41** The Committee is of the opinion that to introduce a register which could easily be avoided would fail to achieve any useful objective. It would constitute little more than political 'window dressing' and would, indeed, be somewhat misleading if it suggested to the public that objectives were being achieved which in fact the register was inadequate to bring about.

**6.42** The Committee has grave doubts whether it would be possible to devise a register so as to eliminate lawful avoidance. Such a register would need to be more far reaching than any register so far devised or suggested. For example, it would be necessary to cover not only the interests of Members and their families, but also, trusts and family companies and details of the operations of trusts and family companies. Even if such a register could be devised, there can be no doubt that those who were so disposed could still resort to evasion.

**6.43** *It is argued that to introduce registration for Members would impugn their honour and integrity.* Registration has become a familiar phenomenon overseas and appears likely to become so in Australia at State and local government levels in the future. Although undoubtedly its introduction might be seen as based on the assumption that it is necessary to introduce safeguards against Members feathering their own nests, the Committee considers any effect of impugning the honour and integrity of Members is so slight as not to constitute a reason for not introducing it, if otherwise it is considered to be in the public interest to do so.

**6.44** *It is argued that registration should not be introduced because it would be used to denigrate the parliamentary institution or to denigrate individual Members.* A register would no doubt be explored to see if it could provide ammunition to be used in an attempt to denigrate Members. Nevertheless, the Committee is of the opinion that, if it was considered to be otherwise in the public interest to introduce a register, this argument would not be sufficiently weighty to persuade it that it should not be introduced.

**6.45** *It is argued that a register should not be introduced because it would furnish information which might be used by kidnappers, extortionists or terrorists against the Member or his family.* It has been put to the Committee that kidnappers or extortionists would already be able to obtain this information so that the register would add nothing to any risks to which a Member may at present be subject. If this is true, it seems to furnish an argument against the introduction of a register on the basis that it would furnish no information which was not already available. However, the Committee does not think this is true. The hypothetical case of a Member who owned a Tom Roberts painting worth, say, \$30 000 was instanced by a Member. If he had to disclose this in a register, it was suggested that while he was in Canberra it was likely his wife might well suffer a visit from thieves wishing to steal the painting.

**6.46** As far as terrorism is concerned, evidence was given to the Committee that activities of terrorist groups were directed rather to political objectives than to action on the basis of assets held by political figures. No evidence was

given on the likelihood of activities being engaged in by terrorists, such as bank robberies or kidnapping to finance the organisation of their terrorist activities, as it has been suggested has occurred abroad.

**6.47** The Committee is unable to arrive at firm opinions on these matters. Fortunately, Australia has so far been relatively free of these types of activity. It sees no reason to suggest that, if otherwise it was considered to be in the public interest to introduce a register, a decision to introduce it should be rejected upon these grounds.

**6.48** *It is argued that there is no demand on the part of the public for the introduction of registration and that it represents a suggestion made by political parties in order to gain what is seen to be some political advantage and that the suggestion is naturally supported by the media, whose business it is to supply information and who naturally favour any procedure which will produce more information for them.* This argument is difficult to assess. The response to the Committee's public advertisement for submissions tends to support it. Further, no Member who gave evidence was prepared to say there was any demand for it by his constituents. It is true one or two Members said that, having raised the matter with constituents, they received an affirmative answer. But this would appear to be almost as inevitable as if they had asked their constituents whether Members of Parliament should receive a salary rise and received a negative answer.

#### *The Committee's assessment*

**6.49** The Committee is of the view that, in much of the public debate on the disclosure of interests, there has been confusion between declaration and registration. As a consequence, in the public mind, the advantages of registration have been overvalued and the benefits of declaration not sufficiently appreciated. It is not sufficiently recognised, as the Strauss Committee did in relation to Members of Parliament, that a general register is directed to the contingency that an interest *might* affect an officeholder's actions.<sup>4</sup> The proper practice should be aimed at revealing an interest when it *does* so.

**6.50** A second cause of confusion in the debate is a failure to relate a mischief to the proposed cure. Where a matter involving an officeholder has given rise to public concern, it has sometimes been asserted that, had a system of registration of officeholders' interests been in operation, the mischief would not have occurred or at least would have been more readily foreseen. Such an assertion is, however, often open to question. Frequently, the mischief has not been associated with what would ordinarily be a registrable interest; even if it had been registrable, an officeholder bent on perpetrating the mischief would most likely have evaded registration of the interest involved.

**6.51** The arguments for and against the institution of a system of registration of private interests show many weaknesses. The Committee finds itself convinced by neither. It has therefore been forced to a position where it has had to decide its attitude towards registration on the basis of personal judgment, by individual assessment of the relative strengths of the claims of public accountability and personal privacy. On such matters of judgment, the Committee makes no claim to a monopoly of wisdom.

**6.52** In forming its judgment it has been influenced by two particular considerations. One is a belief it developed during the course of its deliberations



that, however tightly the specifications for a register might be drawn, it would be impossible to list all private interests which could give rise to conflict situations; in consequence, in many of these situations an officeholder and the public which he serves would need to rely upon the Code of Conduct, with its provision for *ad hoc* disclosure of interests, for reassurance rather than upon any list of interests that may have been set down in a register. The other consideration is the longer term consequences for officeholders' privacy which the Committee can foresee.

**6.53** The Committee has given careful consideration to the arguments for registration but it is not convinced that they outweigh those against it. It believes that, if registers of pecuniary interests of officeholders are instituted, the first step has been taken on a slippery slope that is likely to lead to a much wider system of disclosure and unjustified invasions of privacy than its first proponents contemplated. The deficiencies of a limited register would be quickly exposed by media probing and by the opportunity for political advantage that might be derived from allegations suggesting particular conflicts of interest not disclosed by the register. Restricted access to disclosed information, if that were the procedure adopted, would come under attack as it did in the United States during the 1970s. Unless provision was made for the public to have access to the information in the register, registration would be likely to become immediately unacceptable. Once the discrediting process started, the alternatives would be to leave the existing rules, except that they were imperfect and did not cover all possible conflict situations, or else begin 'tightening up' by extending the interests to be disclosed and opening the register to public scrutiny. If the first course were followed, the supposed symbolic value of a register would dissipate; if the second, privacy would suffer.

**6.54** This view is reinforced by what the Committee considers would be the practicalities of the situation. Even were there to be rules purporting to test the *bona fides* of persons seeking access, as was suggested by some witnesses, they would be likely to be ineffective in practice. Suggestions that the custodians of a register could effectively test *bona fides* and prevent misuse are unrealistic. **Those who wished to obtain access would have little difficulty in setting up reasons or getting access through others who could set up reasons why they should have access.** Those who had legitimate claim to access could not be sufficiently bound by any restriction intended to prevent them from disseminating information from the register once they were possessed of it.

**6.55** The Committee has therefore found itself in substantial agreement with the position reached by the Salmon Committee in the United Kingdom, which said:

In our view, registers of interests can do little more than present a general picture of a person's background against which his attitude to the issues of the day can be assessed. They can also, we accept, have a part to play in isolating specific interests from an individual's participation in official business and in keeping people with improper interests out of public life, but too much should not be built on this. The main sanction against specific conflicts of interest must be disclosure at the relevant time, and a register cannot perform this function. An individual who was determined to exploit public office for his own ends would probably be able to find ways round any registration requirements that were not of such complexity that they would be generally unacceptable and unenforceable. Apart from any other consideration, registers can be expected to cover only major continuing interests; it would be impracticable to require the registration of each and every business transaction.<sup>5</sup>

It has concluded that there is insufficient justification at the present time to introduce a system of compulsory registration of Commonwealth officeholder's interests. Instead, reliance should be placed on the Code of Conduct recommended in Chapter 4 of this report, which includes a requirement for *ad hoc* declarations of interest, and on the other measures proposed. The effectiveness of this should be kept under review. **The Committee recommends that, subject to what is said in Chapters 8 to 10 no system of compulsory registration of officeholders' interests be instituted.**

### A compulsory register of private interests

**6.56** In making its recommendation in paragraph 6.55 the Committee is conscious of the fact that it is based on personal judgment. Some may disagree. Some witnesses argued that the time was ripe for the introduction of registration along the lines of the recent Canadian proposals.<sup>6</sup> It is desirable, therefore, to place on record the Committee's views on the type of register which would be necessary should it be decided, contrary to the Committee's recommendation, to introduce registration.

**6.57** In Chapter 2 the conclusion was drawn that it would not be possible to prepare a completely comprehensive and satisfactory statement of principles on the nature of private interests, pecuniary or otherwise, which could conflict with the public duty of officeholders. It was pointed out that there are special difficulties of definition with non-pecuniary private interests and lesser, but nevertheless substantial, difficulties of definition and/or practice with pecuniary interests. These findings have influenced the Committee in the comments which follow.

**6.58** The Committee has noted that there are precedents for the inclusion of non-pecuniary interests amongst the items which may be subject to registration requirements. The Victorian *Members of Parliament (Register of Interests) Act* 1978, for example, requires a Member of the Victorian Parliament to register information as to the name of any political party, body or association or trade or professional organisation of which the Member is or has been a member during the return period. But clearly it would be impracticable to frame a requirement which would cover all non-pecuniary interests which may give rise to conflicts of interest amongst officeholders or may give the appearance of doing so.

**6.59** Apart from reasons of practicality, there are other reasons which the Committee considers should cause hesitation before any decision is made to include non-pecuniary interests amongst the registrable items. Many of these interests are highly personal and any requirement to register them would raise serious privacy issues. Religion is one such interest and a requirement to register it would cut sharply across a longstanding and well-entrenched convention within the Australian community that religious affiliation, if any, is to be regarded as a personal affair, to be divulged only at the discretion of the individual. Yet religious affiliation has the potential to give rise to conflict between private interest and public duty. Similar considerations apply with respect to political leanings. There is no problem here as regards Members of Parliament and Ministers, whose political affiliations are publicly known, but a requirement for public servants and statutory officeholders to register political interests which may be regarded as likely to influence their attitudes and decisions would run counter to all our Australian understandings about politically neutral executives and could introduce the possibility of prejudice and bias within administrations.

**6.60** Here, in passing, it might be mentioned that religious affiliation or belief occupies a special status amongst non-pecuniary interests in that, not only would any attempt to compel disclosure raise privacy and civil liberties issues, but in Australia may raise Constitutional questions as well.<sup>7</sup>

**6.61** For these and other reasons, the Committee could not recommend adoption of a register which would require the disclosure of non-pecuniary interests. It believes that any disclosures of interests of this kind are best made in conformity with an accepted Code of Conduct such as has been recommended in Chapter 4 of this report. What is said in the balance of this section therefore deals only with pecuniary interests.

**6.62** It has already been said that the Committee regards registers of interests as no more than one means of buttressing the requirements and expectations in a Code of Conduct. For the reasons already given, it cannot be a sufficient means in itself and, indeed, there are grave dangers should it become so regarded.

**6.63** It should be repeated that no register, however comprehensive, can be fully proof against action by officeholders to avoid or evade its requirements. This needs to be clearly understood and accepted. There is a danger, if a register is introduced, that the very fact that a register is in existence may induce a degree of public confidence in the protection it can afford against the possibility of conflicts of interest in officeholders which is not justified.

**6.64** Should a decision be taken to require officeholders to register their pecuniary interests, the register should be as comprehensive as practicable. The Committee is not impressed by the coverage of the registrable interests provided in the more limited registers described in Appendix 6 and regards them as being so ineffective as likely to be misleading to the public. To provide guidance to the Committee's thinking on the matter, there is included in Appendix 6, paragraph 15, a statement setting out items which it believes should be essential ingredients of a register for all categories of officeholder. In Chapters 7 to 10 there are some comments on the application of this type of register to particular categories of officeholder.

## Registers of interests now established

**6.65** The previous two sections of this chapter have been concerned with the compulsory registration of private interests for all officeholders. A brief mention should be made of those registers of interests now in force.

**6.66** The registration of private interests is practised in a number of areas of Commonwealth administration. The best known example is in the **Ministry**, where there are, and have been for some time, requirements for Ministers to disclose shareholdings and directorships to the Prime Minister. A form of registration of interests applies to ministerial staff. Amongst the statutory bodies there are examples and certain Permanent Heads of departments file statements of their private interests with their Ministers. In one department, senior officers are encouraged to declare their financial interests to the Permanent Head.

**6.67** These arrangements are largely the products of self-regulation and the registers are not publicly accessible. They appear to have a degree of acceptability amongst the officeholders concerned and the Committee does not propose that

there should be any substantial changes in the way in which they operate. Should a decision be taken at the government level to introduce compulsory registration of private interests, these existing registers would, of course, be superseded.

## Conclusions

**6.68** The Committee's conclusions regarding the registration of private interests may therefore be summarised:

- (a) the advantages of compulsory registration of the private interests of office-holders are insufficient to outweigh the disadvantages;
- (b) subject to some qualifications made in later chapters, the existing arrangements for the registration of private interests of certain groups of office-holders should be permitted to continue;
- (c) in the event of a decision by the Government to require compulsory registration:
  - (i) comprehensive registers embodying the ingredients set out in Appendix 6, paragraph 15, should be established; and
  - (ii) the existing registers should be superseded.

1. Australia, House of Representatives, *Debates*, no. 15, 1978, p. 1151.
2. *Dimes v. Grand Junction Canal* (1852) 3 HLC 759; *Horne v. Barber* (1920) 27 CLR 494.
3. Australia, Parliament, *Declaration of Interests: Report of the Joint Committee on Pecuniary Interests of Members of Parliament*, AGPS, Canberra, 1975, p. 16.
4. Great Britain, House of Commons, Select Committee on Members' Interests (Declaration) (G. R. Strauss, Chairman), *Report*, 1969-70 H.C. 57, HMSO, London, 1976, p. xxiii.
5. Great Britain, Royal Commission on Standards of Conduct in Public Life 1974-1976 (Lord Salmon, Chairman), *Report*, Cmnd. 6524, HMSO, London, 1976, p. 48.
6. See Appendix 6, para. 10.
7. Commonwealth of Australia Constitution Act, section 116.

## 7. Measures for Members of Parliament and their staffs

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**7.1** While the Committee considers that the Code of Conduct set out in Chapter 4 should be the principal means by which the conduct of all four major categories of officeholder should be guided and regulated, the procedures by which the Code of Conduct is implemented will differ between the categories of officeholder. In part the differences will be procedural, consequential upon the different constitutional or legal basis on which each category holds office. **In addition, there will be variations in the importance and relevance of specific items of the Code of Conduct as they apply to particular categories.** This chapter and the following three chapters set out the measures which the Committee believes should be taken in order to implement or supplement the Code of Conduct for the four major categories of officeholders and certain associated subsidiary categories.

### The Code of Conduct and its application to Members

**7.2** The nature of the public duty of Members of Parliament, as it has evolved, was set out in Chapter 2. Two features of the role of the ordinary Member appear particularly relevant to the implementation of the Code of Conduct:

- because of the role of Members of the House of Representatives as the elected representatives of a particular division, or, in the case of Senators, a particular State, disqualification of a Member of Parliament from voting or participating in a debate on a matter is rarely an option as this would effectively disfranchise his electors on that matter;
- because backbenchers do not have executive power, and have limited access to confidential information, there is rarely any necessity for divestment.

**7.3** With these qualifications in mind, the Committee *recommends* that the Senate and the House of Representatives be invited to consider:

- (a) amending their Standing Orders to include new Standing Orders requiring, respectively, Senators and Members of the House of Representatives to conform to the Code of Conduct; or
- (b) passing a resolution adopting the Code of Conduct; and
- (c) providing that a subsequent breach of the Code of Conduct should constitute misconduct and a breach of the privileges of the Parliament.

### Prohibition

**7.4** Although prohibition in the form of the exclusion of holders of offices of profit and government contractors from Parliament has been one of the oldest methods of regulating conflicts of interest, for many years it has been apparent that, at the parliamentary level, it deals with only a small, and increasingly peripheral, part of the problem.

**7.5** The principal matter here is the existence of three provisions of the Australian Constitution which purport to avoid conflicts of interest by disqualifying persons who hold offices of profit or government contracts, or receive a fee or honorarium for services rendered to the Commonwealth or in the Parliament to any person or State. The relevant sections are ss. 44 (iv), 44 (v) and 45 (iii).

**7.6** The Joint Committee on Pecuniary Interests of Members of Parliament concentrated its attention on ss. 44 (v), and 45 (iii), substantially disregarding s. 44 (iv), which has tended to be more a matter of State concern, although the problem is easier to resolve there because the State Parliaments have capacity to amend their Constitutions and indemnify Members found to have breached existing provisions. The Constitutional provisions, the Joint Committee found, did not 'give the necessary assurance that decisions affecting the public will be taken in the public interest'.<sup>1</sup> The Committee agrees.

### *Offices of profit*

**7.7** The rule on offices of profit evolved in the seventeenth century as the House of Commons attempted to assert its independent privileges by excluding those, such as judges, who were associated with the House of Lords.

**7.8** From the time of the Restoration, however, the office of profit rule was used to exclude from the Parliament those who might be subservient to the Crown, which was attempting to use the considerable patronage at its disposal to win political support. The office of profit disqualification has been justified subsequently on other grounds:

- to insulate certain offices (for example, posts in the civil service, membership of public authorities) from being held by Members of Parliament;
- to maintain the principle of ministerial responsibility by preventing civil servants, for whose decisions a Minister is responsible, from becoming Members of Parliament themselves;
- to eliminate the opportunity which might tempt Members of Parliament to pursue self-interest;
- to ensure that Members devote their time to their parliamentary duties.

**7.9** Various office of profit cases have arisen in Britain, although the matter has never been considered by the courts but has been left to the House of Commons itself. Statutory provision was made over the years to exclude certain officeholders from the disqualification, while specific Acts of Indemnity were necessary to save particular Members of Parliament from possibly ruinous consequences, because common informers could sue Members in breach of the disqualification. To reduce uncertainty and to avoid catching trivial appointments, Britain eventually enacted the House of Commons Disqualification Act, which lists all disqualifying offices by name in a Schedule (alterable by Order in Council).<sup>2</sup> Thus Members of Parliament can know with certainty whether an office can be accepted without disqualification. In addition, the Act abolished monetary penalties and empowered the Commons to declare that a particular disqualification be disregarded.

**7.10** There have been several court cases at the State level in Australia involving offices of profit. There the doctrine has operated to disqualify Members of Parliament who assumed relatively minor and innocuous positions.<sup>3</sup> The possibility

has been raised in at least one State of specifying the disqualifying offices in the State Constitution.<sup>4</sup> Section 44 (iv) of the Commonwealth Constitution has never been considered by the courts although there has been some academic discussion.<sup>5</sup> The recent *Common Informer (Parliamentary Disqualifications) Act 1975* reduced the monetary penalties which a common informer can obtain from a Member of Parliament in breach of the provision. This had previously been set by s. 46 of the Constitution at \$200 for each day the Member sat whilst disqualified.

### *Government contractors*

**7.11** The decision in the *Webster* case, coupled with the associated change to the law concerning common informers, leaves s. 44 (v) of the Constitution relating to government contracts with very little substance.<sup>6</sup> In that case, a Senator held an interest in a family company which had certain contracts with the Australian public service. The Court of Disputed Returns, comprising Barwick CJ, held that the section does not apply to casual and transient contracts. To be covered, a contract must be one where the government could conceivably influence the contractor in relation to his parliamentary duties. The decision is consistent with the interpretation placed by the English courts on a corresponding provision which existed in British legislation until its repeal in 1957.<sup>7</sup>

**7.12** The Committee is aware of the argument that the purpose of s. 44 (v) was not simply to prevent the independence of Members of Parliament from being undermined by the Crown's allocating them government business—the clear design of the British provision. The Convention debates of the 1890s also demonstrate a concern regarding Members of Parliament using their elected office for personal gain.

### *Fees and honoraria for services to the Commonwealth and in the Parliament*

**7.13** Section 45 (iii) apparently was intended to catch lawyers, by analogy with government contractors. Its effect is much wider, but its full ambit is a matter of uncertainty in the absence of authority. The section does not seem to extend to such things as gifts and sponsored travel, which in practical terms might be more serious than the payment of fees and honoraria. However, it may be that the existence of this provision has prevented the development of the consultancy arrangements which so concerned the British House of Commons and contributed to the decision to introduce a register of Members' interests. That register includes remunerated employments or offices and requires disclosure of the names of clients when the interest involves 'personal services by the Member which arise out of or are related in any manner to his membership of the House'.<sup>8</sup> Such arrangements would, to a large extent, be precluded by s. 45 (iii), with its severe penalty of disqualification. Certainly the section inhibits barrister Members of Parliament who might otherwise have taken Crown briefs, but what other effect it has can only be a matter for speculation.

**7.14** By themselves, these Constitutional provisions are inadequate to cope with the many conflict of interest situations which arise in the federal government. Although it will be difficult to amend them, **the Committee recommends that ss. 44 (iv), (v), and 45 (iii) of the Constitution be reviewed.** The Committee would call attention to s.4 of the Canadian Independence of Parliament Bill 1978, which allows certain government contracts, as a starting point for discussion of possible change to s. 44 (v).

It notes that a private member's Bill has been proposed to the Senate to seek amendment of s. 44 (iv). It further notes that the desirability of amending s. 44 (iv) and changing other provisions relating to the qualification and disqualification of Members of Parliament has been referred to the Senate Standing Committee on Constitutional and Legal Affairs.<sup>9</sup>

**7.15** The other significant prohibition applying to Members is House of Representatives Standing Order 196, the text of which was set out at para. 5.17. This prohibits Members from voting on certain types of question in which they have a pecuniary interest. In brief, the operation of this provision has been extremely restricted, due both to the qualifications contained in its wording and the interpretations placed on it by successive Speakers. These have limited its application to private Bill legislation dealing with special interests. However, because the legislative powers of the Commonwealth Parliament do not lend themselves to these, such Bills have been absent from its business.<sup>10</sup> (For a more detailed discussion, see Appendix 4.) The resulting ineffectiveness of this Standing Order was indicated by the Joint Committee on Pecuniary Interests of Members of Parliament, which, commenting on the absence of a comparable Standing Order for the Senate, stated that 'it would seem that the public interest would be no more adequately safeguarded, even if such a Standing Order were in existence'.<sup>11</sup>

**7.16** The Committee *recommends* that the House of Representatives, in considering the Committee's later recommendations about declaration by Members, be invited to consider the desirability of strengthening Standing Order 196.

## Declaration

**7.17** The Committee is of the view that only in exceptional circumstances of an immediate and substantial conflict of interest should a Member of Parliament be required to abstain from voting or speaking. To require otherwise would effectively disfranchise his electors in relation to the matter under debate. Normally, a declaration of interest at the earliest opportunity when speaking in debate, or taking part in committee proceedings, should be sufficient.

**7.18** The practice of declaration should go beyond formal proceedings in the Parliament or a committee of the Parliament to other occasions when the Member of Parliament, discharging his official duties, seeks to influence some other officeholder. That objective was clearly identified in the resolution adopted by the British House of Commons on 22 May 1974.<sup>12</sup> The same language was employed in the resolution proposed to the House of Representatives on 1 August 1974 by the then Special Minister of State.<sup>13</sup>

**7.19** The Committee *recommends* that the Senate and the House of Representatives should be invited to consider adopting, whether by Standing Order or resolution, requirements along the lines of the resolution of the British House of Commons of 22 May 1974:

**That, in any debate or proceedings of the House or its committees or transactions or communications which a Member may have with other Members or with Ministers or servants of the Crown, he shall disclose any relevant pecuniary interest or benefit of whatever nature, whether direct or indirect, that he may have had, may have or may be expecting to have.**

**7.20** The Committee considered whether the terms of such a resolution might go beyond dealings with other Members, Ministers and public servants to require a



declaration of interest by a Member of Parliament when dealing with, say, representatives of pressure groups or members of the public, and concluded that this would not be appropriate. Whilst undoubtedly Members should seek to be frank and open in their contacts with anyone, any formal rules or requirements should be confined to those situations when they are dealing with other officeholders.

**7.21** Each House might, however, wish to consider two points. One is the practicability of requiring a Member or Senator to disclose an interest 'he may be expecting to have'. Whilst it would be reasonable to disclose an interest currently being transferred to the Member or Senator, or over which he had an option to purchase or the like, it might be stretching relevance too far and require too much prescience of the declarant to require disclosure of an expectation (see para. 2.34). The other is the limiting of the obligation to declare to 'pecuniary' interests only. The Committee has argued that non-pecuniary interests can, and do, create conflicts of interest, and declaration of such interests would appear an appropriate extension of the effect of a requirement such as that suggested here.

**7.22** The Committee further *recommends* that the Senate and the House of Representatives should be invited to consider including in such Standing Order or resolution provisions:

- (a) that a declaration of interest should be made at the earliest opportunity when speaking in debate or taking part in committee proceedings;
- (b) that such declarations should be automatically recorded as part of the official record and indexed in *Hansard* for convenience of reference.

## Registration

**7.23** Chapter 6 of this report dealt in some detail with the arguments for and against the registration of officeholders' interests, and set out the Committee's views on the question of introducing registers of the interests of the principal categories of officeholders. The Committee's conclusion was that adoption of a requirement for the registration of the interests of Members and other officeholders was not warranted—the situation could be met by the introduction of the other measures recommended. The point was made, however, that should the Government institute registration of officeholders' interests, the Committee thought it would be preferable to proceed forthwith to the introduction of a comprehensive register.

**7.24** The Committee *recommends* that, if the Government of the day should find it necessary to introduce measures for registration of Members' interests, then it would be preferable to proceed forthwith to a comprehensive register. While the administration of such a register would be a matter for the appropriate Houses of the Parliament to determine, the Committee suggests that consideration might be given to the matters raised in Appendix 6, paras 15 to 16.

### *Parliamentary candidates*

**7.25** If, contrary to the Committee's recommendation, compulsory registration of interests is introduced for Members, it would become necessary to consider whether the requirement should extend to parliamentary candidates. It was put to the Committee, as it was to the Joint Committee on Pecuniary Interests of Members of Parliament, that candidates for election to the Parliament should be subject to the same registration requirements as Members. The Joint Committee recorded its view that legislation could be validly enacted to require candidates to disclose

their interests, but did not make a recommendation on the subject. The arguments for requiring registration of their interests have been:

- it would inform the electors, who could make better choices as a consequence;
- it would ensure fair competition between incumbents and new candidates—assuming that disclosing is a handicap;
- it would treat new candidates equally with incumbents.

Against these arguments it could be claimed that disclosure will not operate as an electoral handicap. It may be an advantage, and so, if incumbents have to register their interests, challengers are likely to disclose their interests voluntarily.

**7.26** In the United States, candidates are required to disclose interests as soon as they become avowed candidates. The South Australian Members of Parliament (Disclosure of Interests) Bill, which had been passed by the House of Assembly in 1978, and was subsequently laid aside in February 1979 after consideration by the Legislative Council, would require an electoral candidate to lodge a return on the same day as he is nominated. The returns would go to the Registrar of Members' Interests and be available to the public.

**7.27** The Committee has been informed that it is unlikely there would be substantial administrative problems created by a requirement for parliamentary candidates to register their private pecuniary interests. There are, however, some practical considerations arising out of existing legislation which may impinge upon the feasibility of adoption of such a requirement, and reference is made to these in Appendix 6.

**7.28** Any proposal to require registration of candidates' interests would raise questions about the consequences of non-compliance. If a return was required, should failure to lodge an acceptable return have any effect on the result of the election in that division? Should a successful candidate be unseated for his own defective return, or should his election be imperilled by a defective return from some other candidate? Yet if the only sanction was a fine, some candidates might choose to risk a small fine for a better chance of winning, if they thought disclosure was a handicap.

**7.29** Answers could perhaps be found to these questions, but the Committee does not believe it necessary to take the matter further. It has already expressed in Chapter 6 its scepticism concerning the use to which information disclosed by registration would be put. It is even more doubtful about the contribution such information would make to the assessment of candidates in the middle of a campaign. With the party system as it operates in Australia, electors at general elections commonly vote for the party they wish to have governing the country rather than vote for or against particular candidates. **The Committee recommends that registration of interests not be extended to parliamentary candidates.**

## Authorisation

**7.30** The openness of parliamentary proceedings renders unnecessary any authorisation following a declaration of interest where Members of Parliament are concerned. The requirement for a declaration implies automatic authorisation by the Parliament for the Member to continue to speak on the matter.

## Divestment

**7.31** Divestment is hardly an option for Members whose public duty is unlikely to have the sustained and substantial conflict with a private interest which might require divestment. It is possible to imagine exceptional circumstances in which it might be appropriate. For example, the Chairman, and perhaps other members, of a Standing or Select Committee ought not to have personal pecuniary interests in business concerns which might be directly advantaged by their activities. Divestment might be the appropriate solution in such cases, and should be considered together with disqualification from committee service (see para. 7.34 below).

## Disqualification

**7.32** For Members of Parliament, disqualification is not generally available as an option. However, it should be noted that both Houses of the Commonwealth Parliament have Standing Orders dealing with the committee service of Members who have a 'personal interest' in the committee's work. For the Senate, the relevant Standing Order, 292, reads:

No Senator shall sit on a Select Committee who shall be personally interested in the inquiry before such Committee.

Its application was considered in 1970 in connection with the Senate Select Committee on Securities and Exchange, when the question was raised whether members of that Committee should sell any shares they might hold and refrain from dealing in shares throughout the life of the Committee.<sup>14</sup> The Attorney-General advised that the matter was one of parliamentary practice rather than law, and should be left to the Senate and to the individual Senators on the Committee.

**7.33** For the House of Representatives, the relevant Standing Order is 326, the terms of which are almost identical to Senate Standing Order 292. Three House precedents are known. In 1955, a member of the Committee of Privileges took no active part in an inquiry which arose from a published attack upon him that was subsequently held a breach of privilege.<sup>15</sup> In 1963, a member of the Select Committee on Grievances of Yirrkala Aborigines was challenged because he was a litigant in proceedings related to the subject matter into which the Select Committee was inquiring. He declined to stand down and the point was not pursued.<sup>16</sup> In 1975, a member of the Joint Committee on Pecuniary Interests of Members of Parliament resigned from the Joint Committee when it was alleged to the Committee that he had breached s. 44 (v) of the Constitution.<sup>17</sup>

**7.34** Another problem is that of how great an interest a Member should have in a matter for him to be prevented from voting under these Standing Orders. Similarly, it would be difficult to identify a threshold of 'personal' interest appropriate to the intention of Senate Standing Order 292 and House of Representatives Standing Order 326. The matter, as the Attorney-General advised in 1970, is really one for the Senator or Member concerned and his colleagues in the chamber to which he belongs. They alone can assess the circumstances of the individual case in sufficient detail. The infrequency with which the problem has been raised in the past suggests that reasonable care is already exercised in avoiding potential conflict of interest situations when the composition of committees is being considered.

**7.35** The Committee *recommends* that the Senate be invited to consider its Standing Order 292 and that the House of Representatives be invited to consider its Standing Order 326 to determine whether any amendment is required to avoid conflicts of interest in respect of committee members.

### The Presiding Officers

**7.36** In the following chapter, the Committee recommends certain restrictions on the interests which Ministers may retain on taking office (paras 8.23—8). It believes that similar rules should extend to the Presiding Officers of the Commonwealth Parliament as well as to Ministers. The need for the appearance of impartiality in the conduct of their offices, and the heavy duties which these entail, make it undesirable that the President of the Senate and the Speaker of the House of Representatives should continue with interests which might detract from the appearance of impartiality or from their application to their official duties.

**7.37** Accordingly the Committee *recommends* that each House consider the adoption of a practice that its Presiding Officer:

- (a) should resign all directorships in public companies and private companies which engage in significant trading operations, but may retain directorships in private companies which operate family farms, or pastoral holdings or investments, but not otherwise;
- (b) should cease to engage in professional practice; and
- (c) should cease to be involved in the daily routine work of any business.

### Staffs of Members of Parliament

**7.38** The staffs of the five Parliamentary Departments are considered in para. 9.32. The staff who are recruited by individual Members of Parliament or *en bloc* by the Opposition leaders, or by the Opposition collectively, are in a different position. At the present time—the Committee understands that the matter is under review—those who are members of the Australian Public Service become **unattached officers on leave without pay during the period of their appointment as staff of Members**, while persons specially recruited for the purpose do not come under the Public Service Act. Thus, the sanctions available against public servants are not applicable, and it would appear that the only disciplinary sanctions which could be used would be admonition, or, in more extreme cases, dismissal in respect of those staff who were not public servants, and return to their original departments for those who were public servants. However, the nature of their duties does raise the possibility of their being involved in conflict of interest situations, for example when making representations to officeholders on the instruction of the Member whom they serve, when the Member's interests would require a declaration of interest if the representation had been made by the Member personally, or when the staff members have personal interests of their own which ought to be declared.

**7.39** The Committee *recommends* that:

- (a) responsibility for the proper conduct of the staff of Members of Parliament should remain with the Member they have been appointed to assist;
- (b) Members of Parliament should ensure that their staff are familiar with the Code of Conduct and conform to it;
- (c) such staff should disclose to their Members any interests which they have that are likely, or might reasonably appear likely, to cause conflicts of interest;

**(d) when dealing with officeholders the staff of Members of Parliament should declare personal interests according to the same rules as apply to their Members; and**

**(e) a Member of Parliament instructing a member of his staff to make representations on his behalf to an officeholder should acquaint the member of staff with the substance of any declaration of interest he would have been required to make had he made the representation himself, and direct that the information be communicated to the officeholder when the representation is being made.**

1. Australia, Parliament, *Declaration of Interests: Report of the Joint Committee on Pecuniary Interests of Members of Parliament* (J. M. Riordan, Chairman), AGPS, Canberra, 1975, p. 10.
2. Now the House of Commons Disqualification Act 1975.
3. For example, *Bowman v. Hood* in re *The Warrego Election Petition* 1889, 9 QJ 272. See also Appendix 5, paras 11–12.
4. Western Australia, Law Reform Committee, *Disqualification for Membership of Parliament: Offices of Profit under the Crown and Government Contracts: Report* (Project No. 14), Law Reform Committee (mimeo), Perth, 1971.
5. For example, P. J. Hanks, 'Parliamentarians and the Electorate', in Gareth Evans (ed.), *Labor and the Constitution 1972–75*, Melbourne University Press, Melbourne, 1977, pp. 191–4.
6. *In re Webster* (1975) 132 CLR 270.
7. For example, *In re Samuel* [1913] AC 514; *Royse v. Birley* (1869) LR 4 CP 296.
8. Great Britain, *Report from the Select Committee on Members' Interests (Declaration)* (F. Willey, Chairman), 1974–75 H.C.102, HMSO, London, 1974, para. 13, p. vii.
9. Constitution Alteration (Holders of Offices of Profit) Bill 1978, introduced by Senator Colston on 24 November 1978 (Australia, Senate, *Debates* 1978, no. 22, pp. 2622–3.) This was referred to the Senate Standing Committee on Constitutional and Legal Affairs on 7 March 1979 (Australia, Senate, *Debates* 1979, no. 3, p. 586).
10. See for example J. R. Odgers, *Australian Senate Practice*, 5th edn, AGPS, Canberra, 1976, p. 283, where it is stated that 'No private Bill has ever been introduced in the Senate'.
11. Riordan, *Declaration of Interests*, p. 10.
12. Great Britain, House of Commons, *Debates*, 5th Series, 1974, vol. 874, cols 537–8, 543–4.
13. Australia, House of Representatives, *Debates* 1974, vol. 89, pp. 949–51.
14. Australia, Senate, *Debates* 1970, vol. S. 43, pp. 21, 854–5.
15. Australia, Parliament, Joint Committee on Pecuniary Interests of Members of Parliament, *Official Hansard Report*, vol. 1, AGPS, Canberra, 1975, submission by Mr N. J. Parkes, Clerk of the House of Representatives, p. 55.
16. Australia, House of Representatives, *Votes and Proceedings* 1962–63, vol. 1, p. 559.
17. Australia, Parliament, *Minutes of Meetings of the Joint Committee on Pecuniary Interests of Members of Parliament*, Minutes of Twenty-Fifth Meeting, 15 April 1975, Canberra, n.d., pp. 42–3.



## 8. Measures for Ministers and their staffs

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**8.1** The highest standards of conduct are demanded of Ministers, going beyond those which apply to them as Members of Parliament. These higher standards are a consequence of the unique role of Ministers as members of Cabinet, as the officeholders ultimately responsible for administering departments, and as the holders of various statutory powers.

**8.2** For Ministers, certain parts of the Code of Conduct take on extra significance, and must be enforced more stringently. Being a member of the Ministry is a full-time task. The commitment owed to his ministerial responsibilities will require a Minister to abstain from outside employment, including the practice of a profession. Because of his executive role, which may involve allocating benefits between competing interests, and because his position may give him privileged access to confidential information, a Minister must avoid acquiring any interests connected with the duties of his portfolio and divest any which may have been acquired. While there is no general agreement that registration of interests should be required of all officeholders, there appears to be a consensus that a Prime Minister should maintain a private register for his Ministers because of the need to be assured that proper standards of conduct are being observed by this especially powerful category of officeholders.

**8.3** Details of how the Code of Conduct should be implemented for Ministers and of the measures which are desirable to supplement the Code are set out in the remainder of this chapter.

### Introduction of the Code of Conduct

**8.4** Should the Houses of the Parliament, either by amendment of their Standing Orders or by resolution, adopt the Code of Conduct for general application to Senators and Members, Ministers would be subject to its provisions. But notwithstanding any action taken within the Parliament, **the Committee recommends that, for application to Ministers, the Code of Conduct be recognised by a letter from the Prime Minister to each of his Ministers.** Both in Australia and in Canada, Prime Ministers have used such letters to prescribe rules of conduct relating to conflicts of interest. Alternatively, adoption of the Code of Conduct might be a matter for a collective decision by the Ministry, and thereafter by each new Ministry.

### Prohibition

**8.5** One of the three Constitutional prohibitions which apply to Members of Parliament—that relating to offices of profit—is removed for Ministers by virtue of the provisions of the Constitution (ss. 44 and 66) and successive Ministers of State Acts. But Ministers are covered *qua* Members of Parliament by the other two prohibitions relating to government contracts and receipt of fees or

honoraria for services rendered in the Parliament. As a consequence of being Commonwealth officers under the *Crimes Act* 1914, Ministers are covered by its provisions relating to bribery. The Committee has recommended in Chapter 14 that a new offence of misuse of official information cover all Commonwealth officers.

## Declaration

**8.6** Apart from his parliamentary duties, a Minister works in two different situations, namely in the Cabinet and as the officer responsible for the administration of his department. There is already a well-established practice in the Cabinet, whatever its political complexion, that Ministers declare to their colleagues their interests in matters coming forward for Cabinet consideration. It is a practice which relies for its authority on convention rather than rule, and the Committee believes that the time has come when it should be formalised. **The Committee recommends that:**

- (a) at meetings of Cabinet and its committees, a Minister should disclose to his colleagues when he has an interest which does, or might reasonably be thought likely to, conflict with his public duty as a Minister;**
- (b) his declaration should be noted in the Cabinet records; and**
- (c) the Minister should then either indicate that he will not take part in the discussion in question or else he should secure the explicit authorisation of his colleagues for taking part.**

**8.7** The Committee believes that the same principles should now be formally adopted with respect to a Minister's conduct when administering his department. **It therefore recommends that:**

- (a) when directing the business of the department he administers a Minister should inform the Prime Minister of any real or apparent conflict of interest that arises;**
- (b) the Prime Minister, unless he asks the Minister to divest himself of the interest, should either arrange for another Minister to deal with the matter or else give explicit authorisation to the original Minister to proceed with it; and**
- (c) in any event, the Prime Minister should have the matter recorded.**

In exceptional circumstances, when discharge of a statutory responsibility is involved, it might be necessary to swear in a new Minister temporarily. Ordinarily it should be sufficient for a different Minister to deal with the matter.

**8.8** Ministers are required to observe guidelines which require that significant gifts received by them or their families in the course of their official duties are disclosed and valued. Where a gift presented by another government is valued at \$250 or more, or a gift from any other source is valued at more than \$100, the gift is surrendered unless the recipient pays the determined valuation. The guidelines governing the acceptance of gifts by Ministers and their families do not specifically mention offers of concessional overseas travel. Ministers are expected not to accept, for themselves or their families, offers of concessional overseas travel from commercial sources, whether the commercial activities are connected directly with the Ministers' responsibilities or not. **The Committee recommends that:**

- (a) existing guidelines concerning gifts received by Ministers or their families be continued;**
- (b) guidelines concerning acceptance of sponsored overseas travel be drawn up.**



## Registration

**8.9** If the Committee's recommendation against a register for Members is not accepted and the decision were to be made to require extensive registration of their interests, little need be added on the subject of Ministers. Introduction of a 'limited' register of interests resembling that adopted by the British House of Commons or that recommended by the Joint Committee on Pecuniary Interests of Members of Parliament would, of course, leave open the possibility of more extensive requirements for Ministers. The Committee would hope that its criticisms of the substantial deficiencies of registers of interests, particularly registers of a 'limited' kind, do not leave this as a serious possibility. As the Committee's first preference would be to rely on the Code of Conduct, which includes a requirement for *ad hoc* declaration of interests, and would not require registration of Members' interests at all, it is necessary to make separate recommendations concerning registration of interests by Ministers.

**8.10** There is, in fact, already a system of self-regulation through the registration of Ministers' interests. An extensive set of requirements was prescribed by the Prime Minister shortly after his first full Ministry took office. In a letter to all Ministers dated 13 January 1976, subsequently tabled in the House of Representatives on 16 August 1977, he wrote:

. . . I should like you to provide me with a written statement setting out any relevant pecuniary interest or benefit of whatever nature, whether direct or indirect, that you may have or may be expecting to have . . .

In particular the statement should include:

- the names of all companies in which you have a beneficial interest in shareholdings, no matter how insignificant, whether as an individual, member of another company, or partnership or through a trust, where that beneficial interest is in a public company or a private company which is akin to a public company;
- the approximate value of any such beneficial interest;
- the location of any realty in which you have a beneficial interest and the purpose for which the realty is held;
- the names of all companies of which you remain a director even if the directorship is unremunerated;
- any sponsored travel.

I emphasise that it is the responsibility of each Minister to avoid any conflict of interest arising and to inform me of any significant changes in the information provided in response to this letter.

. . . The information provided will of course be kept on a strictly personal and confidential basis.

**8.11** Evidence given to the Committee indicates that previous Prime Ministers required Ministers to disclose certain interests, although the particulars of what had to be disclosed are somewhat uncertain. (See Appendix 4, paras 41–9, for a review of past practice in this area.)

**8.12** Ministers, as a consequence of the nature of their public duties, are particularly liable to be placed in conflict of interest situations. The range of government affairs passing under Cabinet consideration is virtually coextensive with the total responsibilities of government. Nevertheless, only a small proportion of government decisions is taken collectively at the Cabinet level, and the individual Minister acts on his own responsibility in respect of many important matters involving his own department. Moreover, many government decisions must, by their nature, be taken secretly without the fact that they have been taken, or the circumstances in which they were taken, being revealed. It is particularly important that adequate procedures for avoiding and resolving conflicts of interest be available to Ministers.

**8.13** Declarations of interests are an important element of the system, and in the previous section of this chapter the Committee has recommended that rules governing the practice should be formally adopted for Ministers. The Committee believes that it is necessary to go further. Disclosure should include registration as well.

**8.14** In recommending that Ministers should be subject to a compulsory system of registration with limited access, the Committee is conscious that it has come down strongly against such a requirement in the case of the ordinary Member or other officeholder. It sees no inconsistency in this.

**8.15** The argument that such a requirement is an undue invasion of privacy does not seem to the Committee to carry the same force in the case of a person occupying ministerial office, nor does the argument that disclosure of an interest is best made only when a particular matter is under consideration. Ministers, through their place in the Cabinet, may be faced at any time during their tenure, and often at very short notice, with any one of a multiplicity of matters, none of which can be predicted beforehand. The Committee does not see that its criticism of compulsory registration, on the grounds of ease of avoidance or evasion, applies with equal force to Ministers. What they do in the discharge of their office, whether in the administration of their own department or in their Cabinet work, has a degree of immediacy and exposure about it which is likely to focus public attention upon their actions much more closely and much more quickly than is the case with the ordinary Member or officeholder. They are a much smaller group and may so much more readily be watched and exposed. Their violation of the registration rules would be tempered also by a knowledge that the penalty for discovery would be so much more severe, so much more prompt. It is relevant also to mention that divestment of sensitive assets is to be a prerequisite to the appointment of Ministers. As with compulsory registration of interests, this is a requirement that the Committee does not recommend for ordinary Members.

**8.16** There is, of course, the further consideration that the Committee's suggestion in respect of Ministers is nothing novel. It is something which has been required of them in the past, and to insist on registration would not in their case involve any additional intrusion into their privacy as it would in the case of ordinary Members.

**8.17** The Committee considers that the current practice of registration, as set out in the Prime Minister's letter, is satisfactory, subject to two extensions. First, it would appear that disclosures are accessible only to the Prime Minister. The Committee believes that they should be accessible to some other members of the Cabinet as well. **The Committee recommends that:**

- (a) the returns of Ministers' disclosures of interests be kept, on a confidential basis, by the Secretary to Cabinet;**
- (b) consideration be given to determining whether a small committee of senior Ministers, appointed by the Prime Minister or by Cabinet, should be established to have immediate responsibility for the register of Ministers' interests, but with ultimate responsibility for the register remaining with the Prime Minister.**

**8.18** Second, the list of items currently required to be disclosed needs expansion in line with the proposal for a register set out in Appendix 6, paragraph 15. **The Committee recommends that Ministers should disclose in their register of interests the following additional information:**

- (a) the beneficial interest of the Minister, or a member of his immediate family, under any trust, and in any nominee company, with a statement of the nature of operations of the trust or company;
- (b) any trust of which the Minister is a trustee, with a statement of the beneficiaries and the nature of the operations of the trust;
- (c) partnership and joint venture interests with a statement of the nature of their operations;
- (d) liabilities;
- (e) shareholdings, under procedures which will disclose the ultimate interests in circumstances where private companies are used as a screen to mask holdings directly or indirectly in other companies.

## Authorisation

**8.19** A Minister who declares an interest *ad hoc* in a Cabinet or Cabinet committee meeting may be authorised by the Prime Minister or his colleagues to participate in the discussion where it appears that the interest is trivial or irrelevant, or where the Minister's continued presence or participation is essential. The Committee notes that this practice is one of long standing, and appears to work satisfactorily. It has already recommended that declarations of interest by Ministers should be noted in the Cabinet records. **The Committee recommends that, when the Prime Minister or the Cabinet authorises a Minister to continue to carry out his Cabinet or ministerial duties in relation to a matter in which he has declared an interest, a record of that authorisation should be made.**

## Divestment

**8.20** Divestment is relevant to the executive work of a Minister in relation to his department and to his duties in Cabinet. In Australia the first known rules on the holding of directorships date back to a statement in Parliament by the then Prime Minister, in 1938, in which he indicated that, *prima facie*, Ministers should not be directors of companies which had direct dealings with the government but that there was no objection to the holding of directorships in companies with no business dealings with the government.<sup>1</sup>

**8.21** Since 1949, the practice has been to require Ministers to divest any directorships in public companies but to allow them to retain directorships in private family companies. In recent years Ministers have also been required to resign directorships in private companies where these were akin to public companies. (For an account of the evolution of practice in this area see Appendix 4, paras 18–34.)

**8.22** The present Prime Minister requires Ministers to resign directorships in public companies. Directorships in private companies which are principally family companies may be retained, but directorships in private companies which may be akin to public companies in their operations should be given up. The Committee endorses both requirements.

**8.23** On similar grounds, Ministers, on assuming office, should not carry on the daily routine work of or take an active part in professional practice. There is no objection to a Minister's continuing to hold a practising certificate if this is necessary to protect his right to return at a later date to his profession.

**8.24** A Minister who, prior to appointment, was engaged in business, whether alone, in partnership, or otherwise, should cease to carry on the daily routine work of the business or to take an active part in its day-to-day management. Although such connections should be severed, there is generally no need for a Minister to divest himself of ownership in such circumstances.

**8.25** The Committee *recommends* that Ministers:

- (a) should resign directorships in public companies;
- (b) may retain directorships in private companies provided that:
  - (i) they make full disclosure under the rules relating to registration of interests concerning the assets, liabilities and activities of such companies,
  - (ii) such companies operate family farms, pastoral holdings or investments, but not otherwise;
- (c) should cease to engage in professional practice; and
- (d) should cease to be involved in the daily routine work of any business.

**8.26** The Committee *recommends* that a Minister should divest his shares and similar interests in any company or business involved with his department. For example, he should divest where the company in which he has shares has dealings with or could directly benefit, or might reasonably be thought to benefit, from the department or its activities. The Committee does not consider that this is too harsh an imposition on Ministers. Public life, as stated previously, involves some sacrifices. Many Ministers will not be affected by the rule, either because they have no interests in such companies or because they administer a department which is not involved with such companies. Ministers who are affected by the rule, and wish to retain their interests, can always ask the Prime Minister to allocate them to another portfolio. In a small number of cases, Ministers may have a range of shareholdings and be allocated a department which is involved with many companies. For such cases, the Committee can do no better than to cite the example given to it in evidence by several witnesses of a former Minister who, when he was appointed as Minister for National Development, a department which dealt extensively with mining companies, divested himself of his shares in such companies, thereby suffering a significant financial loss.

**8.27** Divestment, as the Committee has used the term, means complete divestment.<sup>2</sup> The Committee *recommends* that it should be unacceptable for a Minister who is required to divest to transfer his interests to certain other persons or bodies, for example to his spouse, to another member of his family, or to a nominee company or trust.

**8.28** The Committee does not wish to suggest any rule regarding divestment by a Minister's spouse or family of interests held independently. However, prudence may so demand. In this regard, the Committee was told by a former Minister that during a period when he had responsibility for the granting of various land and mineral rights, he asked his wife, who managed her own investments, to sell any shares she held in companies concerned with such activities in this area, and to abstain from acquiring any new interest in such companies. He received her explicit assurance on the point.

## Disqualification

**8.29** Disqualification is the other side of divestment. This involves the breaking, permanently or temporarily, of the connection between the officeholder and the duty which creates conflict (see para. 5.39). The Prime Minister, having responsibility for the allocation of the duties of Ministers, may deal with this situation either at the time of appointment of a Minister or, subsequently, if and when a conflict arises.

## Staffs of Ministers

**8.30** Ministerial staff comprise:

- officers of the Australian Public Service seconded to work in Ministers' offices, who usually have the status of unattached officers; and
- persons employed from outside the Service, who are exempt employees under s. 8A of the *Public Service Act* 1922.

In theory ministerial staff are subject to the normal disciplinary provisions of the Public Service Act. Amendments to the Public Service Act in 1978 made special provision for unattached officers, such as those working for Ministers, to be disciplined for improper conduct committed either before the officer became an unattached officer or while an unattached officer, where the improper conduct was conduct 'which brings the Service into disrepute'. However, in practice ministerial staff, whether officers seconded from departments or specially recruited, are under the direct control of their Minister and are responsible to him alone. Thus it is that Minister's responsibility to ensure their good conduct.

**8.31** Since the beginning of 1976 ministerial staff have been required to disclose to their Minister their pecuniary interests in terms not less rigid than those applying to the Ministers themselves. Copies of the disclosures they make to their Minister are kept by the Secretary of the Department of Administrative Services, which department is responsible for the appointment and payment of ministerial staff.

**8.32** Ministerial staff are like public servants in that they are employed on the same terms and conditions and technically are subject to the same obligations. They also resemble public servants in that their duties are essentially supportive rather than decision making. They mainly undertake liaison with the Public Service, general office administration, and, to a lesser extent, advise the Minister on policy and related matters. However, they differ from public servants in that they are under the direct control of the Minister, and they may have access to confidential information to an extent far greater than most public servants.

**8.33** The Committee noted that since 1973 the Canadian Prime Minister has required his Ministers to apply the same standards of conduct to their Executive Assistants as applied to the Ministers themselves, unless a specific decision to the contrary is taken. All exempt staff employed by Canadian federal Ministers are under an obligation to disclose actual or potential conflicts of interest to their Ministers.

**8.34** The Committee concluded that, since ministerial staff have access to substantially the same official papers and information as the Ministers to whom they are responsible, they should be subject to requirements no less stringent concerning conflicts of interest. **The Committee recommends that a ministerial staff member should**

be subject to requirements similar to those applying to Ministers concerning conflicts of interest, namely he should be:

- (a) subject to the Code of Conduct;
- (b) required to register similar interests as required for Ministers;
- (c) required to declare his interests when dealing with officeholders, and, on instruction by his Minister, to disclose the Minister's interests in situations involving other officeholders where the Minister himself would have been obliged to declare an interest; and
- (d) required to divest interests if necessary.

The sanction for non-observance of these requirements would be admonition by the Minister, the application of the disciplinary provisions of the *Public Service Act* 1922 in so far as these were applicable, and dismissal in other cases where the Act was not applicable.

1. Australia, House of Representatives, *Debates* 1938, vol. 157, pp. 1373-4.
2. The Committee's views concerning the efficacy of using blind or frozen trusts as alternatives to divestment have already been expressed in Chapter 5, paras 5.33-7.

## 9. Measures for public servants

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**9.1** Public servants differ from other categories of officeholders because of their legal status as servants of the Crown and as employees. As was stated in paragraph 2.14, they also differ in that their duties are more extensively set down in statute.

**9.2** The Permanent Head of a department is in a special position by virtue of his responsibility under the *Public Service Act* 1922 for the administration of his department, and, in some cases, because of statutory powers which are vested in him. The Permanent Head is also at the peak of the departmental hierarchy, and so enjoys a degree of independence not available to other officers within the department.

**9.3** The power and influence, and access to confidential information, of other public servants varies. They may provide advice, make decisions under delegation within the framework of established policy, carry out research, implement government decisions, provide services to the public, or act as support staff. But because they operate within a hierarchy, it is often difficult to identify who was responsible for a particular action or piece of advice, and so whose interests were relevant to the matter. On the other hand, there are more checks and balances and procedural safeguards against the possibility that a particular action or decision may have been tainted by conflict of interest.

### Introduction of a Code of Conduct

**9.4** In the case of the Australian Public Service, the Code of Conduct, when adopted, would have to be integrated into an already extensive and detailed set of obligations and duties. Its application would have to take account of the degree of sensitivity of the particular post occupied by the individual public servant, perhaps of the particular duties currently assigned to him, and of the degree of independent responsibility he exercises. For example, the general obligation to be frank with colleagues may have to be modified by the fact that a public servant often has to give advice within the framework of agreed government policy.

**9.5** The Committee *recommends* that the Public Service Board issue the Code of Conduct as a General Order or such other form of instruction as the Board sees fit. Public Service Regulation 32 (e) provides that every officer shall comply with 'all enactments, regulations, and authoritative instructions made or issued for his guidance in the performance of his duties'. Although a General Order does not have the same legal status as a provision in the Public Service Regulations, adoption of the Code of Conduct by this method would give it authority such that a breach would constitute improper conduct within the meaning of s. 56 of the Public Service Act. This course was recently followed in the Northern Territory (see para. 11.8).

**9.6** The Committee *recommends* that the Public Service Board review the *Public Service Act* 1922 and Regulations to ensure that existing provisions dealing with

**conflicts of interest are not inconsistent with the provisions of the Code of Conduct, and seek any necessary amendments.**

## Prohibition

**9.7** Public servants are subject to certain prohibitions contained in the Public Service Act and Regulations, for example against taking outside employment without authorisation. **The Committee recommends that the review of the Public Service Act 1922 and Regulations include examination of any prohibitions in the legislation to ensure that they are compatible with the Code of Conduct.**

**9.8** There are two matters under this heading on which the Committee wishes to make specific recommendations. Both concern the operation of Public Service Regulation 37, which prohibits the solicitation or acceptance of gifts connected with the duties of an officer, and which, the Committee has been informed, is currently under consideration by the Public Service Board.

**9.9** The first concerns the acceptance of gifts by members of a public servant's family. In keeping with its previously expressed views on the need for officeholders to avoid any appearance of conflict of interest, **the Committee recommends that the Public Service Board include in its Guidelines on Official Conduct advice that it is undesirable that members of a public servant's immediate family accept gifts which would give the appearance of a conflict of interest with his public duty.**

**9.10** Secondly, the Committee considers that acceptance of hospitality beyond what might be considered normal is open to abuse. In an extreme case, provision of hospitality could constitute bribery. **The Committee recommends that the Public Service Board give consideration to identifying permissible hospitality and laying down a requirement to seek authorisation in doubtful cases.**

## Declaration

**9.11** When a public servant has an interest, whether pecuniary or otherwise, which conflicts, or might be thought likely to conflict, with his public duty, he should declare that interest to the officer designated for that purpose. **The Committee recommends that:**

- (a) the obligation to declare and the procedures by which a declaration is recorded should be set out in Regulations made under the Public Service Act 1922;**
- (b) the particulars of that declaration should be noted on the file(s) relating to the matter in respect of which the conflict exists, and also centrally recorded in the department. The designated officer may then arrange for another officer to undertake the responsibility in question, or else shall authorise the officer who had disclosed the interest to continue to deal with the matter.**

**9.12** **The Committee recommends that a Permanent Head should disclose to his Minister when he has such an interest, and procedures comparable to those for other public servants should then be followed.**

**9.13** The Committee considered whether applicants for positions should be required to declare all relevant interests at the time of interview or prior to their selection being confirmed. **The Committee recommends that it should be the obligation of the appointing authority to question applicants for positions on any potentially conflicting interests, especially as regards sensitive positions or sensitive assets.**



## Registration

**9.14** The Committee noted that the Joint Committee on Pecuniary Interests of Members of Parliament had put forward the 'general principle' that public servants should have no less obligation to disclose their interests than other persons 'located in other key constituent parts of the decision-making process of parliamentary democracy'. The Joint Committee had also noted that there had been 'a custom' that a Permanent Head should make some form of disclosure of his interests to his Minister, and recommended that 'this commendable custom . . . be formalised'.<sup>1</sup>

**9.15** However, in general the Joint Committee deferred to the Royal Commission on Australian Government Administration, which was then at work. Subsequently the Royal Commission recommended that a system of registration be developed by the Public Service Board which would take the form of departmental registers with access restricted to the Permanent Head and the Minister. The Royal Commission also proposed that registration be made a statutory duty for public servants within the designated levels unless specifically exempted by the Minister.<sup>2</sup>

**9.16** The Committee is of the opinion that the strongest justification for registration of the interests of certain public servants is the important part which senior public servants play in government decision making, and the possibility that conflicts of interest might influence their advice and decisions. The argument that, if Members of Parliament were required to register their interests, then public servants should do the same, did not persuade the Committee. For one thing, it fails to distinguish between those public servants who could properly be called powerful or influential and those who carry out routine duties and have no opportunity to take significant decisions or to influence those who do. Nor does the security of tenure, or otherwise, of a particular officeholder appear a major consideration in determining whether his interests should be disclosed and in what circumstances.

**9.17** In addition to the general arguments against registration set out in Chapter 6, two arguments which have been advanced against registration by public servants seek to distinguish the position of public servants from that of elected officeholders. The first claims that there are basic differences:

- public servants did not choose to enter 'public life' with its attendant public attention and invasions of privacy, but expected to be anonymous in their official duties and private in their non-official lives;
- public servants advise on and implement decisions, rather than make them, the making of decisions being the responsibility of Ministers individually and collectively, just as legislation is the responsibility of Members of Parliament;
- individual public servants rarely make final decisions, for the government decision-making process is diffuse;
- the Public Service has numerous procedural checks and balances which reduce the likelihood of improper conduct.

The second argument points to the much larger number of public servants which a registration system would have to cover, even if this was restricted only to those who make or influence decisions, so that maintaining and scrutinising their registered disclosures would be prohibitively expensive and time consuming.

**9.18** The Committee believes that the difference between public servants and elected officeholders is not as clear cut as these arguments would suggest. It is well aware that a substantial number of public servants are in a position effectively to make decisions, or to influence the decisions of others, so as to confer pecuniary or other benefits on individuals, business enterprises or other bodies. As a consequence, their own interests, and possibly those of their immediate families, could conflict, or appear to conflict, with their public duties.

**9.19** Officers in the First and Second Divisions are especially likely to find themselves in this position because of the breadth and importance of their duties. An unknown number of Third (and in certain cases Fourth) Division officers discharge responsibilities in 'sensitive' areas such as purchasing, so that their inclusion in any system applied to First and Second Division officers would be appropriate. Many public servants in practice do exercise considerable responsibility. While it is true that procedural constraints reduce the likelihood of abuses, sufficient scope for the appearance of conflict of interest remains to warrant additional precautions.

**9.20** Moreover, the Committee is not persuaded that, because public servants do not enter public life in the same sense as elected officeholders, they should necessarily expect to be anonymous in their official duties. The appearance, as well as the fact, of integrity in public administration is essential to public confidence in government, and public servants who accept certain responsibilities, for which they are compensated by way of remuneration, must also accept any attendant disabilities.

**9.21** Nevertheless, on balance, and for reasons broadly the same as those which influenced its judgment in the case of Members of Parliament, **the Committee recommends that a requirement for the registration of the interests of public servants should not be introduced. If, contrary to the Committee's recommendation, a decision is taken to introduce a register for public servants, the Committee recommends that it be along the lines set out in Appendix 6 (paras 15 and 20-8) to this report.**

### Authorisation

**9.22** To ensure greater certainty and evenhandedness, there will be need for formal rules relating to authorisation in respect of public servants. **The Committee recommends that:**

- (a) the Public Service Board should draw up general guidelines on authorisation;
- (b) authorisation should always be in writing and filed so as to be retrievable in the event of dispute as to whether it has been granted;
- (c) there should be provision for withdrawal of authorisation granted, for example where the nature of the interest or the officer's duties changes, or when new facts emerge;
- (d) where the obligation rests on the public servant with the interest to obtain authorisation, failure to seek it should be a breach of discipline.

### Divestment

**9.23** **The Committee recommends that:**

- (a) Public servants should not possess 'sensitive' interests which are likely to conflict seriously with their official duties. Possibly the duty statement for positions should stipulate when divestment may be required.

- (b) **Permanent Heads should examine all *ad hoc* disclosures of interests by officers of their departments to identify those which are ‘sensitive’ and may require divestment.**

**9.24** Divestment is one means whereby conflict situations may be resolved. Other methods would include the transfer to another post of the person concerned or, where an appointment to a position was being considered, a decision not to proceed with it. The responsibility of the appointing authority to question applicants on any potentially conflicting interests, and to counsel them as to the possible need for divestment if their application was successful, was mentioned at para. 9.14 above. It should be emphasised that the situation in which divestment is necessary will emerge where there is a continuing or frequently recurring conflict of interest. The exceptional or occasional instance in which private interest and public duty would clash can usually be disposed of by temporarily replacing the public servant with another or authorising him to continue to act. But when the conflict would require constant switching of personnel back and forth, or authorisation would have to be given frequently, with the consequent appearance that the principle involved had been effectively abandoned, then divestment or permanent transfer must be the choice.

**9.25** A requirement that public servants must avoid having interests which might conflict, or appear to conflict, with their official duties or else act to neutralise the conflict would be unexceptionable. For example, the Public Service Board’s Draft Guidelines speak of a ‘clear responsibility’ for an officer to inform his Permanent Head (or in the case of a Permanent Head, his Minister) of any pecuniary interest that might conflict, or appear to conflict, with his public duty in a matter he has under consideration, or which is likely to come under his consideration.

**9.26** A power to compel divestment would be a very serious responsibility. It might be open to abuse if vested in a person too close to the officer to whom the direction was issued. Accordingly, **the Committee recommends that the power to require divestment as a condition of holding certain offices should be given only to the Public Service Board, which would consider an application from the Permanent Head of the officer concerned and have a discretion whether to issue the direction or not. Were the officer himself a Permanent Head, then the Board, when apprised of the situation by a Minister, should be empowered to act on its own initiative.**

**9.27** In respect of shareholding, a slight problem is created by s. 91 of the *Public Service Act 1922*. After prohibiting the performance of work outside the Service without the express permission of the Public Service Board, it continues:

- (2) Nothing herein contained shall be deemed to prevent an officer from becoming a member or shareholder only of any incorporated company, or of any company or society of persons registered under any law in any State or elsewhere.

**The Committee recommends consideration should be given to the extent to which s. 91 (2) of the *Public Service Act 1922* might be modified to allow divestment to be compulsory, with penalties for non-compliance, as a condition of holding certain offices.**

**9.28** **The Committee recommends that compensation should not be payable for losses suffered as a result of a requirement to divest.** Divestment is a consequence of public office and the Commonwealth has no obligation to compensate.

**9.29** Where the interest was held by a person other than the officeholder himself, for example his spouse, a member of his family or a trustee not subject to his direction, a direction to divest under pain of disciplinary proceedings in the event of non-compliance could not be effective. In such a case, the only remedy would be transfer of the officer to other duties or, where an appointment has yet to be made, not to proceed with it.

## Disqualification

**9.30** The Public Service Board or a Permanent Head has extensive powers to direct the temporary or permanent transfer of officers to other positions. This is, the Committee thinks, a sufficient power to deal with problems of disqualification when they arise. Transfer also provides an alternative to requiring divestment, and the Committee would suggest that, as a matter of practice, departments should offer staff who would otherwise be compelled to divest the option of transfer to another position of equal or lower status, wherever practicable.

## Special categories

### *Members of the Defence Force*

**9.31** The Committee *recommends* that:

- (a) **Members of the Defence Force, including members of the Reserve Forces, should be required to observe requirements regulating conflict of interest similar to those proposed for public servants.**
- (b) **The Department of Defence should ensure that there be as much uniformity as possible with the Australian Public Service in the application of the Defence Force regulations and orders relating to conflict of interest.** The Committee recognises that there may be a need for variations to take account of the requirements and circumstances of a particular Service. It would be a matter for the Chief of Defence Force Staff to determine which categories of officer below, say, the ranks of Brigadier and equivalent should be required to disclose interests, having regard to other guidelines that may be established in government service.
- (c) **Application of the proposed Code of Conduct to the Defence Force should be a matter for the Chief of the Defence Force Staff in consultation with the Secretary of the Department of Defence.** The Committee is aware that some differences exist among the Services as to their regulations and orders.
- (d) **The regulations and orders applicable to the Defence Force should be reviewed to ensure that those dealing with conflict of interest conform with the provisions of the Code of Conduct, and existing regulations should be amended or new regulations introduced where this is necessary.**
- (e) **Breaches of conflict of interest requirements should be investigated and penalties determined by the disciplinary machinery already existing for the Defence Force.**

### *The Parliamentary Departments*

**9.32** The staff of the five Parliamentary Departments are for most purposes equivalent to other public servants. They are covered by the Public Service Act, although there are special provisions resulting from their responsibility to the Presiding Officers of the Commonwealth Parliament rather than to Ministers. **The Committee recommends that those of its recommendations which refer to public servants should apply to the staff of the Parliamentary Departments.**

### *Consultants*

**9.33** The Committee noted the revised edition (May 1978) of the Public Service Board's *Consultants and Contractors for Services: Guidelines for Departments and Authorities*.<sup>3</sup> The Committee recommends:

- (a) that the Public Service Board's *Consultants and Contractors for Services: Guidelines for Departments and Authorities* be amended to include provisions that departments and authorities proposing to employ consultants should examine the likelihood of any significant conflict of interest concerning each consultant, and, where appropriate, should require any consultant to disclose any information which might be material to an actual or potential conflict of interest;
- (b) when a consultancy is likely to operate for some time, it should be made a condition of the consultancy that the consultant disclose any conflicts of interest which might arise during its term.

The Committee would add that it would expect disclosure to be sufficient means of regulating any conflict in respect of consultants. If the conflict appears likely to be serious, the department or authority would presumably refrain from pursuing the matter further and employing the consultant in question.

### *Non-career Heads of Overseas Missions*

**9.34** The measures proposed for public servants would apply generally to non-career Heads of Overseas Missions. They would be required to observe the Code of Conduct and to make all necessary disclosures. Any decision which might be taken to require registration of interests by public servants should in logic apply equally to non-career Ambassadors.

**9.35** The Committee has been informed that consideration is being given to the inclusion in the directive sent to all Heads of Mission upon their appointment of a paragraph drawing attention to the issue of conflict between public duty and private interest. Adoption of the Code of Conduct in respect of all Head of Mission appointees would obviate the need for such action.

### *Trade Commissioners*

**9.36** Many trade commissioners are appointed from industry and commerce and frequently return to private business life after a period with the Trade Commissioner Service. Their position is akin to that of non-career Heads of Mission and similar provisions to govern conflict of interest situations would need to be applied to them.

## **Procurement**

**9.37** In his electorate talk on 12 March 1978, the Prime Minister stated that the question of government employees working in the tendering process had been referred to the Inquiry for examination. The Committee has not seen this as reflecting an expectation that it would examine the tendering process in great detail but rather that, in considering measures to promote the avoidance and, if necessary, the resolution of conflicts of interest, it would have particular regard to the possibility of conflict of interest arising in the course of government procurement.

**9.38** In the evidence presented to the Committee, some examples were given of instances where conflicts of interest may have arisen during the procurement process. In keeping with the general approach to its work, the Committee has not

sought to investigate allegations of this kind, but has treated them as background information against which it could judge the adequacy of its proposals in circumstances such as those involved in the particular cases.

**9.39** Through the Secretary of the Department of Administrative Services, the Purchasing Division of that Department provided a detailed submission on conflicts of public duty and private interest as they relate to the government purchasing function. That submission made the point that, in public procurement, as in other areas, it is necessary to take into account both the avoidance of situations where conflicts can occur and the need to ensure that the absence of conflict involving impropriety can be publicly demonstrated, so that public confidence in the integrity of the system is preserved. It suggested that there appear to be several areas relevant to procurement where conflicts of interest might occur, or be seen to occur, by observers of the government procurement process, for example:

- (a) an officer's private interest (such as financial interest in a company, prospect of employment in the company, friendship or kinship with company owners or management) might cause him to favour that company in the allocation of a government contract or contracts;
- (b) private interests of the kind mentioned in (a) above might lead an officer to provide information to a particular company which is not available to the company's competitors and which would give that company an advantage in competing for a government contract;
- (c) a former government officer who has left to join a company interested in Commonwealth business might provide that company with information derived from his former Commonwealth employer which confers advantages on the company similar to those in point (b) above;
- (d) a former government officer may, after joining a company supplying government requirements, seek to negotiate business relevant to his former Commonwealth function with his former department.

**9.40** The conclusion of the Purchasing Division was, however, that the problems arising from apparent conflicts of interest in the government procurement field arise as much from gaps in the general institutional arrangements in the procurement area itself as from lack of rules in relation to individual officers. In regard to individual officers, the problems are generally those met throughout the breadth of the Australian Public Service, and officers in the procurement area are in a similar position to officers in several other areas of the Service which handle commercially sensitive information.

**9.41** Problems of the type mentioned in examples (c) and (d) above are discussed at Chapter 13. As regards problems of the kind covered in examples (a) and (b), the Committee agrees that, in essence, government employees in the procurement area are placed in positions which, while 'sensitive', are not different from 'sensitive' positions in many other areas. The Committee notes that such employees will be subject to the same requirements directed towards the avoidance and resolution of conflicts of interest as other public servants. For this reason, the Committee makes no special recommendations concerning them.

**9.42** The Purchasing Division submitted that propriety and impartiality could be publicly demonstrated in this area to better effect if all major Commonwealth contracts were handled by a single central Contracts Board clearly independent of the department or authority requiring the supplies. This would be reinforced

if, in addition, a high level, independent Procurement Review Board was available to sift facts and provide advice to the Government upon claims and charges of the kind relating to conflicts of interests that are sometimes met in the area. It would require a study more detailed than the Committee has been able to make to determine whether this would be so. The Committee noted that the Joint Parliamentary Committee on Public Accounts, in its 174th Report, recently reported to the Parliament on proposed guidelines for computer purchases and use in the Australian Public Service.<sup>4</sup> The Committee also noted that a subcommittee of the House of Representatives Expenditure Committee is currently examining Commonwealth Government purchasing, and that a subcommittee of the Parliamentary Joint Committee on Foreign Affairs and Defence is inquiring into, *inter alia*, the implementation and effectiveness of Australia's announced defence programs, with particular reference to procurement policy.

**9.43** The Committee concludes, in relation to the question of government employees working in the tendering process, that:

- (a) no special requirements beyond those proposed elsewhere in this report for public servants are necessary to deal with government employees working in the tendering process; but
- (b) should it be considered that additional measures are needed to demonstrate the propriety and impartiality of the operations of government in this area, the question of the desirability of establishing a single central **Contracts Board, independent of the departments or authorities directly concerned**, to handle major Commonwealth contracts could be one of those measures to be examined.

1. Australia, Parliament, *Declaration of Interests: Report of the Joint Committee on Pecuniary Interests of Members of Parliament* (J. M. Riordan, Chairman), AGPS, Canberra, 1975, pp. 37-8.
2. Australia, Royal Commission on Australian Government Administration (Dr H. C. Coombs, Chairman), *Report*, AGPS, Canberra, 1976, pp. 234-5: the quotation from Sir Frederick Wheeler's evidence is at Joint Committee on Pecuniary Interests of Members of Parliament, *Official Hansard Report*, vol. 2, AGPS, Canberra, 1975, p. 1272.
3. Public Service Board, *Consultants and Contractors for Services: Guidelines for Departments and Authorities*, Public Service Board (mimeo), Canberra, 1978.
4. Australia, Parliament, Joint Committee of Public Accounts, *One Hundred and Seventy-fourth Report: Use of ADP in the Commonwealth Public Sector—Acquisition of Systems in the Public Service*, AGPS, Canberra, 1978.





## 10. Measures for statutory officeholders and the staffs of statutory bodies

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**10.1** Statutory authorities play a variety of roles. They range from bodies the essence of whose functions requires that members be, and be seen to be, impartial and disinterested, to advisory and representative bodies part of whose function is to provide the Government with access to expert advice or representative opinion within a particular industry or subject area. The latter, by their nature, are likely to include members with private interests in the relevant area. Even in the case of those bodies whose functions require impartiality, some bodies have a broad-ranging focus where one particular interest may arise only infrequently, for example the Industries Assistance Commission. Others have a relatively narrow focus, such as the commodity boards.

**10.2** Another crucial distinction is between full-time and part-time statutory officeholders. Part-time officeholders are likely to have been selected for a particular contribution they can make, which can often be associated with the possession of a relevant interest. They also must rely on other sources for the greater part of their income.

### The Code of Conduct in its application to statutory officeholders and staffs of statutory authorities

**10.3** Because of the diversity among authorities, the Code of Conduct will have to be implemented in different ways for different kinds of authority and officeholder. For instance, some statutory officeholders have the status of a Permanent Head. Again, in the case of a tribunal with a wide range of subject matter, it is probably sufficient that a member with an interest in a specific matter declares that interest and disqualifies himself from deliberations on it. But in the case of a tribunal allocating benefits within a single industry, there may be a case for requiring divestment or prohibition of interests in that industry. Prohibitions on outside employment, while not unreasonable in the case of a full-time chairman, are obviously inappropriate in the case of part-time officeholders, for whom the only requirement can be that they devote *proper* effort to the duties of their office.

**10.4** The offices of statutory officeholders being constituted by particular statutes, an element of autonomy and separateness is implied. But it is important that both the Government and individual statutory officeholders should be seen to be committed to the obligations of the Code of Conduct. The Committee believes that this division of responsibility might best be recognised by three steps. **The Committee recommends that:**

- (a) the Cabinet should consider recommending to statutory authorities that the Code of Conduct be adopted as the standard to guide the conduct of the members of such bodies;

- (b) each statutory authority examine for itself, in consultation with the responsible Minister, how the Code of Conduct should be adapted by it for its members and for its staff, and what form measures supplementary to the Code should take; and**
- (c) each statutory authority should resolve formally upon its own implementation of the Code.**

## Prohibition

**10.5** The Committee, as was stated at paragraph 5.14, does not regard prohibition as a satisfactory means of avoiding or resolving conflicts of interest in the great majority of situations. The Committee accepts that in some cases it will be desirable that there should be total prohibition of certain forms of interest before an appointment is made, for example in regulatory bodies dealing with a particular industry where it is important that there be an appearance of impartiality as between sectors of the industry or firms involved in it.

**10.6** Several Acts which establish statutory authorities contain prohibitions regarding the interests which members may hold (see Appendix 4, paras 75, 86, 88, for examples). **The Committee recommends that there should be a review of provisions in relevant legislation establishing statutory authorities to determine whether any existing statutory prohibitions, together with any prohibitions that might have been adopted by resolution of the body concerned, require alteration in the light of the Committee's views expressed in this report.**

## Declaration

**10.7** The legislation establishing statutory authorities with more than one member generally contains a clause requiring the disclosure by members, at meetings, of certain sorts of interest in any matter under consideration by the authority, and the recording of such disclosures in the minutes of the authority. A member possessing such an interest is generally precluded from taking part in deliberations or voting on the relevant matter. Failure to comply with these obligations usually leads to automatic termination of the member's appointment. A recent example of such a clause is the *Commonwealth Legal Aid Commission Act 1977*, s. 18.

**10.8** The Committee was given evidence of several unsatisfactory features of the current statutory clauses requiring disclosure of interest:

- They are not universal. For instance, several of the Acts establishing commodity boards have no such provisions.
- They are not uniform. Although uniformity is not necessarily desirable for its own sake, it is arguable that many of the differences between such clauses are unwarranted because they appear to be arbitrary and unrelated to any special functions of the authority. For example, the older clauses generally require only disclosure of a direct or indirect interest in a contract made or proposed to be made by the authority, as in the *Australian Tourist Commission Act 1967*, s. 12 (4), whereas the more recently drafted clauses require declaration of any 'direct or indirect pecuniary interest in a matter being considered or about to be considered by the authority', as in the *Commonwealth Legal Aid Commission Act 1977*, s. 18. On the other hand, the Committee was informed that some of the lack of uniformity between existing clauses was because departments had sought variations at the time of drafting, in order to meet the specific circumstances of an authority.

- Even those features of the clauses that are uniform do not necessarily make the best provision for conflicts of interest. For example, it is standard practice that such clauses exempt a member from disclosure where the member has a private interest 'as a member of, and in common with other members of, an incorporated company consisting of more than 25 persons', except that more recent legislation may nonetheless require a member to disclose interests in a company of which he is director. Such an exemption appears to have no rationale, as the number of shareholders in a company is not a reliable guide to the extent of the interest or degree of control of this particular shareholder in the company. In the Committee's view, this exemption is an anachronism.
- The Committee notes that failure to comply with such a disclosure requirement generally brings about automatic termination of office. However, some recent Bills, such as the Casey University-Australian Defence Force Academy Bill 1978, clause 14 (1) (d), qualify this to apply only to failure 'without reasonable excuse'. It was suggested to the Committee by one witness that, because of the possibility that a member could, without impropriety, find himself infringing the section, removal from office for non-disclosure should be discretionary, not automatic. The Committee agrees that forfeiture of office should be required only where officeholders fail to declare without reasonable excuse.
- Other points of detail were that the situation of acting members, and situations where decisions were made under delegation between meetings, for example by the full-time chairman, were not adequately covered.

The part of such disclosure clauses which relates to disqualification is discussed below at paras 10.21–6.

**10.9** The standard formula clause discussed above applies only to the situation of those statutory authorities which conduct meetings. It does not cover authorities which have only a single officeholder. The Committee notes that the Acts constituting such authorities may require the officeholder to declare all pecuniary interests relevant to his office to the responsible Minister, for example the *Insurance Acts* 1973, s. 12 (3). **The Committee recommends that a provision requiring declaration of all relevant pecuniary interests to the responsible Minister should be standard in all legislation establishing single-member authorities.**

**10.10** In addition, **the Committee recommends that where a full-time chairman of a statutory authority frequently must make decisions under delegations on behalf of the authority, he should be required to declare all pecuniary interests relevant to his office to the Minister.**

**10.11** There exist other forms of statutory disclosure of interest clauses, for example the *Trade Practices Act* 1974, s. 17 (2), which requires disclosure to the public of any interest in a business or body corporate which is the subject of an inquiry held by a member participating in the inquiry. The Committee expects that these would also be examined in the review of disclosure clauses recommended above.

**10.12** The Committee believes that, in view of the lack of uniformity and generally unsatisfactory nature of the existing forms of disclosure clauses, improvements are desirable. It was put to the Committee that one solution might be to enact a single statute applying to all Commonwealth officers which would override existing declaration clauses. The Committee noted that the consequences of adopting a single

statute would need to be considered closely in relation to each statutory body before such action could be taken. On balance, **the Committee recommends that existing disclosure provisions in statutory authority legislation (including Australian Capital Territory Ordinances) should be reviewed, with a view to adopting a standard drafting formula which would take into account the points made in para. 10.8.** This could then be incorporated into the existing statutory authority legislation by amendment, with any necessary modifications of the standard formula to meet the circumstances of specific authorities.

**10.13** The Committee notes that statutory disclosure provisions such as those above may not always be sufficient, especially as they relate only to pecuniary interests. **The Committee recommends that, where relevant, each statutory authority should supplement any statutory disclosure requirements by its own rules, adopted by resolution or otherwise, covering such matters as disclosure of relevant non-pecuniary interests.** The Committee notes that some authorities, for example the Australia Council, have already followed such a course.

**10.14** The question whether disclosure should always be accompanied by disqualification is discussed below (paras 10.21–6).

## Registration

**10.15** Several statutory authorities indicated to the Committee that they kept, or were in the process of establishing, registers of relevant pecuniary interests of their members. Such registers were described in several cases as analogous to the registers of interests of company directors required to be kept under the uniform Companies Act. The interests registered generally correspond to the limited range required to be disclosed *ad hoc* at meetings of the relevant statutory authority under the legislation by which it was established. However, in one case, members are required to record shares held, debenture interests, rights or options, and the details of any contracts to or from which a member is a party or is entitled to receive benefits. The same authority has also invited members ‘to volunteer information about their personal investments or activities, family trusts etc. that might be relevant to the performance of their duties’. Some witnesses were anxious about the possibility that registration requirements would discourage suitable persons from accepting appointment as part-time statutory officeholders. The Committee believes that some of this concern may arise from an expectation that registration entails public access to the information disclosed, and that, when registration is thought appropriate, suitable restriction of access should make it acceptable to appointees to such positions.

**10.16** The wide range of functions which they undertake would rule out the imposition of a uniform requirement for registration on all statutory authorities. Some authorities have a field of responsibility so wide that general registration of interests would be appropriate, if a decision for registration was taken. There are others, with narrower trading or regulatory functions, where this would not be necessary. Where a statutory authority decides to adopt a form of registration, it would be a matter for the statutory authority itself to identify those interests which might conflict with the official duties of members and should, as a consequence, be registered.

**10.17** **The Committee recommends that, if a decision is taken to require registration of interests by the members of a statutory authority, the matters referred to in Appendix 6, paras 15, 29 and 30 should be taken into account.**

## Authorisation

**10.18** Where an absolute statutory prohibition or disqualification does not apply, authorisation can play a useful part in the smooth functioning of statutory authorities. For instance, it can allow the participation of an interested person where it is considered that, on balance, the particular public interest which the statutory authority was set up to promote is better served by that person's participation, despite the possibility of real or apparent conflict of interest. (The Committee's views on statutory prohibitions and disqualifications, and whether such provisions should allow for the making of exceptions, are set out elsewhere in this chapter).

### **10.19** The Committee *recommends* that:

- (a) statutory officeholders should have any authorisations recorded in the minutes of meetings or other appropriate records of the bodies to which they belong;
- (b) when authorisation relates to suspension of a requirement relating to conflict of interest which requires divestment or prohibits holding an interest, the responsible Minister should be notified forthwith.

## Divestment

**10.20** The Committee believes that statutory officeholders can be in a position of potential conflict analogous to that of Ministers in respect of interests directly related to their duties. It *recommends* that:

- (a) a Minister responsible for the appointment of a statutory officeholder should, prior to the appointment, carefully investigate any personal interests likely to create, or appear to create, conflicts of interest with the duties of the office;
- (b) subject to any legislative provision requiring a statutory officeholder to possess specified interests as part of his qualifications for appointment, the Minister should obtain from the proposed appointee explicit confirmation that he does not currently hold such interests and an undertaking to divest himself of such interests should he subsequently come into possession of them;
- (c) when an undertaking has been given to the responsible Minister by a statutory officeholder that he will divest himself of certain sorts of interests, a sanction should be provided in the event of a breach of such an undertaking.

## Disqualification

**10.21** Under the existing statutory provisions in relation to the declaration at meetings by members of statutory authorities, declaration is normally accompanied by disqualification from deliberations or voting on the matter in which the member is interested. The exact form of the disqualification varies. The most common form requires that the member shall not take part in any relevant deliberations or decisions of the body and shall not be counted as part of the quorum. Recent legislation generally requires simply that the member not be present at any relevant deliberations. The objects of requiring a member to withdraw from a meeting were stated in the Redcliffe-Maud Report as 'that the member should not hear his colleagues discuss the issue in which his interest arises; and secondly that his presence should not inhibit them from speaking freely'.<sup>1</sup>

**10.22** However, a general requirement that a member not be present when an item in which he is interested is being debated can cause problems. It may deny the body the benefit of the expertise of the only member who has knowledge or

experience of that particular subject and, indeed, for the sake of which expertise he may have been appointed. Where a high proportion of members of an authority have interests of a certain kind, for example all have interests in the industry regulated by the authority, situations could arise where there might be difficulty in obtaining a quorum if a strict legal interpretation of such disqualifications was applied.

**10.23** The Committee believes that to require the disqualification of members with interests is not always appropriate and that, in certain cases, the public interest may be better served if a member declares an interest in a matter under consideration but is not precluded from contributing to deliberations on that matter.

**10.24** There have been several attempts to meet this difficulty, some more successful than others. First, some legislation copes with the situation of members directly involved in the industry with which the authority is concerned by exempting from the ambit of the disclosure provisions interests held by members in that industry. For example, the *Wheat Industry Stabilisation Act 1974*, s. 12 (2), excludes from the ambit of the disclosure provision any interest that a member of the Australian Wheat Board has in common with other wheat growers or in most contracts made by the Board in respect of wheat or wheat products. As a consequence of the breadth of this exemption, members of the Wheat Board are not required, under the relevant legislation, to declare many interests which might conflict with their official duties.

**10.25** A more satisfactory solution is adopted in certain statutory authority legislation which allows the disinterested members to determine whether a member with an interest should be authorised to be present, or to take part in discussions and vote, when the matter in which he is interested is under discussion, for example the *Australian Meat and Livestock Corporation Act 1977*, s. 29 (5), and the *Australian Science and Technology Act 1978*, s. 17 (2). The New South Wales Local Government Act, 1919 adopts an alternative solution in that s. 30A (8) provides that the Minister may remove a disqualification from voting or speaking applying to a council member, 'subject to such conditions as he may think fit to impose', where the number of members disqualified at a particular time would be so great a proportion of the council 'as to impede the transaction of business, or in any other case in which it appears to the Minister that it is in the interests of the electors of the area' that the disqualification be removed. This appears to be a sensible approach. **The Committee recommends the adoption, in suitable cases, of an approach which would allow either the Minister or the disinterested members of an authority to determine whether a member should be authorised to take part in discussions or vote on a matter in which he has an interest.**

**10.26** Where a statutory officeholder has been elected or nominated to represent a particular group in a body, disqualification has the effect of disfranchising those persons or groups whom he is supposed to represent. The Committee has stated its opinion that Members of Parliament should not be prevented from voting by reason of their possessing an interest which conflicts with their public duty in a particular situation. Declaration of the interest is sufficient to neutralise the conflict. The Committee believes that the same principle should apply to those statutory bodies which contain representatives of persons or groups. **It recommends that consideration be given to removing requirements, whether created by statute or resolution, that would**

**prevent a member of a statutory authority who is a representative of a particular group or particular persons from taking part in deliberations or voting, provided always that a declaration of interest is made before speaking.**

## Staff

**10.27** Statutory authorities fall into three broad groupings with respect to the rules which lay down the duties of staff:

- Those authorities which are staffed under the Public Service Act, to which the provisions relating to public servants apply, for example the Industries Assistance Commission.
- Those for which the Public Service Board has some statutory responsibility in relation to the terms and conditions of employment of their staff, for example the Australian Honey Board. These have their own staff rules, but they tend to follow the pattern of the relevant Public Service Regulations.
- Those authorities which have independent staffing powers, and whose staff rules or regulations may therefore vary more from the public service pattern. Most of these have simple staffing provisions which give them power to determine terms and conditions of staff, for example the Australian Shipping Commission. The legislation for some authorities has more detailed provisions, providing for many of the staffing arrangements and protections afforded by the Public Service Act, including detailed disciplinary machinery. Such authorities include the Commonwealth Banking Corporation, the Reserve Bank of Australia, the Australian Telecommunications Commission and the Australian Postal Commission.

**10.28** The range of functions undertaken by statutory authorities is such that it cannot be assumed that the Committee's recommendations for public servants could automatically be applied in all cases. For example, the staff of certain statutory authorities carrying out activities in direct and substantial commercial competition with private sector enterprises, such as Australian National Airlines, the Australian National Line and the component banks of the Commonwealth Banking Corporation, are perhaps more analogous to the staff of their commercial competitors than to public servants.

**10.29** The Committee *recommends* that:

- (a) those statutory authorities in statutory relationship with the Public Service Board should consider adopting those recommendations in this report which apply to public servants, with any necessary modification to fit the circumstances of the authority;
- (b) those authorities which have independent staffing powers should examine the position with respect to their staff, with a view to adopting, by way of staff rules or regulations, or otherwise, such of the Committee's recommendations as are appropriate to the public duties of their staff and the likelihood of conflicts of interests occurring in respect of such duties, and which are not already adequately covered in existing staff rules or regulations;
- (c) each such statutory authority should consider how to ensure that its staff disclose any actual or potential conflicts of interest to their superiors or, in the case of senior staff, to the members of the statutory authority.

**10.30** The Committee *recommends* that, if registration of interests is adopted for the Australian Public Service, then equivalent registration practices should be adopted by each statutory authority for its staff. This would entail identifying those officers whose

responsibilities made it desirable that they register their interests, and specifying which interests of the officer and his immediate family should be registered. It would not be necessary to set out any such requirements in the authority's statute. But neither should they be kept as confidential between the members and staff concerned. **The Committee recommends that the details of any registration practices concerning the staffs of statutory authorities, but not the contents of any registers which may be established, should be made public.**

## Other categories

**10.31** In addition to the statutory officeholders and staffs of Commonwealth statutory authorities, there are certain similar categories of persons who fall within the list of 'persons holding positions of public trust in relation to the Commonwealth'. These are dealt with in the following paragraphs.

### *Directors and staffs of Commonwealth-owned or controlled companies*

**10.32** Sometimes the Commonwealth Government chooses to use the company form to carry out some public purpose, either by establishing a Commonwealth-owned or controlled company, such as Aboriginal Hostels Ltd or Qantas Airways Ltd, or by holding shares in an ordinary company such as Mary Kathleen Uranium Ltd. The Committee believes that the obligations of the Commonwealth-appointed members of the boards of directors of such companies are, and should be, the normal obligations of company directors under the applicable Companies Act. A public servant chosen as a director of such a company as a representative of the Commonwealth or his Minister or department or authority may encounter conflicts between his duties as an officer and his fiduciary duties as director.

**10.33** Such companies will no doubt develop their own staff rules setting out standards of conduct applicable to their staff. **The Committee recommends that the attention of the managements of Commonwealth-owned or controlled companies be drawn to the proposed Code of Conduct for possible incorporation in their staff rules, in a modified form if necessary.**

### *Staffs of joint Commonwealth-State bodies and bodies established under international agreements*

**10.34** Examples of joint Commonwealth-State bodies include the Advisory Council for Inter-government Relations, the River Murray Commission and the Joint Coal Board. Examples of bodies established under international agreement include the Anglo-Australian Telescope Board and the Christmas Island Phosphate Commission, both statutory bodies, and the British Phosphate Commissioners, a non-statutory body. The Committee sees no difference in principle between the public duty of the staff of such joint bodies and that of the staff of wholly Commonwealth bodies. Accordingly **it recommends that the attention of joint Commonwealth-State bodies and of bodies established under international agreements be drawn to the proposed Code of Conduct for consideration, in consultation with the relevant governments, whether the Code should be incorporated in their staff rules, in a modified form if necessary.**

## Tribunals

**10.35** The Commonwealth Government is responsible for a large number of statutory and non-statutory tribunals, some of which have a quasi-judicial character, together with the potential for conflict of interest problems. They include a number of statutory authorities which were not established solely or



primarily as tribunals but which act as tribunals, that is bodies which make decisions or recommendations affecting the rights and entitlements of individuals, in the course of carrying out one or more of their functions. For example, the Public Service Board is a tribunal in so far as it determines various types of appeal by public servants. The various primary industry commodity boards act as tribunals in so far as they make decisions or recommendations in relation to the allocation of export licences.

**10.36** The legislation establishing statutory tribunals may contain requirements for divestment, or disclosure combined with disqualification. To give two examples, divestment is required of members of the Australian Broadcasting Tribunal under the *Broadcasting and Television Act 1942*, s. 9. Disclosure is required by the *Administrative Appeals Tribunal Act 1975*, s. 14. In addition, the legislation establishing statutory bodies which act as tribunals in performing one or more of their range of functions usually contains a clause requiring disclosure to the other members of an interest in a matter under consideration and disqualification from deliberations upon that matter, except where the interest is held as a member of a company with more than twenty-five members (see para. 10.8 for further details).

**10.37** Either provision, whether for divestment or for disclosure, may be appropriate for particular sorts of tribunal: divestment when the responsibility is narrowly focused and a class of 'sensitive' assets can be identified as always likely to create conflict or the appearance of conflict; disclosure to the chairman or the parties when the work of the tribunal is more wide ranging and conflicts are more difficult to anticipate. **The Committee recommends that:**

- (a) there should not be an omnibus prohibition embodied in a single statute to avoid bias in tribunals; but
- (b) there should be as much uniformity as possible through adherence to general rules.

**10.38** Accordingly, it *recommends* that an examination be made of the conflict of interest provisions regarding disclosure applying to existing statutory and non-statutory tribunals when exercising quasi-judicial functions, with a view to introducing provisions along the lines of the *Administrative Appeals Tribunal Act 1975*, s. 14, or bringing existing provisions up to this standard where appropriate. Given that so many tribunals are also statutory authorities with a variety of other functions, this examination should be co-ordinated with the general review of declaration of interest clauses in statutory authority legislation, suggested at para. 10.12.

**10.39** The Committee notes the qualification contained in some existing provisions applying to disclosures by members of tribunals, that the interest arises from a 'business carried on in Australia'. It records its doubt that such a qualification is appropriate in a time when so many economic concerns are organised on an international or multinational basis. **It recommends that consideration be given to deleting the qualification contained in some statutes which restricts interests which must be disclosed to those arising from a 'business carried on in Australia'.**

1. Great Britain, Prime Minister's Committee on Local Government Rules of Conduct (Lord Redcliffe-Maud, Chairman), *Report*, Cmnd. 5636, HMSO, London, 1974, p. 13.



## 11. Measures for other categories of persons

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**11.1** The greater part of this report is concerned with four categories of officeholders: Ministers, Members of Parliament, public servants and statutory officeholders. However, there are certain other categories of persons to whom briefer reference must be made.

**11.2** The first, holders of judicial office under the Commonwealth, was not included in the Committee's terms of reference nor in the list published in its advertisement for submissions. The Committee believes that the omission of judges from its recommendations should be explained. The second and third categories, Members of the Legislative Assembly of the Northern Territory and Members of the Legislative Assembly of the Australian Capital Territory, were not included in the terms of reference but were added by the Committee when it advertised for submissions. The fourth category, members of the Commonwealth and Australian Capital Territory Police Forces, was identified at a later stage as requiring mention. The fifth category, identified in the Committee's subsequent list when advertising for submissions as 'directors, executives, editors and journalists of media organisations'—dealt with below under the heading 'The media'—came to be considered as a result of the Prime Minister's letter of 8 March 1978 (see para. 1.8). The sixth category, lobbyists, was identified at a later stage as requiring mention.

**11.3** Other categories, which either were mentioned in the terms of reference (such as the staff of Ministers and of Members of Parliament, who were dealt with in Chapters 8 and 7 respectively) or were included in the Committee's list when advertising for submissions (such as members of the Defence Force, who were dealt with in Chapter 9), were bracketed with the most appropriate and closely related major category of officeholders.

### Holders of judicial office

**11.4** Conflict of interest situations involving members of the federal judiciary are currently regulated by the criminal law, by legal doctrine and by convention.

**11.5** The *Crimes Act* 1914, s. 34 (b), provides that 'any person who . . . being a judge or magistrate, wilfully and perversely exercises Federal jurisdiction in any matter in which he has a personal interest, shall be guilty of an offence'. The penalty for a breach is imprisonment for two years.

**11.6** It is now accepted that judges should not engage in business or in any way be associated with business institutions, for example as director, trustee or adviser. The law disqualifies a judge who has a pecuniary interest in one of the parties before the court, although it is accepted that the parties to a case can waive the disqualification. For example, a judge is disqualified if one of the parties is a company and he is a shareholder in it.<sup>1</sup> In England, it has been assumed that the disqualification applies whether the shares are the judge's personal holdings or those of his spouse. However, in the *Bank Nationalisation* case, where the wife of one judge held shares in one of the parties and another judge was joint holder of

shares as a bare trustee for someone else, the judges were not disqualified.<sup>2</sup> Judges tend to disqualify themselves in other cases, besides those involving financial interest, for example if as counsel they acted for one of the parties over a long period, or if, as parliamentarians, they were intimately involved with a matter which is now before the court and where embarrassment might be felt by the judge or objection taken by any party.

**11.7** The Committee considered whether there was need for further rules, such as are contained in the Code of Judicial Conduct for United States judges, which was adopted in 1973, or those adopted in the Ethics in Government Act of 1978, which require disclosure of income from non-judicial sources, receipt of gifts, and so forth. It concluded that there was no discernible need for such extension of the existing rules, which, in the Committee's opinion, render extremely unlikely the possibility that a conflict of interest involving a member of the federal judiciary might develop and would provide for resolution of the situation if it did.

### Members of the Legislative Assembly, public servants and statutory officeholders of the Northern Territory

**11.8** The achievement of self-government by the Northern Territory on 1 July 1978 and the continuing evolution of the institutions of government in the Territory render inappropriate any attempt by this Committee to prescribe practices or rules for the Members of its Legislative Assembly. Moreover, the Committee is aware that a system of disclosure has been introduced for Members of the Legislative Assembly of the Northern Territory which parallels those suggested in several of the States. In addition, in October 1978, the Public Service Commission for the Northern Territory issued a General Order, Declaration of Pecuniary Interests, which imposed on employees a series of obligations in relation to the avoidance or resolution of conflicts of interests. Details of these measures are set out at Appendix 5.

**11.9** In the circumstances, the Committee does not wish to make any recommendations in respect of the Northern Territory, whether relating to Ministers, Members of the Legislative Assembly, public servants or statutory officeholders.

### Members of the House of Assembly of the Australian Capital Territory

**11.10** Up to the present, the Legislative Assembly of the Australian Capital Territory has operated under Standing Orders similar to those of the Commonwealth and the State Parliaments. In particular, Standing Order 162 is the equivalent of Standing Order 196 of the House of Representatives. The side note to the Order states 'No Member to vote if pecuniarily interested', but the actual language of the Standing Order is the same as in the House of Representatives Standing Order. The Task Force on Self-government for the Australian Capital Territory in March 1976 recommended that, where applicable, the recommendations by the Joint Committee on Pecuniary Interests of Members of Parliament should be applied to Members of the Assembly in legislation which the Task Force proposed for conferring legislative power on the Assembly. Adoption of this recommendation would have involved registration of Members' interests with an Assembly Registrar and a right of access to the registered information by *bona fide* inquirers. The Registrar, the Task Force suggested, might be the Clerk of the Legislative Assembly.<sup>3</sup> The Task Force's recommendations were not pursued.

**11.11** Although Members of the Legislative Assembly have been part time and the powers of the Assembly itself have been restricted, the Committee believes that the rules regarding conduct of Members of the Assembly should approximate those for the conduct of Members of the Commonwealth Parliament. Both groups are elected representatives of the community. Indeed, two differences might be thought likely to increase the risk of conflict of interest for Members of the Legislative Assembly. One has been the practice of appointing Members of the Assembly to various statutory bodies operating in the Australian Capital Territory, as a consequence of which they are involved in quasi-executive responsibilities. The other is that their part-time status and modest salary makes it very likely that Members will have employment or business interests to which they have to devote a high proportion of their time and effort and upon which they will depend financially.

**11.12** The Committee considers that, when any outstanding questions about its future status and responsibilities have been determined, the Legislative Assembly (soon to be known as the House of Assembly) should review its position in respect of conflicts of interest. It might consider whether the Code of Conduct proposed in Chapter 4, or some modified version of it, would be appropriate to the Assembly's circumstances and should be adopted by resolution or in Standing Orders.

### Members of the Commonwealth and the Australian Capital Territory Police Forces

**11.13** Police officers fall within the provisions of the *Crimes Act* 1914 relating to disclosure of information and official corruption by reason of the definition of 'Commonwealth officer' within that Act. The Committee is also aware that various proposals for codes of ethics for police officers have been drawn up, for example the Law Enforcement Code of Ethics of the International Association of Chiefs of Police, and the draft Code of Conduct for Law Enforcement Officials proposed by the General Assembly of the United Nations in Resolution 3452 (XXX). It believes that adoption of any comparable code of conduct is a matter best left to those responsible for the Police Forces in question. It may be that this Committee's report, as it deals with such topics in respect of public servants and other categories of officeholders, can be of assistance to them. Amalgamation of the two Forces into the Australian Federal Police has been announced by the Government. This provides an immediate occasion for considering the matter. But the Committee does not consider that it has the specialised experience which would make it competent to offer appropriate recommendations related to the police.

### The media

**11.14** As noted in Chapter 1, the Committee recognised at an early stage of its activities that, arising from the Prime Minister's letter of 8 March 1978, it would need to give consideration to the appropriateness of including certain classes of persons concerned with the mass media among 'persons holding positions of trust in relation to the Commonwealth'. Accordingly, its advertisement inviting submissions to the Inquiry listed 'directors, executives, editors and journalists of media organisations' among the persons added to the original categories specified in the terms of reference. It was recognised that there would be political, and possibly Constitutional, difficulties in extension of a uniform system of regulation

of conflicts of interest from public officeholders to all of the major media. In particular, there may be difficulties in bringing the print media within the Constitutional authority of the Commonwealth.

**11.15** The Joint Committee on Pecuniary Interests of Members of Parliament heard evidence from witnesses representing both print and electronic media. Its report stated that the press was 'a fundamental and a necessary mechanism in the checks and balances of a healthy Parliamentary democracy', and that it would be inequitable to impose requirements on one tier of the democratic process that were not imposed on others. Its report also stated that the overwhelming majority of media witnesses before the Joint Committee advocated registration of pecuniary interests for themselves and other media, as well as for others in the democratic process. The Joint Committee concluded that to have done otherwise would have been to advocate an imbalance in the system of checks and balances in the body politic.<sup>4</sup>

**11.16** The Joint Committee went on to recommend that a Media Council should be established; and, as an interim measure, the Parliament should require those media organisations which are accredited to or enjoy the facilities of Parliament House to comply with the same registration requirements that are required of Members of Parliament. It envisaged that, in the longer term, the areas of interest which might be of concern to the proposed Media Council would include administering the media register of pecuniary interests; devising a code of conduct for the media; acting as a 'tribunal' in all matters relating to the standing of the media; and generally guarding media standards.<sup>5</sup>

**11.17** This Committee, whilst recognising the great influence and political importance of the mass media, believes that such influence does not make the owners and employees 'persons holding positions of public trust in relation to the Commonwealth'. The Committee has reservations about using a method as roundabout as the Parliament's control over the areas occupied by the media in Parliament House to extend external regulation into so sensitive an area as the liberty of the mass media.

**11.18** One precedent is sometimes cited for the imposition of a requirement for disclosure of interests upon journalists. In New South Wales and Victoria the Securities Industry Acts 1975, ss. 73-80, require 'financial journalists' to register particulars of securities in which they have an interest and any transactions which vary those interests, and South Australia has similar legislation in hand. The penalty for non-compliance is a fine of \$1000 or six months imprisonment.

**11.19** The Committee believes that this requirement may be distinguished from any similar requirements proposed for political journalists on two grounds: firstly, passage of the Securities Industry Acts followed detailed inquiry by a Parliamentary Committee which disclosed unacceptable practices by certain financial journalists, whereas there has been no comparable evidence concerning political journalists; secondly, the interests which are required to be registered by financial journalists are easily specified and are immediately relevant to possible conflict of interest situations which might arise, whereas the pecuniary interests of political journalists are much less obviously relevant to their work as journalists. This exceptional case does not, in the Committee's opinion, advance the argument for regulation of the media when they are dealing with political matters.

**11.20** The Committee is concerned that any proposal to impose a requirement for disclosure of interests, or any other form of regulation, upon political journalists would be seen as an attempt to blunt the teeth of criticism. It fears that other proposals for the regulation of conflicts of interest, which are intended to enhance public confidence in government institutions, and in particular in the parliamentary institution, might well be discredited by their association with interference with freedom of the press and of the electronic media. The Committee noted the New South Wales Government's immediate rejection of the proposal by that State's Parliamentary Joint Committee upon Pecuniary Interests that political journalists be required to register pecuniary interests, and the omission of journalists from similar legislation proposed or in force in other Australian States.

**11.21** Recently, Australian media organisations have concerned themselves with more effective self-regulation of their standards. In 1976, the Australian Press Council was formed to deal with complaints from private citizens against newspapers, and, from the limited studies the Committee has been able to make of its work, the Council appears to be playing an effective role. In 1977, the Australian Broadcasting Tribunal reported on self-regulation for the commercial electronic media<sup>6</sup>, and, following this, the Government announced that, except in relation to certain areas where minimum standards would be laid down, as a general principle, broadcasters would be expected to develop and to police their own industry codes.<sup>7</sup> It may be noted that the Australian Journalists Association has adopted a 'code of ethics', although the Committee has been informed that there are problems with its enforcement.

**11.22** Elsewhere in this report, the Committee points to the advantages of self-regulation of codes of conduct by the four major categories of officeholders. Contrary to the experience with witnesses before the Joint Parliamentary Committee on Pecuniary Interests of Members of Parliament, the general theme of the evidence by witnesses before this Committee was that self-regulation was to be preferred to government intervention. The Committee concurs with this view. It believes that any attempt to regulate conflicts of interest involving the media should incorporate this principle.

**11.23** The most recent British Royal Commission on the Press was required to consider, amongst other things, 'the interaction of the newspaper and periodical interests held by the companies concerned with their other interests and holdings, within and outside the communications industry'. The Commission interpreted this as implying that it should look at the questions of the degree of restriction over the common ownership of press and broadcasting interests that is required by the public interest, and whether any damage to the public interest is likely to be caused by links of ownership between the press and other business interests which the press might be in a position to further and, if so, what measures are required.<sup>8</sup>

**11.24** In respect of the second of these two questions, the Royal Commission saw the objection to the involvement of media organisations in other forms of economic activity as resting on a suspicion that editorial comment may be biased. It said:

In its simplest form the fear is that, if a newspaper's proprietors have substantial holdings in, say, travel, this may lead to pressure for editorial puffs for a travel firm in the same ownership, or alternatively to pressure to ignore or criticise its rivals. It may lead, too, to unfair competition through cheap or unpaid advertising.<sup>9</sup>

and expressed the opinion that public knowledge should extend beyond ownership of other publishing interests to knowledge of the main other business interests of groups publishing newspapers and periodicals, and that, in the case of companies with press interests, disclosure of beneficial interests is required in the interests of readers and of the public generally, whether or not the companies are listed.<sup>10</sup>

**11.25** The recommendations of the Royal Commission included:

- Every newspaper and periodical (be) obliged to state not merely, as at present, the name and address of the publisher, but also, where the publisher is a subsidiary company, the name and country of incorporation of its ultimate holding company and, moreover, to display both with reasonable prominence.
- . . . newspapers and periodicals should establish a constant practice of declaring their interests when reporting or commenting on the affairs of an associated company or on an industry in which the publisher or an associated company has significant financial interests directly or indirectly.<sup>11</sup>

In relation to the first of these, the Commission added the observation that:

We do not think that it should be necessary in the legislation to prescribe in more detail what is meant by 'with reasonable prominence'. In the case of a newspaper, what we have in mind is that the information should be stated conspicuously, either beneath the masthead or on the leader page, and not, as generally occurs at present, in minute print in an obscure position on the back page.<sup>12</sup>

**11.26** The Committee finds attraction in these recommendations and believes they could have useful application in the Australian context. In this connection, it may be noted that there are a number of bodies presently concerned with the maintenance of standards of conduct in the Australian media, such as the Australian Press Council, the Australian Broadcasting Tribunal, and the Federations of Australian Commercial Television Stations and of Australian Radio Broadcasters. The Committee believes that the methods of implementation of disclosure of interests, whether in line with the British Royal Commission proposals or not, are best left to the group immediately concerned.

**11.27** In relation to the question raised in the Prime Minister's letter of 8 March 1978, the Committee *recommends* that no form of government control be introduced to regulate conflicts of interest involving the media, but that it be suggested to the bodies presently concerned with the maintenance of standards of conduct in the Australian media that they should consider adoption, with such modifications as may be necessary, of any recommendations of the British Royal Commission on the Press 1977 which are relevant to the disclosure of interests.

## Lobbyists

**11.28** The Committee also considered whether it should inquire into the role of lobbyists in conflict of interest situations. In the United States of America, there is a long tradition of regulation of the activities of lobbyists, especially as to disclosure through registration, which extends back into the nineteenth century for some States and to 1946 in respect of the federal government.<sup>13</sup> In Britain, in 1969 the Strauss Committee gave some consideration to the possibility of registering those public relations firms which employed Members of Parliament.<sup>14</sup> In 1974, the Willey Committee, directed to implement the House of Commons decision for a register of Members' interests, concluded that any definition of 'lobbying' would be too broad to form a practical basis for registration.<sup>15</sup>



Several persons who made submissions to this Committee raised the possibility of including lobbyists within any system for controlling conflict of interest in respect of the Commonwealth Government, but without supplying convincing evidence as to improper activities by lobbyists.

**11.29** The Committee believes that the phrase ‘persons holding positions of public trust in relation to the Commonwealth’ properly confines its recommendations to those persons who hold some variety of public office. The Committee’s responsibilities do not extend to private persons who, in pursuit of economic or other objectives, seek to influence government or public officials unless they intrude upon the ‘black’ area of bribery and corruption or improperly offer gifts or post-separation employment. This view is not simply a consequence of the Committee’s terms of reference. It is also a considered opinion as to what constitutes the proper sphere for government regulation and how far initiatives outside that sphere are likely to prove effective. Although the political and constitutional situation in Washington is sufficiently different to make any attempt to draw parallels with Canberra most unwise, the difficulties encountered in successive attempts to regulate lobbying in Washington suggest the unprofitability of starting down that path in Australia. **The Committee recommends that no special measures be taken in relation to lobbyists.**

**11.30** The Committee’s terms of reference did not refer to party finance and election campaign donations as a potential source of conflicts of interests. The Joint Committee on Pecuniary Interests of Members of Parliament had previously noted:

It must be added that no safeguards exist at present in relation to the abuses which might be thought to flow from undisclosed political campaign contributions. A number of other countries have considered this question in conjunction with the question of a register of pecuniary interests. However, the question of contributions to political campaigns is not within this Committee’s terms of reference.<sup>16</sup>

**11.31** In the United States control over campaign funding has been closely connected to regulation of conflicts of interest. For example, two of the ten items in the Code of Conduct adopted by the House of Representatives in 1968 related to campaign funds, compared with three relating to conflict of interest. A pecuniary benefit given to an elected officeholder’s campaign or party funds might, in some circumstances, be as likely to influence his conduct as the same benefit given to him personally or to a member of his immediate family. It may be as likely to create a conflict of interest between his public duty and private interest. However, such matters lie beyond the Committee’s terms of reference, and, notwithstanding some suggestions received from witnesses, it can do no more than note that any *comprehensive* system for avoidance and resolution of conflicts of interest might well have to include disclosure of the sources and amounts of political funds. No doubt the Commonwealth Government is aware of this.

1. *Dimes v. Grand Junction Canal* (1852) 3 HLC 759; 10 ER 301.
2. (1948) 76 CLR 1; not reported on this point but see *R. v. The Industrial Court* [1966] Qd R 245, at pp. 279–80.
3. Australia, Department of the Capital Territory, *Report of the Task Force on Self-government in the Australian Capital Territory*, AGPS, Canberra, 1976, pp. 16–17.
4. Australia, Parliament, *Declaration of Interests: Report of the Joint Committee on Pecuniary Interests of Members of Parliament* (J. M. Riordan, Chairman), AGPS, Canberra, 1975, p. 42.
5. *ibid.*, p. 44.
6. Australian Broadcasting Tribunal, *Self-regulation for Broadcasters: A Report on the Public Inquiry into the Concept of Self-regulation for Australian Broadcasters*, Parl. Paper 170, Canberra, 1977.

7. Minister for Post and Telecommunications, Media Release 78/17, 15 September 1978.
8. Great Britain, Royal Commission on the Press (Prof. O. R. McGregor, Chairman), *Final Report*, Cmnd. 6810, HMSO, London, 1977, p. 141.
9. McGregor, *Report*, p. 149.
10. *ibid.*, pp. 151–2.
11. *ibid.*, pp. 152–3.
12. *ibid.*, p. 152.
13. Federal Regulation of Lobbying Act 1946. Measures are currently before the Congress to strengthen this Act—see United States, House of Representatives, Committee on the Judiciary, *Lobbying and Related Activities, Hearings before the Subcommittee on Administrative Law and Government Relations*, 95th Congress, 1st sess., Serial No. 10. Washington 1977.
14. Great Britain, House of Commons, *Report from the Select Committee on Members' Interests (Declaration)* (G. R. Strauss, Chairman), 1969–70 H.C. 57, HMSO, London, 1969, pp. xxiv–xxvi.
15. Great Britain, House of Commons, *Report from the Select Committee on Members' Interests (Declaration)* (F. Willey, Chairman), 1974–75 H.C. 102, HMSO, London, 1974, p. xv.
16. Riordan, *Declaration of Interests*, pp. 10–11.

## 12. Machinery for dealing with conflict of interest cases

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**12.1** In Chapters 7 to 10, the Committee recommended that responsibility for avoiding and resolving conflicts of interest should rest with those persons and bodies already responsible for the conduct of particular categories of officeholders. However, its terms of reference raised the possibility of the development of special machinery or special procedures not previously employed in Australia:

. . . to recommend whether or not a register under judicial or other supervision should be maintained so that, *in the event of allegations of impropriety, the allegation may be open to judicial investigation and report* (emphasis supplied).

Although the focus is on the maintenance of a register of interests and the use of the register in relation to conflicts of interest, the potential scope is much wider. Further, in his press statement of 16 December 1977, the Prime Minister stated that the Committee 'will also be asked to recommend what procedures should be followed to determine whether there has been any breach of the high standards which are properly required of those in public office' and 'to recommend the method which should be used to determine whether there has been a breach'.

**12.2** The Committee, consistently with the philosophy adopted throughout this report, believes that ordinary cases involving allegations of conflict between public duty and private interest should be resolved through the established machinery for dealing with misconduct or misbehaviour on the part of officeholders. It recognises, however, that such machinery may be inadequate or inappropriate in exceptional cases where a high degree of public concern is involved. It has concluded that special machinery should be established to deal with a very limited number of matters.

### Avenues for bringing to notice allegations of conflicts of interest

**12.3** A variety of avenues now exists for the investigation of allegations of conflicts of interest on the part of Members, Ministers, public servants and statutory officeholders. Some of these are formally established by legislation; others do not rely upon legislative provision but upon administrative or parliamentary procedures. In recent years, the 'traditional' avenues for the public to question the bases for administrative decisions, including those involving conflicts of interest, have been expanded greatly by the passage of the *Administrative Appeals Tribunal Act 1975*, the *Ombudsman Act 1976* and the yet to be proclaimed *Administrative Decisions (Judicial Review) Act 1977*.

**12.4** For the aggrieved or concerned citizen, dissatisfied with the correctness of an administrative decision, the Member of Parliament has long been, and continues to be, an effective channel for the airing of a complaint. The Member is in a unique position by reason of his office as he has available options for action which are not available to the citizen himself. He may raise a matter in debate in the Parliament, or through questions addressed to the responsible Minister, in the certain knowledge that, if it is sufficiently serious, it is likely to receive widespread publicity; he may

make representations in writing or orally to the Minister, with the full assurance that those representations will be seriously considered; he may make approaches to departments and authorities with a measure of assurance that, with the 'weight' that his office carries, his approaches will be dealt with carefully and expeditiously. The political impact of any complaint in the Parliament regarding decisions by office-holders, on the grounds of conflict between public duty and private interest, is considerable, and this in itself can be a sanction of importance.

**12.5** The citizen can, of course, address his complaint directly to the responsible Minister or to the Prime Minister. At this level, it ordinarily receives special attention, especially where an allegation of conflict of interest has been made. The fact that a complainant who is dissatisfied with an explanation given may have his complaint raised in the Parliament provides a substantial assurance that an allegation is properly investigated.

**12.6** Similarly, a complaint addressed to the Permanent Head of a department regarding the conduct of one of his officers would ordinarily be thoroughly investigated. In such cases, there is not only the political sanction available but there are also disciplinary sanctions available under the Public Service Act.

**12.7** The 'traditional' avenues for the person aggrieved by a decision by an office-holder have, under certain circumstances, included the courts. This is, however, an avenue which can sometimes be fraught with difficulty. The Commonwealth Administrative Review Committee, reporting in 1971, observed that:

A person aggrieved by a decision of a Commonwealth official or tribunal will generally feel that the decision was wrong on the facts or merits of the matter. Sometimes there is an appeal on the merits to an administrative tribunal or to the courts, but generally such a person has no way of appealing against a decision on the facts or merits. The courts are, in most cases, not open to him for this purpose and he is driven, if he wishes to upset a decision, to find some way of attacking it in the courts upon legal grounds. The legal grounds are, however, limited and the means, or remedies, complicated. He has to select his court, his ground of attack, and his procedure or remedy. If, being driven to seek in the courts an invalidating judgment, he succeeds in having a decision set aside, he is, in effect, in many cases back where he started with the administrative process to be faced again before the same administrative officer or body. An attempt is often made to have a decision upset, not so much because of the legal flaws involved but because a person aggrieved by it thinks that it is wrong on the merits and success in the courts in many cases involves the risk of the same decision on the merits being reached, after the previous judicial decision has been given, by the same administrative body and by processes which can no longer be attacked in the courts.<sup>1</sup>

and went on to conclude that:

It is generally accepted that this complex pattern of rules as to appropriate courts, principles and remedies is both unwieldy and unnecessary. The pattern is not fully understood by most lawyers; the layman tends to find the technicalities not merely incomprehensible but quite absurd. A case can be lost or won on the basis of choice of remedy and the non-lawyer can never appreciate why this should be so. The basic fault of the entire structure is, however, that review cannot, as a general rule, in the absence of special statutory provisions, be obtained 'on the merits'—and this is usually what the aggrieved citizen is seeking.<sup>2</sup>

The courts are not, therefore, always a satisfactory answer for use by the citizen.

**12.8** The *Administrative Appeals Tribunal Act* 1975 provides that, upon application by a person or persons whose interests are affected by a decision in designated areas of government administration, the Tribunal set up under the Act may review that

decision. The Tribunal is empowered to affirm, vary or set aside a decision under review and, in the last-mentioned case, make a new decision in substitution of the original one or remit the matter for reconsideration. There is a right of appeal against a decision of the Tribunal to the Federal Court of Australia upon a question of law.

**12.9** The *Ombudsman Act* 1976 provides for the appointment of a Commonwealth Ombudsman with the function of investigating administrative action taken by a department or a designated statutory authority, which is either the subject of a complaint or is a matter which he considers warrants investigation. The Ombudsman is not empowered to review actions by Ministers but may investigate a recommendation made by a department to a Minister. He may not substitute his own decision for one under review and may recommend corrective action only where he thinks there has been maladministration.

**12.10** The Administrative Appeals Tribunal Act and the Ombudsman Act have provided important new channels for the investigation of complaints against administrative decisions, including those involving conflicts of interest. When the *Administrative Decisions (Judicial Review) Act* 1977 is proclaimed, this will supplement the two Acts by establishing in appropriate cases a single simple form of proceeding in the Federal Court of Australia for judicial review of the legal aspects of Commonwealth administrative actions as an alternative to the present cumbersome and technical procedures for legal review which were the subject of comment by the Commonwealth Administrative Review Committee (see para. 12.6, above).

**12.11** In the Committee's view, these avenues provide ample opportunity for allegations of conflicts of interest involving public officeholders to be brought to notice. It is, however, less satisfied about the nature of the machinery available for the investigation of such allegations.

### The investigation of allegations of conflicts of interest

**12.12** Within the areas in which they function both the Administrative Appeals Tribunal and the Commonwealth Ombudsman have wide powers for obtaining the facts relating to cases involving administrative decisions in which conflict of interest is alleged to have been an element. Hearings of the Tribunal are required to be in public unless the confidentiality of the matters before it leads the Tribunal to decide otherwise. Inquiries by the Ombudsman, on the other hand, must be made in privacy.

**12.13** The independent natures of the Tribunal and the Ombudsman ensure that cases before them are considered impartially and their decisions and findings, in consequence, have a high degree of public acceptability. They are important institutions in the field with which the Committee is concerned. There are limitations on the areas in which they are permitted to work, but, nonetheless, the scope for their investigations is extensive.

**12.14** For the investigation of allegations against officeholders employed under the Public Service Act or in major statutory authorities such as the Commonwealth Trading Bank of Australia, the Australian Postal Commission or the Australian Broadcasting Commission, there is established internal machinery. This machinery has, the Committee believes, operated satisfactorily in the past and no evidence has been presented that it requires strengthening.

**12.15** Apart from the Administrative Appeals Tribunal and the Commonwealth Ombudsman, there appears to be no established machinery for the investigation of allegations against statutory officeholders. No doubt the Minister concerned would

draw upon the resources of his department to examine and report on any such allegations. However, the Committee is aware of no evidence of a need to introduce special arrangements to cover the position of statutory officeholders.

**12.16** It is in relation to elected officeholders that the Committee has most concern. Allegations of conflict between public duty and private interest concerning Ministers and Members are usually raised in the Parliament itself. Each of the Houses of the Parliament has its Privileges Committee and, no doubt, allegations could be referred to the appropriate Committee by the House to which the Minister or Member belonged. But, in practice, Parliamentary Committees are not used for the investigation of conflict of interest allegations. The matter is usually handled on a political basis which may give satisfaction to no one. It may become a festering sore which poisons relations within the Parliament and adds to any public disillusion with 'politicians' as a group and with the Parliament as an institution.

**12.17** There appear to be a number of ways in which the inadequacies of the present arrangements for the investigation of allegations against Members might be met. One is to strengthen and formalise the parliamentary machinery. Another is to create a special body outside the Parliament to carry out investigations. A third might involve a combination of the preceding two. There are, of course, others such as the use of the Ombudsman, Royal Commissions, Committees of Inquiry or even the courts to conduct investigations.

**12.18** The Committee has already expressed, in paragraph 3.12 and elsewhere, its belief that responsibility for the standards of conduct of officeholders, whether elected or appointed, should vest in those responsible for their management. In relation to the Parliament, it believes that there are special considerations in that it is vital to the continuation of good government that the capacity of Members to manage their own affairs should not be impaired. On grounds of principle, therefore, the Committee would be reluctant to embrace proposals which would involve the use of an outside agency for the investigation of allegations of conflict of interest involving Members unless there were sound reasons for so doing.

**12.19** The approach which is most in keeping with the Committee's philosophy in this area would be to strengthen and formalise the existing parliamentary machinery. Many of the difficulties which the Committee has with the present arrangements arise from the fact that there is no recognised channel through which allegations of conflict of interest concerning Members may be tested. The absence of a channel of this kind results in unresolved and unsatisfactory situations.

**12.20** The Committee has noted that, in the British House of Commons and within the Congress of the United States of America, the practice is to establish House Ethics or similar committees and that proposals for the establishment of committees with like functions are before the Canadian Parliament.<sup>3</sup> The case for the establishment of such committees was stated in the 1970 report of the Association of the Bar of the City of New York Special Committee on Congressional Ethics, in which, referring to the United States experience from 1958, the comment was made:

A skeptic might point to the fact that Congress and the entire Federal service had a code starting in 1958 and that its existence had little practical significance. This is probably true, but it is largely because no one was charged with the responsibility of enforcing the 1958. code. This points up the necessity that ethics codes be coupled with ethics committees. If there is a permanent committee, there is someone *to whom* complaints of individual violations can be made and *against whom* complaint can be made if ethical rules generally go unenforced.<sup>4</sup>

**12.21** In the context of the British House of Commons, there has been discussion on whether the appropriate body to deal with ethics questions was the House Privileges Committee (or a subcommittee of it) or a separate Committee. The Strauss Committee favoured the former; the Willey Committee the latter.<sup>5</sup> The argument advanced by the Willey Committee was that:

Certainly for the first years it is . . . essential to have a separate Committee, not only to deal with ad hoc problems or complaints but also to keep under review the whole subject of Members' interests and to make recommendations. For this reason it would be advisable to make provision for the Committee and the members thereof to be established for the duration of a Parliament.<sup>6</sup>

**12.22** The Committee finds itself attracted to the concept of separate Ethics Committees, with functions similar to those suggested by the Willey Committee. The Privileges Committees of the two Houses do not appear to be appropriate vehicles for the investigation of conflict of interest cases and there would be advantage in having a continuing committee for each House charged with special responsibilities in questions involving the operation of the Code of Conduct in relation to Members and, in particular, situations involving conflicts of interest. It would, of course, be necessary to evolve machinery for the receipt and investigation of complaints and allegations and to determine the extent of the Committees' powers. It is envisaged that complaints might be made to the Committee by members of the public.

**12.23** But, irrespective of any strengthening and formalising of the parliamentary machinery, there are likely to be a few special cases where investigation by an 'in-house' committee such as an Ethics Committee would not provide public assurance that an allegation has been sufficiently investigated. Investigation by a body outside the Parliament may be the only means of providing the necessary reassurance.

**12.24** This problem raises the question whether all investigations of allegations against Members should be made by an outside body. The Committee would be loath to make a recommendation along these lines as it would be contrary to the approach favouring self-regulation which it has adopted throughout this report.

**12.25** Nevertheless, the problem of the special case is one that must be faced. The Committee favours a compromise arrangement under which all allegations against Members are initially considered by an Ethics Committee from the House to which the Member belongs and those cases of sufficient moment to warrant detailed outside investigation are referred by the House concerned to a special investigatory body after the House has received and considered a recommendation by the Committee. The nature of this special investigatory machinery is discussed in the next section of this chapter.

**12.26** The Committee *recommends* that each House of the Parliament be invited to:

- (a) establish a Standing Ethics Committee empowered to:
  - (i) report to the House, from time to time, on any changes in the Code of Conduct that it deems desirable; and
  - (ii) receive, investigate and report upon any complaints of departures by Members from the Code of Conduct, and, in particular, upon allegations involving conflicts of interest; and
- (b) determine the procedures for the operation of the Committee and the extent of its powers.

## Special investigatory machinery

**12.27** The circumstances in which special machinery would be employed would resemble those for which the British Royal Commission on Tribunals of Inquiry of 1966 thought that inquisitorial procedures would be necessary:

There are . . . exceptional cases in which such procedures must be used to preserve the purity and integrity of our public life without which a successful democracy is impossible. It is essential that on the very rare occasions when crises of public confidence occur, the evil, if it exists, shall be exposed so that it may be rooted out; or if it does not exist, the public shall be satisfied that in reality there is no substance in the prevalent rumours and suspicions by which they have been disturbed.<sup>7</sup>

**12.28** In the context of the present report, the matters for the consideration of which the special machinery would be invoked would include:

- allegations of major breaches of the proposed Code of Conduct by Ministers and Members referred to it by the Parliament;
- allegations of major breaches of the rules governing the public duty and private interests of Ministers referred to it by the Prime Minister;
- allegations of major breaches of the proposed Code of Conduct by public servants referred to it by the Chairman of the Public Service Board; and
- allegations of major breaches of the proposed Code of Conduct by statutory officeholders referred to it by the Minister concerned.

If a requirement for the registration of interests was introduced, allegations of major breaches of that requirement might also be matters for reference to the special machinery. The Committee would expect that the general run of breaches by statutory officeholders and public servants would be dealt with outside the special machinery.

**12.29** It would not be a function of the special machinery to go beyond the stages of investigation and report. Subsequent action would be a matter for the authority responsible for the conduct of the officeholder.

### *Legislation in Britain and the United States*

**12.30** Here mention might be made of the special arrangements that have been developed in Britain and the United States to deal with serious allegations of impropriety in public affairs.

**12.31** In Britain, the Tribunals of Inquiry (Evidence) Act 1921 provides that a Tribunal may be established by the Government, following a resolution of both Houses of Parliament which states 'that it is expedient that a tribunal be established for inquiring into a definite matter described in the Resolution as of urgent public importance'. A Tribunal has the same powers, rights and privileges as are vested in the High Court. It can compel the attendance of witnesses and production of documents. Failure to attend, to produce documents or to answer questions may be punished by the High Court as if it were contempt of the Court itself. Its hearings are public unless the Tribunal finds that this is against the public interest.

**12.32** Its functions have been described thus:

The task of a tribunal of inquiry is to investigate certain allegations or events with a view to producing an authoritative and impartial account of the facts, attributing responsibility or blame where it is necessary to do so. It is not the duty of tribunals of inquiry to make decisions as to what action should be taken in the light of their findings of fact.<sup>8</sup>



**12.33** In the United States, allegations of public misconduct have usually been investigated by Congressional committees. On occasion, a Special Prosecutor has been appointed to insulate the conduct of the investigation from partisan influences. Since Watergate and public concern about possible political influence on the Department of Justice, proposals have been made to include provision for the appointment of a Special Prosecutor under legislation relating to regulation of conflicts of interest. For example, the Senate Select Watergate Committee recommended that Congress enact legislation to establish permanently an office of public attorney with jurisdiction to prosecute criminal cases in which there is a real or apparent conflict of interest within the executive branch.<sup>9</sup>

**12.34** Provision for the appointment of a Special Prosecutor was eventually included in the Ethics in Government Act of 1978, but the Senate's plans for an Office of Government Crimes within the Department of Justice, to have jurisdiction in relation to prosecution of executive branch officers and breaches of federal laws relating to conflict of interest, lobbying and elections, were dropped during passage of the Act.

#### *The nature of the special machinery*

**12.35** As previously noted, the Committee has been required under its terms of reference to consider whether, 'in the event of allegations of impropriety, the allegation may be open to judicial investigation and report'. As a preliminary to its consideration of the special machinery it would recommend for adoption, the Committee examined whether a member of the judiciary should form part of the machinery.

**12.36** After careful consideration, the Committee has rejected the idea of appointing a judge in active service to supervise a register of interests and to investigate and report upon allegations of impropriety. It does not consider that the continuous involvement of a serving member of the judiciary with such duties would be conducive either to the most effective regulation of conflicts of interest in respect of the Commonwealth Government or to maintaining the proper role of the judiciary outside the political arena.

**12.37** In reaching this conclusion, the Committee was influenced by two factors which it regarded as having special weight. First, particular investigations may call for a variety of skills and experience which a single person, whether a judge or not, might not possess. Second, the Committee believes that the public expectation of objectivity and integrity, which presumably led to the initial suggestion that a judge be designated for these responsibilities, could equally be met by the alternative arrangements which are described below.

**12.38** The Committee considered, but rejected, the possibility of passing responsibility for the investigation of allegations of gross misconduct by officeholders to the Ombudsman. The Committee has reservations about involving the Commonwealth Ombudsman in a quite different and disparate role and subject matter, by giving him responsibility for investigating breaches or allegations of breaches of conflict of interest rules. Such a role might divert the Ombudsman from his central function, that is the investigation of complaints made to him by persons aggrieved by administrative actions of Commonwealth officials and agencies. In addition, the Ombudsman is at present explicitly or implicitly excluded by the *Ombudsman Act 1976* from investigating the actions of Ministers or Members. He is also excluded from investigating matters of public service employment such as disciplinary matters. To give the Ombudsman the responsibility for investigating breaches of conflict of interest rules

would thus change, and perhaps jeopardise, his relationships with the Parliament and the administration. The Committee believes that the complete responsibility should be given to some other body.

**12.39** It should be noted that the *Ombudsman Act 1976* indicates that where a member of the public has a 'sufficient interest' in the matter, he may make a complaint to the Ombudsman about an action or decision by a Commonwealth official or agency, on the grounds that the action or decision had been tainted by conflict of interest. The Ombudsman Act, s. 9 (10), also provides that, if the Ombudsman's investigations reveal some misconduct or breach of duty, he may, if he believes the circumstances justify his doing so, bring the matter to the attention of the principal officer of the department or prescribed authority. If that officer were the one considered to be at fault, the notice would go to the responsible Minister. Thus the Ombudsman could refer any apparent breaches of conflict of interest rules by Commonwealth officials to the relevant Minister, department or statutory authority, which would then take whatever action was thought appropriate.

**12.40** At the present time, it is always open to the Government to appoint a Royal Commission to investigate allegations of misconduct by officeholders. However, the fact that the appointment of a Royal Commission, the selection of its members and the determination of its terms of reference will take place after the allegations of misconduct have already become a political issue can give a party political flavour to the work of the Royal Commission. This may run counter to the main purpose of restoring public confidence in the proper working of government institutions. If a statutory body, with its members already designated by a process which transcends party differences, is already in existence and available to conduct the investigation within terms which the body itself sets, the Committee believes that this problem can be avoided.

**12.41** The Committee *recommends* that:

- (a) a statutory body, to be known as the Public Integrity Commission, should be created, comprising part-time members appointed by the Prime Minister after consultation with the Leader of the Opposition;
- (b) its Chairman should be a retired judge or person likely to be acceptable as of sufficient standing and experience;
- (c) there should be a standing panel of five (or seven) members from whom three, one of whom might be the Chairman himself, would be selected by the Chairman for a particular inquiry;
- (d) a secretariat should be established and located in an administratively convenient department or authority.

**12.42** The Committee *recommends* that the Commission should have the powers of a Royal Commission under the *Royal Commissions Act 1902*, including power to compel persons to attend, be sworn and give evidence, and to produce documents. As with that Act, penalties should be available for non-compliance with a direction to attend, be sworn, give evidence or produce documents, with acts or omissions on different days constituting separate offences, and imprisonment for five years for giving false testimony.

**12.43** The Committee *recommends* that the Public Integrity Commission should have:

- (a) power to employ counsel to assist it, with provision for examination of witnesses by counsel equivalent to s. 6FA of the *Royal Commissions Act 1902*;

**(b) the same privileges and protection as a Royal Commission; and**

**(c) power to take evidence in private when it considers it to be in the public interest so to do.**

**12.44** The British Royal Commission on Tribunals of Inquiry was concerned at the extent to which the safeguards intended to protect the individual, which had been developed in ordinary civil or criminal proceedings, could be lost before an inquisitorial tribunal where a person against whom an allegation had been made, or a witness called in the proceedings, underwent the risk of having his private life exposed and baseless allegations made against him. It noted that over the previous thirty years some of the safeguards from the ordinary judicial process had been adapted to the inquisitorial processes of the tribunals of inquiry, but recognised that problems remained because it was 'impossible to eliminate all risk of personal hurt and injustice'. The risk could and should be minimised, but in the sort of matters with which such Tribunals would be concerned it was vital in the public interest that the truth should be established.<sup>10</sup>

**12.45** The Royal Commission suggested six principles which, it thought, would largely remove the difficulty and injustice which persons involved in an inquiry might face:

- before any person became involved, the tribunal must be satisfied that there were circumstances which affected him and which it proposed to investigate;
- before any person involved was called as a witness, he should be informed of any allegations made against him and of the substance of evidence supporting the allegations;
- he should be given an adequate opportunity to prepare his case and of being assisted by legal advisers, and his legal expenses should normally be met out of public funds;
- he should have the opportunity of being examined by his own solicitor or counsel and of stating his case in public at the inquiry;
- any material witnesses he wishes called should be heard if reasonably practicable;
- he should have the opportunity for cross-examination of witnesses giving evidence which might affect him.<sup>11</sup>

This Committee commends those principles for the guidance of the Public Integrity Commission.

**12.46** An investigation by the Commission would be conducted as follows. Where an allegation was referred to the Commission for investigation, the Chairman would nominate members of the Commission to undertake the inquiry. The Commission would define the issues to be inquired into and reported upon, and might at any subsequent time prior to completing the hearings amend or extend the issues as previously defined. It would appoint counsel to assist it at the hearings. After allowing sufficient time for the person or persons against whom the allegations had been made to prepare his or their case, public hearings would be conducted in such place or places as the Commission considered appropriate to the case. Counsel assisting the Commission would be able to request the assistance of the Commissioner of the Australian Federal Police in securing evidence to be placed before the Commission. The proceedings before the Commission would generally resemble those before a Royal Commission. The Commission would make its report to the appropriate person or body from whom it received the reference.

**12.47** The Commission's report would state:

- the allegations that had been made;
- the nature of the misconduct either alleged or implied; and
- its findings as to what facts had been established to its satisfaction.

There should be a statutory requirement that a report concerning a Member or Minister should be tabled in the Parliament by the Minister responsible for the Public Integrity Commission within, say, five parliamentary sitting days of its receipt.

**12.48** The existing disciplinary machinery for public servants would need to be taken into consideration when providing for the operation of the Public Integrity Commission as affecting public servants. The *Public Service Act* 1922 currently establishes machinery for disciplinary proceedings against public servants, initiated by the Minister in respect of First Division officers and by the departmental Chief Officer in respect of other officers. **The Committee recommends that provision be made in the Act to the effect that, where the Public Integrity Commission has received a request to investigate allegations concerning an officer, any action in progress or to be taken under that Act be delayed, pending completion of the Commission's investigation and presentation of its finding.**

### *Conclusion*

**12.49** The Committee believes that the proposals just outlined would provide reassurance that allegations of major conflict between public duty and private interest are fully investigated by an agency of high standing independent of those persons and bodies already responsible for the discipline of officeholders. Confidence in the arrangements would be enhanced by the fact that the investigational hearings would ordinarily be in public. In the case of elected officeholders, for whom there is no formal disciplinary machinery, in the event of an adverse finding arising from an investigation, findings by the Commission would be tabled in the Parliament with a minimum of delay.

### **Action following conclusion of an investigation**

**12.50** As previously noted, the Committee does not see the proposed Public Integrity Commission as a disciplinary body. Its responsibilities would cease with the presentation of the findings of its investigation and it would be for the bodies concerned with discipline to take whatever action is deemed necessary following presentation of the Commission's findings.

**12.51** For Members of Parliament and Ministers, following the passing of the Commission's report to the appropriate Presiding Officer and its tabling in the Parliament, it would be a matter for the House concerned to decide the next steps. In a case where a Minister was involved, no doubt the Government itself would take a position, if it had not already done so.

**12.52** With public servants, the action to be taken would be through the normal disciplinary procedures. In the case of a First Division officer this may require a recommendation to the Governor-General.

**12.53** In respect of a statutory officeholder, the responsible Minister would determine the action. In the event of an adverse finding, he could reprimand the officeholder, or, more likely, since the finding would relate to a major conflict of interest, he would exercise his own statutory powers of removal from office or recommend removal by the Governor-General.

## Possible extensions to the scope of Public Integrity Commission investigations

**12.54** The Committee has argued above that the existing channels for citizens to lay complaints against officeholders concerning conflicts of interest are sufficiently wide to permit allegations to be brought to public notice, thereby alerting the bodies responsible for the discipline of officeholders of a need to take action. The Committee has also proposed that the work of the Public Integrity Commission which it has recommended should be established should be restricted to the investigation of cases of major importance. It may, however, be questioned whether the avenues for complaint are sufficient and whether the Public Integrity Commission should not have a role wider than the investigation of the few major cases that are referred to it. It may be suggested that it should be a recipient for complaints from the public with a responsibility for investigating allegations where other investigatory machinery is lacking.

**12.55** To widen the Commission's role in this manner would require a departure' at least from the point of initiating investigations, from the principle that responsibility for standards of conduct of officeholders should be vested in those responsible for its management. Furthermore, it would require the establishment of an organisation with a much larger structure and administrative back-up than the Committee has in mind. Procedures would be necessary to sift out the cases of sufficient importance to warrant investigation and to ensure that there was no overlap in the Commission's work and that of the disciplinary bodies now in existence. The Committee has no evidence that a widening of the scope of the work of the proposed Commission in this way is presently necessary.

**12.56** In Chapter 6, the Committee recommended against the introduction of registers of officeholders' interests. The point was made, however, that should the Government consider that, contrary to the Committee's recommendation, registration of officeholders' interests should be introduced, the registration arrangements should be along the lines set out in Appendix 6.

**12.57** Should registration of interests be introduced, under the arrangements outlined in Appendix 6, the register of Members' interests would appropriately be supervised by the proposed Ethics Committee of each House of the Parliament, with power to question any apparent deficiencies in the information provided by Members. It is possible that detailed examination of the information may be called for and the facilities of the Public Integrity Commission could be utilised to undertake investigations. The form and nature of the reference would be a matter for each House to decide.

**12.58** In similar fashion, the Public Integrity Commission facilities could be used for the investigation of alleged serious defects in the registrations by statutory officeholders and public servants. Again, the form and nature of the inquiries would be matters for direction by the Minister responsible, in the case of statutory officeholders, and the Chairman of the Public Service Board, in the case of public servants.

1. Australia, *Report of the Commonwealth Administrative Review Committee* (J. R. Kerr, Chairman), AGPS, Canberra, 1971, p. 9.
2. *ibid.*, p. 20.
3. In Britain, the House of Commons, by resolution, on 22 May 1974 agreed to the appointment of a Select Committee on Members' Interests (Declaration). In the United States of America, the Senate resolved to authorise the establishment of an Ethics Committee on 24 July 1964 and members were appointed to it on 9 July 1965: the House of Representatives resolved to establish a Committee on Standards of Official Conduct on 3 April 1968. In

Canada, proposed Standing Orders of the House of Commons and Rules of the Senate regarding conflicts of interest of Senators and Members of the House of Commons were tabled on 30 October 1978: these provided for the establishment of Standing Committees on the Independence of Parliament to deal with conflict of interest questions.

4. James C. Kirby Jr, *Congress and the Public Trust: Report of the Association of the Bar of the City of New York Special Committee on Congressional Ethics*, Atheneum, New York, 1970, pp. 224–5.
5. Great Britain, House of Commons, *Report from the Select Committee on Members' Interests (Declaration)* (G. R. Strauss, Chairman), 1969–70 H.C. 57, HMSO, London, 1969; Great Britain, House of Commons, *Report from the Select Committee on Members' Interests (Declaration)* (F. Willey, Chairman), 1974–75 H.C. 102, HMSO, London, 1974.
6. *ibid.*, p. xi.
7. Great Britain, Royal Commission on Tribunals of Inquiry (Lord Salmon, Chairman), *Report*, Cmnd. 3121, HMSO, London, 1966, p. 16.
8. E. C. S. Wade & G. Godfrey Phillips, *Constitutional and Administrative Law*, 9th edn, Longman, London, 1977, p. 650.
9. See, generally, United States, Senate, Committee on Government Operations, *Hearings on Watergate Reorganisation and Reform Act of 1975: December 3, 4, and 8, 1975 and March 11, 1976*, Part 2, Washington, 1976, pp. 335–78.
10. Great Britain, Royal Commission on Tribunals of Inquiry, *Report*, p. 17.
11. *ibid.*, pp. 17–18.

## 13. Post-separation employment

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**13.1** In paras 1.7 and 1.11 it was noted that the Prime Minister had expressed a wish publicly that the Committee should consider the desirability of introducing a procedure, similar to that operating in Britain, relating to the acceptance of employment by government employees resigning or retiring from the Public Service, and, in particular, the acceptance by government officers of employment with firms which have contractual relations with the Government.

**13.2** Post-separation employment (or the employment after resignation, retirement or expiry of office) of public servants and others holding positions of public trust is recognised in a number of countries as an important area in which conflict between public duty and private interest may arise. In Britain, Japan, Canada and the United States, attempts have been made to reduce the likelihood of such conflicts occurring. Similar issues of principle would seem to arise, not only in relation to public servants (upon which most attempts at regulation have focused), but also in relation to members of the Defence Force, Ministers and their staffs and statutory officeholders and the staff of statutory bodies. Any attempt to regulate certain of these categories may, however, in the Committee's opinion, be neither administratively practicable or desirable.

**13.3** This chapter deals broadly with the issues which are created by movements between the public sector and the private sector by any category of officeholder.

### *Mobility between the public and private sectors*

**13.4** The Committee believes that mobility between the public and private sectors is in general unobjectionable and even desirable. It goes part of the way to overcoming any shortage of managerial and professional talent which a relatively young country like Australia can experience in certain areas of business and government. In addition, such movement fosters closer relations between business and government, which can have the effect of furthering economic efficiency and mutual understanding.

**13.5** Nevertheless, mobility between public and private sectors may raise conflict of interest problems in certain cases. In its submission to the Committee, the Public Service Board identified the ways in which conflict of interest might arise with the movement from the public sector into the private sector:

- information or knowledge gained officially (possibly including information concerning competitors) may be used to the advantage of the employer concerned, and to the disadvantage of competitors or the Government;
- future contacts with officials known during service may lead to preferential treatment;
- the hope of such an appointment may lead to preferential treatment during service.

The Committee agrees that such possibilities might occur, or at least might appear to occur. The movement towards earlier retirement might increase the significance of post-separation employment questions.

**13.6** However, on reviewing a considerable number of the cases which had been the subject of comment in the Parliament or the press since 1945, when Commonwealth public servants, members of the Defence Force, statutory officeholders or the staff of Commonwealth statutory authorities entered the private sector on retirement or resignation, the Committee found that relatively few conflict of interest problems have arisen in Australia in practice.<sup>1</sup> In most cases, nothing objectionable was apparent.

**13.7** The Committee also received evidence regarding the conflicts of interest which might arise in relation to the movement of persons from the private sector into the public sector. It was mentioned that officials of regulatory agencies, recruited from private enterprise falling within their ambit, might have continuing financial or other ties with such firms, and thus a vested interest in accommodating them. Or they might inherit industry biases or unquestioningly accept industry's point of view on key policy issues. Such possibilities cannot be ruled out, although they are considered to be remote. The Committee received no evidence alleging misconduct or misuse of office in specific cases.

**13.8** The Committee makes no recommendation on movements from the private to the public sector. However, it would hope that the possibility of conflicts of interest would be one of the factors taken into account by the relevant appointing authority in considering the wisdom of particular outside appointments.

**13.9** The Committee also examined the situation in the United States where the so-called 'revolving door'—the movement between public and private sectors—has given rise to considerable discussion. It concluded that the potential for conflict of interest involved in such movement was much less in Australia, because the staffing policy of the Public Service is based on the concept of a career service. In the United States it is relatively common for persons to spend only a short time in government service, and in some cases to move in and out of government service several times in a working life.

**13.10** The Committee recognises that staff interchange schemes could also give rise to conflict of interest problems, for example the possible misuse of information. In practice it does not consider these problems significant.<sup>2</sup> As the Royal Commission on Australian Government Administration pointed out, the Public Service Board and the outside employer should avoid arranging secondments which could lead to a conflict of interest, and neither party should expect a seconded person, or place him under pressure, to divulge any confidence.<sup>3</sup>

**13.11** Because mobility from the public to the private sector may occasionally raise conflict of interest problems, the Committee believes that there may be a need for a time lag before certain classes of officeholder take up certain forms of employment after leaving office. Any such restriction should be combined with a formal procedure whereby the time period may be reduced.

## The Committee's proposals

### *Scope of the proposed restrictions*

**13.12** While the Committee was required by the Prime Minister to look specifically at public servants, similar principles would appear to apply to Defence Force personnel, to most, if not all, full-time statutory officeholders and to the staffs of those statutory authorities not staffed under the *Public Service Act 1922*.



**13.13** Within the Department of Defence, civilian and Defence Force personnel work side by side, in particular in the sensitive area of procurement from defence-related industries.

**13.14** Apart from the *Secret Commissions Act* 1905, which has some application in relation to job offers made as an inducement or reward to persons acting as agents of the Commonwealth in relation to contracts, there appears to be no legislative provision which regulates the acceptance of business appointments on separation by members of the Australian Public Service.<sup>4</sup> At present, the only restriction on movement from the public sector to the private sector is contained in Regulations applying to the Royal Australian Air Force, which specify that officers of and above the rank of Air Vice-Marshal, and officers holding posts of 'a special or technical character', are required to obtain approval before accepting business appointments within two years of retirement or resignation.<sup>5</sup>

**13.15** With statutory authorities not staffed under the Public Service Act, it is recognised that often employees do not identify with their organisation as lifetime employees. The small size of some of these statutory authorities necessarily limits promotion prospects, especially if staff are recruited directly by the authorities and so do not have rights of access to Public Service Act employment. Some of these problems are slowly disappearing, however, with current moves towards common employment conditions for all Commonwealth employees and greater recognition of prior public sector service.

**13.16** The Committee accepts that it would be unreasonable and unrealistic to attempt to control the subsequent employment of part-time statutory officeholders. However, **it recommends that part-time statutory officeholders should be enjoined to exercise discretion in taking up subsequent employment which might reflect on the previous conduct of their public duties, imply the possibility of their seeking to apply influence on their former authorities or give an appearance of their being in a position to afford improper advantage to their new employers by reason of their previous service as statutory officeholders.**

**13.17** The position of those short-term statutory officeholders who are recruited from the private sector for their expertise, say, in industry, commerce or business activities, and who would expect, on the expiry of their term of office, to return to such activities, presents particular problems. There seems a real possibility of conflict, yet to subject such persons to restrictions might well deter them from accepting office. For this reason, the Committee provides in the recommendations below a power for the Prime Minister to exempt certain statutory offices from the proposed rules. It should be noted, however, that the possibility of conflicts created by such appointments is covered by other recommendations; for example, Chapter 10 suggests that the possibility of conflict should be taken into account in making statutory appointments and Chapter 14 makes recommendations about misuse of official information.

**13.18** The recommendations below are expressed in terms of public servants 'or equivalents'; they are to be read as applying equally to members of the Defence Force, full-time statutory officeholders (except where exempted), and the staff of statutory authorities. The position of elected officeholders is different in certain respects, most notably the risk of sudden and enforced removal from office, and the difficulty of identifying a suitable authority to approve or disapprove subsequent employment arrangements. The subsequent employment of Ministers and their staffs is therefore dealt with separately, at the conclusion of this chapter.

*Form of proposed restrictions*

**13.19** In general terms, the recommendations which follow are an adaptation to Australian conditions of rules and procedures which operate in Britain, and are applied to Crown servants.<sup>6</sup> **The Committee recommends that:**

- (a) **Rules be adopted which would require senior public servants, or equivalents, and others in sensitive areas of public employment, to obtain official assent if they wish to take up employment within two years of resignation or retirement from public employment in the following businesses or other bodies:**
- those in, or anticipating, contractual relationships with the Government;
  - those in which the Government is a shareholder;
  - those in receipt of government loans, guarantees or other forms of capital assistance;
  - those with which the officer's department is otherwise in a special relationship; and
  - those associations whose primary purpose is to lobby Ministers, Members of Parliament, and government departments and authorities.
- (b) **The rules should apply to all officers in the First and Second Divisions of the Australian Public Service, and their equivalents, except such statutory office-holders as are specifically exempted by the Prime Minister; officers, or classes of officers, at lower levels should be included where they are or recently have been in a special relationship with prospective employers by virtue of their duties. Categories likely to be included would be:**
- those involved in purchasing functions;
  - those involved in the preliminary stages of procurement—identification and definition of a requirement—especially when the capability of suppliers is closely connected with specifications;
  - those concerned with anticipated contractual relationships;
  - those having a significant discretion in conferring some advantage, for example a licence or concession, including a bounty, subsidy or tariff;
  - those with knowledge of confidential procedures and criteria used within departments, which could allow anticipation or manipulation of government decisions;
  - those with advance knowledge of government intentions which could confer direct pecuniary advantage on those able to anticipate.
- (c) **Departments should assume the responsibility for identifying the positions which should be included and should keep the resulting list under regular review to allow the addition and deletion of designated positions or persons.** In the case of Defence Force personnel, this would be the responsibility of the Chief of Defence Force Staff and the Secretary of the Department of Defence. In the case of statutory authorities, this would be the responsibility of the relevant authority in consultation with the Public Service Board.

Junior officers should not be subject to regulation simply because of personal acquaintance or friendship with, or obligations to, prospective employers or because they have knowledge of the subject matter of the business of the department or other body or because of skills acquired while in public service. The Committee expects that the numbers of positions designated as 'sensitive' by departments will be relatively small.

**13.20** The Committee also *recommends* that procedures be laid down which would require an applicant to obtain the assent of a committee, which would make a recommendation to the applicant's Minister or the Prime Minister as specified below:

- (a) In the case of a First Division officer or equivalent seeking permission to undertake post-separation employment in commerce or industry of a kind falling within the rules, the ultimate decision should lie with the Prime Minister, advised by a committee of Permanent Heads chaired by the Chairman of the Public Service Board.
- (b) In the case of officers in the Second Division of the Public Service and their equivalents and other designated officers, the committee would be chaired by a member of the Public Service Board and would ordinarily consist of senior public servants. The ultimate decision would lie with the Minister in charge of the losing department. Ministers might, however, delegate, for example to Permanent Heads or to the Public Service Board, decisions on defined categories of cases.
- (c) Variations might need to be made to the composition of the committees depending on the case being dealt with, for example whether it related to a public servant, a member of the Defence Force or a statutory officeholder. The committees should therefore have power to co-opt, both from within the Commonwealth sector and outside, for example an independent business or professional person.

**13.21** The Committee *recommends* that the Public Service Board should monitor the implementation and effectiveness of these rules and procedures in relation to the public service and statutory authorities; the Defence Department should do so in relation to Defence Force personnel.

**13.22** Centralising responsibility, rather than having it at the departmental level, is recommended because of the advantage of uniformity of practice across government employment, and because of the need for the matter to be considered at a very senior level. The disadvantage of centralisation is unfamiliarity with the work and contacts of a department. This can be met by adequate documentation or by temporary co-option to the machinery established.

**13.23** The Committee *recommends* that, having regard to the views of the proposed committees on post-separation employment, the responsible Minister or the Prime Minister, in the case of a Permanent Head, be empowered to determine that:

- the two-year bar on taking up employment of a specified nature, or with a named employer, apply;
- the period of the bar be reduced, whether subject or not to conditions; and
- the bar be waived completely, subject or not to conditions.

The period of two years has been selected as the maximum period frequently adopted in other countries. From the evidence given to the Committee it is apparently acceptable in Australia. There should be a discretion to reduce it where appropriate, but the Committee believes that the full two-year period should be adopted when there has been so close a connection between the former public servant's duties and the prospective employer that the appearance of impropriety would be strong. The bar would only relate to a specific type of employment or to employment with a particular employer and so would not amount to a compulsory period of unemployment.

**13.24** Examples of the type of conditions which might be imposed as an alternative to a two-year bar are suggested by the British rules:

- (a) a bar on involvement in dealings between the prospective employer and the Government, either absolute or with reference to a stated issue or issues, lasting for up to two years, the duration to be determined according to the circumstances of the case;
- (b) a bar on involvement in dealings between the prospective employer and a named competitor (or competitors), subject to the same conditions of scope and duration as those at (a) above;
- (c) a requirement to seek the approval of the prospective employer's competitors for the proposed appointment should this not already have been done.

Similar conditions were suggested by the Public Service Board in its submission. The Committee, without seeking in any way to limit the discretion of the proposed committee(s) on post-separation employment, rejects conditions (b) and (c) above. It believes that any problems which could arise where a public servant who had had access, as part of his official duties, to trade secrets of one firm and then goes to work for its competitor are best met by relying on the Committee's recommendations in the next chapter on misuse of official information, rather than on the imposition of what could be unfair and unrealistic conditions.

**13.25** Other conditions which might be imposed are derived from the United States rules and are not subject to the same problems:

- (d) a bar on acting as a paid lobbyist in dealings with Ministers, Members of Parliament or government departments or authorities, lasting for up to two years;
- (e) a bar on representing parties in any hearing before or application to a government tribunal, lasting for up to two years.

**13.26** The Committee *recommends* that, in exercising his discretion, the Prime Minister or the Minister concerned should consider such factors as the following:

- the importance and sensitivity of the position most recently held and, if appropriate, other positions;
- the nature of the business appointment and its relationship to the official's former position(s) and area(s) of work;
- the relationship of the firm concerned with the Government, for example if it is a regular supplier of services or equipment; and
- the period during which information gained or contacts made within the public service would continue to be of value to the official and his new employer.

**13.27** Specific considerations will arise in particular cases. Take the case of public servants who, on retirement, seek immediately to enter the private sector. On the one hand, the Prime Minister or the Minister will weigh the fact that to apply the two-year rule may rule out any real possibility of post-separation employment. A potential employer might regard a person as 'stale' two years after retirement. On the other hand, only a few avenues of post-separation employment may be closed, and there is the additional fact that such officers will generally retire on substantial superannuation benefits.

## *Job offers*

**13.28** On consideration, the Committee *recommends that there should not be a requirement to report all job offers*. However, it would be advisable for the Public Service Board to insert a caution in its *Guidelines on Official Conduct for Commonwealth Public Servants*. The *Draft Guidelines* contained the tentative formulation:

Staff contemplating employment with a business organisation after separation from the service should, at an early stage, seek guidance from the Permanent Head or the Public Service Board, if there is any possibility that questions of propriety could arise.<sup>7</sup>

That formulation may allow too high a degree of subjectivity in taking the decision whether to report and when. **The Committee recommends that, if the officer does not reject the suggestion of employment, and it would lie within a 'sensitive' area, reporting should be immediate.** Even without a formal provision, public servants will recognise that it is prudent to report job offers to their supervisors or other senior officers designated for the purpose to ensure that they do not provide grounds for allegations of impropriety. Similarly, businesses will appreciate that job offers to those in public employment can cause unjustified suspicion if not done in an open manner. The *Secret Commissions Act* 1905 may also apply to officers and to businesses negotiating with the Government in certain circumstances, and the Committee suggests that the Public Service Board draw attention to the relevant provisions in its *Guidelines on Official Conduct*.

**13.29** Once there is a firm intention to move to the private sector, questions of propriety clearly may arise if this intention is not disclosed. **The Committee recommends that the rules on post-separation employment should require public servants, or others covered by the rules, intending to move from the public to the private sector, where the public servant is in one of the designated categories and intends to be employed in one of the designated areas of private enterprise, to report this fact.**

## **Enforcement**

**13.30** The Committee considered the question of sanctions upon staff or former staff to enforce the rules recommended. It concluded that the civil law did not provide a firm basis for this purpose. Restraint of trade clauses, for example, if introduced as a condition of employment in the public sector, would have the advantages that they are known and accepted in the private sector, that they could be tailored to the needs of particular departments or bodies, and that action in respect of breaches of the rules need be invoked only in important cases. However, it is uncertain, as a matter of law, whether restraint of trade clauses are applicable in the public sector and, even if they were, there might be unacceptable delays and costs. The Committee would draw attention, however, to the civil law duty of confidence, which is breached if former public officials disclose to private sector employers confidential information or information which was imparted to be used exclusively for the benefit of the public service or which would assist outsiders.<sup>8</sup> Public servants who move from the public to the private sector should bear the duty of confidence in mind, as well as the criminal provisions against misuse of information which, the Committee recommends, should be added to the *Crimes Act* 1914 (see paras 14.6–28) and, where relevant, the provisions of the *Secret Commissions Act*.

**13.31** The Committee also examined the question whether sanctions should be imposed on business concerns which employ or seek to employ former public servants. It notes that, under the *Secret Commissions Act* 1905, heavy penalties may be imposed in certain circumstances upon companies which make job offers to public servants whose duties involve arranging contracts on behalf of the Commonwealth. The

Committee notes the recommendation of the British House of Commons Expenditure Committee that there be legal sanctions to penalise companies which appoint ex-civil servants from specified jobs without first obtaining the concurrence of the Government, if necessary by legislation.<sup>9</sup> It also notes the possibility that the Government could acquire power to rescind a contract, or not to award future contracts, where a company has appointed an ex-public employee in breach of the restrictions. (As a matter of principle, it would seem that the Crown or a statutory body could set aside any contract tainted with a bribe.) The Committee recalls Recommendation 24 of the Report of the Committee of Inquiry into Government Procurement Policy (the Scott Committee): that any Purchasing Commission should examine the need to restrict, by policy regulation, dealings with companies or firms employing ex-government officers whose involvement could endanger fair practice.<sup>10</sup>

**13.32** Such action, in the Committee's view, might appear to be arbitrary and excessive or unjust for a minor or technical wrongdoing. The Committee received evidence which suggests that these disadvantages could be avoided if government departments incorporated such considerations informally into their decisions on contracts. As a practical matter, it notes that reliance on a contractual relationship would not extend to where the employer sought some concession or exercise of discretion from government, although an equivalent provision could be built into the procedures covering such activities.

**13.33** The Committee, therefore, *recommends* that no additional legislation or penal sanctions be introduced in the post-separation employment area at this stage.

**13.34** It is prepared to rely on the integrity of public officials, both to obtain approval and to comply with any decision made as to their post-separation employment. Publicity about breaches of the provisions may also be a useful deterrent to ex-officials who seek to defy the procedures. The matter is one to be kept under review in the light of experience as to how the restrictions and the machinery actually operate. If the system proves unsatisfactory, legal sanctions may need to be considered.

**13.35** The Committee *recommends* that, if sanctions are to be imposed to enforce decisions in the post-separation employment area, they should be ordinary penal sanctions. They should not include, for example, a loss or reduction of an ex-official's superannuation pension entitlements. Such a sanction could not be applied to someone who took his superannuation as a lump sum without proceedings to recover moneys already paid over, and, in any event, the underlying intent of the superannuation scheme is that the payments are a right of the contributors. In addition, the Committee *recommends* that any such sanctions should operate against the ex-staff member, not against the new employer. Otherwise, prospective private employers might doubt the desirability of employing ex-public employees, whether in contravention of the rules or not, thus inhibiting beneficial movements from the public to the private sector. The Committee also *recommends* that prosecutions should take place only with the consent of the relevant Minister or the Attorney-General.

**13.36** The Committee prefers the approach outlined, which is based on administrative measures, to that followed in the United States (see Appendix 3), where federal legislation provides that, after his employment has ceased, a former official of the executive, or of an independent agency, must not knowingly act as agent or attorney for anyone in connection with a matter involving specific parties in which the Government has an interest and in which he participated personally and substantially when an official.<sup>11</sup> Furthermore, for two years after his employment has

ceased, a former official must not appear personally as agent or attorney before any court, department or agency in connection with matters in which the Government has an interest and which was under his official responsibility for a year prior to termination of his job as an official. These provisions involve the blunt instrument of the criminal law, whose enforcement authorities might be reluctant to prosecute what are comparatively ill-defined offences.

**13.37** The Committee emphasises that its recommendations should not be seen as intended to inhibit movement from the public to the private sector. As the Salmon Commission remarked of similar provisions in Britain, they are designed 'to regulate, and not to prevent, the movement of people with experience of public administration in the Crown Service into business and industry'.<sup>12</sup> The number of cases where a particular movement will be blocked could be expected to be very small in terms of the total number of public officials who retire or resign every year. Even in such cases, it may be unnecessary to apply the two-year bar while still attaining the aim, as the Salmon Commission put it, of 'reassur(ing) the public and the business community about the impartiality of state servants'.

## Ministers and their staffs

**13.38** The Committee also considered whether recommendations should be made concerning the subsequent employment of Ministers and ministerial staff other than public servants. It concluded that this would not be practicable, nor perhaps desirable, in the absence of security of tenure for such offices. However, it presumes that former Ministers and ministerial staff would give careful consideration before taking up any subsequent employment which might reflect on the previous conduct of their public duties or imply the possibility of their seeking to apply influence on their former departments or give an appearance of their being in a position to afford improper advantage to their new employers by reason of their previous position. **The Committee recommends that the standards expected of them in relation to post-separation employment should be brought to the attention of Ministers and ministerial staff when they take office, and again upon their departure from office.**

1. Australia, Public Service Board, *Acceptance of Business Appointments by Public Servants on Retirement or Resignation*, Public Service Board, Canberra, 1975.
2. Australia, Advisory Council for Inter-government Relations, *Information Paper No. 1: Staff Interchange Schemes of the Commonwealth and State Governments, as at February 1978*, AGPS, Canberra, 1978.
3. Royal Commission on Australian Government Administration (Dr H. C. Coombs, Chairman), *Report*, AGPS, Canberra, 1976, pp. 145-6, especially Recommendation 94 (f) at para. 6.3.29.
4. See Appendix 4, para. 54.
5. Air Force Regulations 12/A/37B, 12/A/37C.
6. The Rules are set out in Great Britain, Royal Commission on Standards of Conduct in Public Life 1974-1976 (Lord Salmon, Chairman), *Report*, Cmnd. 6524, HMSO, London, 1976, pp. 192-7.
7. Australia, Public Service Board, *Discussion Paper: Draft Guidelines on Official Conduct of Commonwealth Public Servants*, Public Service Board, Canberra, 1978, p. 21, para. 3.21.
8. See P. D. Finn, *Fiduciary Obligations*, Law Book Company, Sydney, 1977, pp. 139-41, 149-51; Great Britain, Home Office, Lord Chancellor's Office, Scottish Office, *Report of the Committee on Privacy* (K. Younger, Chairman), Cmnd. 5012, HMSO, London, 1972, pp. 193-4, 295-9.
9. Great Britain, House of Commons, Expenditure Committee, *The Civil Service: eleventh report from the Expenditure Committee, vol. 1: Report 1976-77* H.C. 535-1, HMSO, London, 1977, para. 42.
10. Australia, Committee of Inquiry into Government Procurement Policy, (Sir W. Scott, Chairman), *Report, May 1974*, AGPS, Canberra, 1975, pp. 98-100.
11. 18 United States Code 207. Amended by the Ethics in Government Act of 1978, Title V.
12. Salmon, *Report*, p. 61.





## 14. Criminal law

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**14.1** The principal concern of the Committee has been with the 'grey' area of conflict of interest, that is behaviour which the community has not previously treated as 'illegal' to the point of warranting the sanctions of the criminal law, and may still not wish to treat in this fashion. Although there now appears to be considerable agreement that certain behaviour in the 'grey' area is undesirable, and should be discouraged or prevented, there is still disagreement about the extent to which the criminal law should be brought into play to achieve such ends. In the main, the Committee has avoided the 'black' area constituted by provisions of criminal law relating to bribery and corruption among public officeholders. It believes that this area does not lie directly within its terms of reference, and if the existing law is deficient, the Committee has received very little evidence to that effect.

**14.2** However, there have been certain matters, peripheral to the 'grey' area, which have frequently been raised in submissions and have been considered by similar inquiries in this country and elsewhere. They bear so substantially—albeit sometimes indirectly—on the questions with which the Committee has dealt that they have to be included in its discussion and, when appropriate, in its recommendations. There are two subjects in particular which require consideration:

- the provisions of the *Crimes Act* 1914 concerning bribery of Commonwealth officers, that is Ministers, public servants and statutory officeholders; and
- the misuse of official information.

### Bribery

**14.3** Early in its deliberations the Committee decided that bribery had only a limited place within its terms of reference. There are some significant differences between bribery on the one hand and conflict of interest on the other. For example, a conflict of interest situation may exist when it *appears* that a public official can favour private interests, although there is no suggestion that he has done so.

**14.4** The Committee did not seek opinions as to the prevalence of bribery or other corrupt offences in government, or on whether the machinery for establishing and punishing such offences was adequate for the purpose. However, it noted that prosecutions for such offences in the Public Service were extremely infrequent. It also noted the opinion expressed frequently by those with long experience of public life, that Australia had been extremely fortunate in this regard. Nevertheless, as part of its wide remit, the Committee has examined the existing law relating to bribery, and believes that it may be deficient in several respects.

**14.5** The *Crimes Act* 1914 creates two offences relating to the bribery or attempted bribery of a Commonwealth officer. Section 73 (1) provides that any Commonwealth officer who obtains or attempts to obtain a bribe is guilty of an offence. Section 73 (2) provides that anyone who bribes or attempts to bribe a Commonwealth officer is guilty of an offence. In each case, the maximum penalty is two years imprisonment. The definition of a bribe is drawn widely.

**14.6** The Committee received evidence that s. 73 may not cover the situation where a Commonwealth officer obtains, or attempts to obtain, a bribe not for himself but for a third party, such as a member of his family. It seems advisable that the matter be placed beyond doubt by the insertion of appropriate wording in the section, perhaps along the lines of the *Secret Commissions Act 1905*, s. 4 (1). **The Committee accordingly recommends that s. 73 of the Crimes Act 1914 be amended to cover the situation where a Commonwealth officer obtains or attempts to obtain a bribe for a third party. The Committee also recommends that the culpability of intermediaries who arrange, or attempt to arrange, bribes be clearly expressed in the Crimes Act.**

**14.7** The Commonwealth officer who solicits a bribe is caught by the existing section but perhaps not the officer who is offered a bribe and agrees or offers to accept it. **The Committee recommends that there be included within s. 73 of the Crimes Act a provision dealing with agreements to accept bribes similar to that in the *Secret Commissions Act 1905*, s. 4 (1).**

#### *Members of Parliament*

**14.8** An obvious omission from s. 73 of the Crimes Act is of Members of the Commonwealth Parliament. The section applies to 'Commonwealth officers', who are defined to include persons who perform services for or on behalf of the Commonwealth, a Territory or a public authority under the Commonwealth. Clearly Members who are not Ministers cannot be regarded as Commonwealth officers for they stand in an independent position vis-a-vis the Commonwealth. On similar reasoning, Parliamentarians do not serve under the Crown, as required by the *Secret Commissions Act*. However, Ministers would appear to be caught, as was agreed by the then Attorney-General when the Crimes Act was introduced in 1914.<sup>1</sup>

**14.9** Although Members of Parliament apparently escape the provisions of the Crimes Act, *R v. White*<sup>2</sup>, an old New South Wales case, established that Members are public officers for the purposes of the common law offences of misbehaviour or breach of trust in public office. That was, and is not, the position in Britain, but the decision received the imprimatur of certain High Court judges in *R v. Boston*.<sup>3</sup> There the charge against the Member of Parliament was conspiracy, so that the issue did not arise directly. Both cases concerned Members of a State Parliament, but there is no reason to believe that the precedents would not be held applicable to Members of the Commonwealth Parliament as well. Moreover, as one witness put it, 'in so far as it regulates the activities of public officials the common law suffers both from obscurity, and from uncertainty'.

**14.10** Bribery involving Members of the British House of Commons is a matter of privilege which the House deals with itself. Apart from reprimand, the House can suspend or expel Members of Parliament and can also commit both them and an ordinary individual to prison, although this has not been done in the last century. The courts have no jurisdiction since neither statute nor common law applies to the bribery or attempted bribery of Members of Parliament in respect of their parliamentary duties.<sup>4</sup>

**14.11** In *R v. Boston*<sup>5</sup> the High Court held that a Member of Parliament could be charged with conspiracy by proof of an agreement that he would use his influence by putting pressure on a Minister. The Court assumed that the decision was consistent with English common law and, except for Higgins J, failed to advert to the problem of parliamentary privilege, but there is a question whether the decision is applicable

o the national Parliament since the Constitution provides that, until otherwise declared, the Commonwealth Parliament should have the privileges of the House of Commons.

**14.12** In the light of what has been said about the uncertain nature of the law, in order to clarify the position, **the Committee recommends that s. 73 of the Crimes Act be amended to cover Members of Parliament.** In making this recommendation, the Committee wishes to emphasise that it is motivated solely by the uncertain state of the present law and not because it has received any evidence on bribery in the Federal Parliament. To the contrary, witnesses before this Committee and, three years earlier, before the Joint Committee on Pecuniary Interests of Members of Parliament specifically exempted the Federal Parliament from any strictures about bribery in Australian public life.

**14.13** For Parliament to introduce bribery legislation for Members and Senators is entirely consistent with its privileges. In doing so, Parliament is simply recognising that it is better to delegate such matters to the courts, as it has done with disputed returns.

**14.14** Moreover, there are bribery provisions for Members of Parliament in the Queensland, Tasmanian and Western Australian Criminal Codes.<sup>6</sup> The Committee notes that the Tasmanian provision is more far reaching than that in Queensland or Western Australia, for it covers activity both inside and outside the Parliament. Clearly it is desirable that the law should apply to matters such as representations by Members to Ministers and public servants, and not simply to voting or speaking in the House. **The Committee recommends that the relevant provision of the Tasmanian Criminal Code be used as a guide for the extension of bribery legislation to Members of Parliament so as to cover activity outside the Parliament.**

**14.15** The Committee considers that the value of a strong bribery law is in its potential as a deterrent. Nevertheless, adequate enforcement machinery is a necessary prerequisite to the effective operation of the law. In this respect the Committee wishes to endorse remarks made by the Salmon Commission on the need for practical measures which make it more likely that well-founded suspicions will result in prompt remedial action.<sup>7</sup>

## Misuse of official information

**14.16** The Committee accepts that the misuse of official information for pecuniary gain by persons in public life is at least as serious a potential problem as, for example, the possibility of official actions being influenced by private holdings of pecuniary interests. In Chapter 4, the Committee proposes a provision to cover misuse of official information in the Code of Conduct it recommends for those in public life. The possibility of misuse of official information is also a factor in the Committee's approach to post-separation employment set out in Chapter 13. In the present section, the Committee is concerned with legislative and disciplinary provisions which control the misuse of official information for private gain.

**14.17** At the outset, the Committee should explain briefly what it means by the misuse of official information for private gain. Essentially, the Committee is concerned with the situation when an officeholder uses official information for the purpose of obtaining private gain for himself or any other person, or communicates the information to another person so that person or any other person is enabled to

obtain private gain.<sup>8</sup> The Committee appreciates that the misuse of official information for private gain forms but part of the whole subject of the protection and release of official information. The Parliament is giving attention to that larger problem in legislation such as the Freedom of Information Bill 1978. However, the Committee considers that the misuse of information which it is concerned with is sufficiently connected with conflict of interest to fall within its terms of reference.

**14.18** A few examples illustrate the focus of the Committee with respect to the misuse of official government information for private gain:

- buying or selling real property on the basis of official information about proposed government actions;
- speculation on the stock market on the basis of official information about the affairs of a business;
- sale of official information to commercial interests.

These examples need simply to be described to reveal the gross misbehaviour involved and that it is, in effect, a form of corruption. In each case, it is clear that the officeholder can misuse the information himself, for his own benefit or for that of another person, or he can disclose it to someone else—to his spouse, to a member of his family, or to a friend—who misuses it for his own benefit or for that of another person.

**14.19** The Committee has examined the existing law relating to the misuse of government information and is of the view that it contains certain deficiencies. Section 70 of the *Crimes Act* 1914, for example, purports to prevent the disclosure of information by Commonwealth officers and former Commonwealth officers. The section uses the terminology ‘publishes or communicates . . . any fact or document’, and the Committee accepts that this does not cover all forms of disclosure. More seriously, the section does not extend to situations where an officer, or a former officer, misuses government information himself or for his own advantage without disclosing it.

**14.20** The Committee is aware that such behaviour may be caught by the official secrets section of the *Crimes Act* 1914 (s. 79). It is also aware that there are many specific Commonwealth Acts imposing prohibitions against disclosure which may be relevant. These provisions display a considerable diversity, however, and **the Committee recommends that the *Crimes Act* 1914 be amended to include a simple proscription on the misuse of government information with a penalty equivalent to that attaching to s. 70 (two years imprisonment).**

**14.21** The Committee is strengthened in its view by the existence of s. 124 of the uniform Companies Act, which says simply that an officer of a corporation shall not make use of information acquired by virtue of his position to gain directly or indirectly an advantage for himself or any other person. The penalty for infringement of that section is a fine of \$2000, but the Committee does not consider imposition of a fine sufficient penalty for the misuse of official information.<sup>9</sup>

**14.22** A consideration in this proposal by the Committee is whether an official must be shown to have *mens rea* or guilty knowledge before he can be convicted of the new offence. In Britain, the Franks Committee considered the difficulty for the Crown in proving *mens rea* under s. 2 of the Official Secrets Act 1911 (the official disclosure section). Although this difficulty favoured a strict liability offence, the Franks Committee thought that it would be wrong for an official to be convicted if he believed, with reasonable cause, that he was authorised to make the communication in question or if he did not realise that he had disclosed information to which the

legislation applied.<sup>10</sup> Consequently, it recommended that any criminal provision to replace s. 2 of the Official Secrets Act 1911 should be a strict liability offence but should include carefully defined defences along the lines mentioned.

**14.23** The Committee is attracted to the solution recommended by the Franks Committee. However, it *recommends that the proposed new offence should require mens rea*. The nature of and penalty attached to the offence envisaged are so serious that otherwise there would be too substantial a departure from the existing principles of criminal law.

**14.24** In passing, the Committee notes that an offence of the 'corrupt' misuse of official information, along the lines recommended by the Salmon Commission in Britain<sup>11</sup>, is not an appropriate way of introducing *mens rea* into the law. Definition of the intention necessary to constitute the crime would be more in keeping with Australian drafting practice than addition of an adjective to the name of the crime. In reply to criticism that *mens rea* as an element of the offence would inhibit prosecutions, the Committee would emphasise that an offence of this nature derives its value more from its character as a general deterrent than from its enforcement in particular cases.

**14.25** In keeping with its earlier views on bribery, the Committee *recommends that Members of Parliament should fall within the proposed prohibition on the misuse of official information. The Committee also recommends that the new offence should apply to those persons who misuse official information which comes into their hands, provided that they have the necessary mens rea, whether or not they are officeholders*. Not only persons, such as government contractors, who misuse official information which is lawfully entrusted to them should be culpable. In addition, these proposals would extend criminal sanctions to persons who misuse official information for private gain when that information has been disclosed to them by an officeholder, perhaps unintentionally.

**14.26** Misuse of official information is also covered in Regulation 34 (a) of the Public Service Regulations. The Committee *recommends that this Regulation be retained and similar provisions be adopted for the staff of statutory bodies where these do not already exist*. A provision such as Regulation 34 has the advantage that the authorities can take internal disciplinary action against trivial instances of the misuse of official information for private gain without invoking the heavy hand of the criminal law. Moreover, such internal discipline may be the only practicable step when difficulties of proof rule out criminal proceedings.

**14.27** However, the Committee cannot accept that the misuse of official information can always be adequately dealt with by such regulations. Internal sanctions cannot operate against former officers of the Public Service and statutory authorities, and serious cases are conceivable for which the criminal sanction of imprisonment would be entirely appropriate.

**14.28** Similarly, the Committee considers that it would be wrong to rely on the duty of confidence owed by employees under the civil law to prevent the misuse of official information. The parameters of the duty are still uncertain, and the existing case law demonstrates the barriers to establishing a case in all but the most clear-cut circumstances. In any event, the duty of confidence offers very little in the way of deterrence, which is the main aim of the Committee's proposed offence.

1. Australia, House of Representatives, *Debates* 1914, vol. 75, p. 269.
2. (1875) 13 SCR (NSW) (L) 322.
3. (1923) 33 CLR 386.

4. Great Britain, Royal Commission on Standards of Conduct in Public Life 1974–1976 (Lord Salmon, Chairman), *Report*, Cmnd. 6524, HMSO, London, 1976, p. 98; Great Britain, House of Commons, *Report from the Select Committee on Conduct of Members* (M. Stewart, Chairman), 1976–77, H.C. 490, London, 1977, p. x.
5. (1923) 33 CLR 386.
6. Queensland, *Criminal Code Act*, 1899–1978, ss. 59–60; Western Australia, *Criminal Code Act*, 1913–1977, ss. 60–1; Tasmania, *Criminal Code Act* 1924, ss. 71–2.
7. Salmon, *Report*, p. 12.
8. Great Britain, Home Office, Departmental Committee on Section 2 of the Official Secrets Act 1911 (Lord Franks, Chairman), *Report*, Cmnd. 5104, HMSO, London, 1972, pp. 74–6.
9. Great Britain, Prime Minister's Committee on Local Government Rules of Conduct (Lord Redcliffe-Maud, Chairman), *Report*, Cmnd. 5636, HMSO, London, 1974, pp. 21–2.
10. Franks, *Report*, p. 81.
11. Salmon, *Report*, p. 57.

# 15. Conclusions and recommendations

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**15.1** This Chapter brings together the conclusions the Committee has reached on the matters covered by its terms of reference and the recommendations which it sees as flowing from its investigations.

**15.2** Paragraph 5 of the terms of reference for the Inquiry, as announced by the Prime Minister on 15 February 1978, requires the Committee to regard as being covered by the expression 'persons holding positions of public trust in relation to the Commonwealth' in paragraph 1 of the terms of reference:

- (a) Ministers;
- (b) Senators and Members of the House of Representatives;
- (c) staff of (a) and (b);
- (d) members of the Australian Public Service; and
- (e) such other persons or classes of persons which in the opinion of the Committee ought to be included.

For the reasons given in Chapter 1 of the report, the Committee has accepted that members of the Defence Force, statutory officeholders and staffs of statutory authorities should be regarded as holding positions of public trust in relation to the Commonwealth and therefore be covered by item (e) of paragraph 5. In the preceding chapters of the report, it has adopted the designation 'officeholders' to describe these and the other classes of persons referred to in items (a) to (d) as a group. This same convention has been used in the summary of conclusions and recommendations which follow, and the summary should be read in that light.

## Conclusions

**15.3** The following are the conclusions reached by the Committee in respect of the matters falling within paragraphs 1 to 4 of the terms of reference announced by the Prime Minister on 15 February 1978:

1. *To recommend whether a statement of principles can be drawn up on the nature of private interests, pecuniary or otherwise, which could conflict with the public duty of any or all persons holding positions of public trust in relation to the Commonwealth.*

Conclusion:

The Committee has concluded (para. 2.45) that it would not be possible to draw up a completely comprehensive and satisfactory statement of principles on the nature of private interest, pecuniary or otherwise, which could conflict with the public duty of any or all persons holding positions of public trust in relation to the Commonwealth. The difficulties of so doing are especially great as regards non-pecuniary private interests. As regards pecuniary private interests, definition of principles poses fewer problems, although some of those remaining present difficulties of a substantial kind; practical considerations suggest that, even where pecuniary private interests which could give rise to conflict with public duty are capable of satisfactory definition, it may be desirable to limit the coverage.

2. *To recommend whether principles can be defined which would promote the avoidance and if necessary the resolution of any conflicts of interest which the Inquiry may, under paragraph (1) above, find to be possible.*
3. *In the event of a finding under paragraph (2) above that principles can be defined, to recommend what those principles should be.*

Conclusion:

The Committee has concluded (para. 4.2) that it is possible to define principles which would promote the avoidance and if necessary the resolution of conflicts of interest. A statement of such principles would constitute a Code of Conduct for all persons holding positions of public trust in relation to the Commonwealth, having special reference to their obligations in respect of conflicts of interest. (*Note: For the Committee's recommendation regarding what the principles should be, see para. 4.9.*)

The Committee has further concluded that generally provisions for the enforcement of the Code of Conduct should be built into the existing basic disciplinary procedures for the various categories of officeholders (para. 4.11) but for occasional cases of particular importance special machinery in the form of a Public Integrity Commission be established and given the powers described in paras 12.42 and 12.43, to carry out investigations and report to the relevant disciplinary body.

The Committee considered whether, individually or in combination, various measures which, following studies of overseas and Australian practices, it saw as being available to buttress the Code of Conduct should be adopted in respect of each of the classes of officeholder with which it has been concerned. Its conclusions are reflected in the recommendations made in Chapters 7 to 10.

4. *Without limiting the scope of paragraph (3), above, to recommend whether or not a register under judicial or other supervision should be maintained so that, in the event of allegations of impropriety, the allegation may be open to judicial investigation and report.*

Conclusion:

The Committee has concluded (para. 6.55) that there is insufficient justification at the present time to introduce a system of compulsory registration of officeholders' interests. Instead, reliance should be placed on the Code of Conduct recommended for adoption in Chapter 4 of the report, which includes a requirement for *ad hoc* declarations of interest, and on the other measures proposed.

The Committee recognises, however, that this conclusion is based on personal judgment, by individual assessment of the relative strengths of the claims of public accountability and personal privacy, and that some may disagree. It has, therefore, placed on record its views on the type of register which would be necessary should it be decided, contrary to its recommendation, to introduce compulsory registration of interests for all officeholders. It has concluded that, in these circumstances:

- there should be no requirement for the registration of non-pecuniary interests (para. 6.61);
- the registrable items and administrative arrangements should be those set out in Appendix 6 paras 15 to 37;
- the administrative arrangements could provide for the possible use of the Public Integrity Commission to investigate and report on cases of special importance (paras 12.56 and 12.58), but responsibility for any consequential action in those cases should continue to remain with the disciplinary body concerned.



**15.4** As regards the matter of the post-separation employment of officials leaving the Public Service, referred to by the Prime Minister in the House of Representatives on 7 March and 2 May 1978 and in his letter to the Committee Chairman dated 14 March 1978 (see paras 1.7 and 1.11), the Committee has concluded that there may be a need for a time lag before certain classes of officeholder take up certain forms of employment after leaving office, combined with a formal procedure whereby the time period may be reduced (para. 13.11). Chapter 13 discusses this question and sets out the Committee's recommendations.

**15.5** As explained in Chapter 9, the Committee has not addressed itself in great detail to the question of government employees working in the tendering process, a subject mentioned by the Prime Minister on 12 March 1978 as one for examination by the Inquiry. It has, however, concluded (para. 9.43) that no special requirements additional to those proposed elsewhere in the report for public servants are necessary to deal with government employees working in the tendering process, but, should it be considered that additional measures are needed to demonstrate the propriety and impartiality of the operations of government in this area, the question of the desirability of establishing a single Contracts Board, independent of the departments or authorities directly concerned, to handle major contracts could be one of those measures to be examined.

**15.6** The Committee considered whether any special measures are necessary to meet the situation of non-career Heads of Overseas Missions who hold directorships in public companies, a matter which was the subject of a Parliamentary Question to the Prime Minister on 5 April 1978 (see para. 1.10). It has concluded (para. 9.35) that such appointees should be required to observe the Code of Conduct and to make all necessary disclosures.

## Recommendations

**15.7** The Committee recommends that:

1. The Code of Conduct set out at paragraph 4.9 be adopted for general application to all officeholders. **Para. 4.9**
2. When decisions have been taken on the final text of the Code of Conduct to be adopted for each particular category of officeholder, every effort be made to secure the widest possible familiarity with and observance of the document and the ancillary rules and guidelines which are necessary to expand and apply its basic provisions. **Para. 4.13**
3. Subject to what is said in Chapters 8 to 10, no system of compulsory registration of officeholders' interests be instituted. **Para. 6.55**

### In relation to Members of Parliament

4. The Senate and the House of Representatives be invited to consider: **Para. 7.3**
  - (a) amending their Standing Orders to include new Standing Orders requiring, respectively, Senators and Members of the House of Representatives to conform to the Code of Conduct; or
  - (b) passing a resolution adopting the Code of Conduct; and
  - (c) providing that a subsequent breach of the Code of Conduct should constitute misconduct and a breach of the privileges of Parliament.

- Para. 7.14     **5.** Sections 44 (iv), (v), and 45 (iii) of the Constitution be reviewed.
- Para. 7.16     **6.** The House of Representatives, in considering the Committee's later recommendations about declarations by Members, be invited to consider the desirability of strengthening Standing Order 196.
- Paras. 7.19 to 7.21     **7.** The Senate and the House of Representatives be invited to consider adopting, whether by Standing Order or resolution, requirements along the lines of the resolution of the British House of Commons of 22 May 1974:  
                   **That, in any debate or proceeding of the House or its committees or transactions or communications which a Member may have with other Members or with Ministers or servants of the Crown, he shall disclose any relevant pecuniary interest or benefit of whatever nature, whether direct or indirect, that he may have had, may have or may be expecting to have.**
- Para. 7.22     **8.** The Senate and the House of Representatives be invited to consider including in such Standing Order or resolution provisions:  
                   (a) that a declaration of interest should be made at the earliest opportunity when speaking in debate or taking part in committee proceedings; and  
                   (b) that such declarations should be automatically recorded as part of the official record and indexed in *Hansard* for convenience of reference.
- Para. 7.24     **9.** If the Government of the day should find it necessary to introduce measures for registration of Members' interests, then it proceed forthwith to a comprehensive register.
- Para. 7.29     **10.** Registration of interests not be extended to Parliamentary candidates.
- Para. 7.35     **11.** The Senate be invited to consider its Standing Order 292 and that the House of Representatives be invited to consider its Standing Order 326 to determine whether any amendment is required to avoid conflicts of interest in respect of committee members.
- Para. 7.37     **12.** Each House consider the adoption of a practice that its Presiding Officer:  
                   (a) should resign all directorships in public companies and private companies which engage in significant trading operations, but may retain directorships in private companies which operate family farms, or pastoral holdings or investments, but not otherwise;  
                   (b) should cease to engage in professional practice; and  
                   (c) should cease to be involved in the daily routine work of any business.

**In relation to the staffs of Members of Parliament**

- Para. 7.39     **13.** (a) Responsibility for the proper conduct of the staff of Members of Parliament remain with the Member they have been appointed to assist;  
                   (b) Members of Parliament ensure that their staff are familiar with the Code of Conduct and conform to it;  
                   (c) such staff disclose to their Members any interests which they have that are likely, or might reasonably appear likely, to cause conflicts of interest;  
                   (d) when dealing with officeholders the staff of Members of Parliament declare personal interests according to the same rules as apply to their Members;  
                   and

- (e) a Member of Parliament instructing a member of his staff to make representations on his behalf to an officeholder acquaint the member of staff with the substance of any declaration of interest he would have been required to make had he made the representation himself, and direct that the information be communicated to the officeholder when the representation is being made.

### **In relation to Ministers**

- 14.** The Code of Conduct be recognised by a letter from the Prime Minister to each of his Ministers. Para. 8.4
- 15.** (a) At meetings of the Cabinet and its committees, a Minister disclose to his colleagues when he has an interest which does, or might reasonably be thought likely to, conflict with his public duty as a Minister; Para. 8.6
  - (b) his declaration be noted in the Cabinet records; and
  - (c) the Minister then either indicate that he will not take part in the discussion in question or else secure the explicit authorisation of his colleagues for taking part.
- 16.** (a) When directing the business of the department he administers a Minister should inform the Prime Minister of any real or apparent conflict of interest that arises; Para. 8.7
  - (b) the Prime Minister, unless he asks the Minister to divest himself of the interest, either arrange for another Minister to deal with the matter or else give explicit authorisation to the original Minister to proceed with it; and
  - (c) in any event, the Prime Minister have the matter recorded.
- 17.** (a) Existing guidelines concerning gifts received by Ministers or their families be continued; and Para. 8.8
  - (b) guidelines concerning acceptance of sponsored overseas travel be drawn up.
- 18.** (a) The returns of Ministers' disclosures of interests be kept, on a confidential basis, by the Secretary to Cabinet; and Para. 8.17
  - (b) consideration be given to determining whether a small committee of senior Ministers, appointed by the Prime Minister or by Cabinet, be established to have immediate responsibility for the register of Ministers' interests, but with ultimate responsibility for the register remaining with the Prime Minister.
- 19.** Ministers disclose in their register of interests the following additional information: Para. 8.18
  - (a) the beneficial interest of the Minister, or a member of his immediate family, under any trust, and in any nominee company, with a statement of the nature of operations of the trust or company;
  - (b) any trust of which the Minister is a trustee, with a statement of the beneficiaries and the nature of the operations of the trust;
  - (c) partnership and joint venture interests with a statement of the nature of their operations;
  - (d) liabilities; and
  - (e) shareholdings, under procedures which will disclose the ultimate interest in circumstances where private companies are used as a screen to mask holdings directly or indirectly in other companies.

- Para. 8.19**     **20.** When the Prime Minister or the Cabinet authorises a Minister to continue to carry out his Cabinet or ministerial duties in relation to a matter in which he has declared an interest, a record of that authorisation be made.
- Para. 8.25**     **21.** (a) They resign directorships in public companies;  
                   (b) they may retain directorships in private companies provided that:  
                           (i) they make full disclosure under the rules relating to registration of interests concerning the assets, liabilities and activities of such companies,  
                           (ii) such companies operate family farms, pastoral holdings or investments, but not otherwise;  
                   (c) they cease to engage in professional practice; and  
                   (d) they cease to be involved in the daily routine work of any business.
- Para. 8.26**     **22.** A Minister divest his shares and similar interests in any company or business involved with his department.
- Para. 8.27**     **23.** It be unacceptable for a Minister who is required to divest to transfer his interests to certain other persons or bodies, for example to his spouse, to another member of his family, or to a nominee company or trust.

**In relation to ministerial staff**

- Para. 8.34**     **24.** A ministerial staff member should be subject to requirements similar to those applying to Ministers concerning conflicts of interest, namely he be:  
                   (a) subject to the Code of Conduct;  
                   (b) required to register similar interests as required for Ministers;  
                   (c) required to declare his interests when dealing with officeholders, and, on instructions by his Minister, to disclose the Minister's interests in situations involving other officeholders where the Minister himself would have been obliged to declare an interest; and  
                   (d) required to divest interests if necessary.

**In relation to public servants**

- Para. 9.5**     **25.** The Public Service Board issue the Code of Conduct as a General Order or such other form of instruction as the Board sees fit.
- Para. 9.6**     **26.** The Public Service Board review the *Public Service Act* 1922 and Regulations to ensure that existing provisions dealing with conflicts of interest are not inconsistent with the provisions of the Code of Conduct, and seek any necessary amendments.
- Para. 9.7**     **27.** The review of the *Public Service Act* 1922 and Regulations include examination of any prohibitions in the legislation to ensure that they are compatible with the Code of Conduct.
- Para. 9.9**     **28.** The Public Service Board include in its Guidelines on Official Conduct advice that it is undesirable that members of the public servant's immediate family accept gifts which would give the appearance of a conflict of interest with his public duty.
- Para. 9.10**    **29.** The Public Service Board give consideration to identifying permissible hospitality and laying down a requirement to seek authorisation in doubtful cases.

30. (a) The obligation to declare and the procedures by which a declaration is recorded be set out in Regulations made under the *Public Service Act 1922*; Para. 9.11  
 (b) the particulars of that declaration be noted on the file(s) relating to the matter in respect of which the conflict exists, and also centrally recorded in the department.
31. A Permanent Head disclose to his Minister when he has such an interest, and procedures comparable to those for other public servants should then be followed. Para. 9.12
32. It should be the obligation of the appointing authority to question applicants for positions on any potential conflicting interests, especially as regards sensitive positions or sensitive assets. Para. 9.13
33. No requirement for the registration of the interests of public servants be introduced. Para. 9.21
34. If, contrary to the Committee's recommendation 33, above, a decision is taken to introduce a register for public servants, the registration requirement be along the lines set out in Appendix 6. Para. 9.21
35. (a) The Public Service Board draw up general guidelines on authorisation; Para. 9.22  
 (b) authorisation always be in writing and filed so as to be retrievable in the event of dispute as to whether it has been granted;  
 (c) there be provision for withdrawal of authorisation granted, for example where the nature of the interest or of the officer's duties changes, or when new facts emerge; and  
 (d) where the obligation rests on the public servant with the interest to obtain authorisation, failure to seek it be a breach of discipline.
36. (a) Public servants should not possess 'sensitive' interests which are likely to conflict seriously with their official duties; and Para. 9.23  
 (b) Permanent Heads examine all *ad hoc* disclosures of interests by officers of their departments to identify those which are 'sensitive' and may require divestment.
37. The power to require divestment as a condition of holding certain offices be given only to the Public Service Board, which would consider an application from the Permanent Head of the officer concerned and have a discretion whether to issue the direction or not; were the officer himself a Permanent Head, then the Board, when apprised of the situation by a Minister, be empowered to act on its own initiative. Para. 9.26
38. Consideration be given to the extent to which s. 91 (2) of the *Public Service Act 1922* might be modified to allow divestment to be compulsory, with penalties for non-compliance, as a condition of holding certain offices. Para. 9.27
39. No compensation be payable for losses suffered as a result of a requirement to divest. Para. 9.28

#### **In relation to members of the Defence Force**

40. (a) Members of the Defence Force, including members of the Reserve Forces, be required to observe requirements regulating conflicts of interest similar to those proposed for public servants; Para. 9.31  
 (b) the Department of Defence ensure that there be as much uniformity as possible with the Australian Public Service in the application of the Defence Force regulations and orders relating to conflict of interest;

- (c) application of the proposed Code of Conduct to the Defence Force be a matter for the Chief of the Defence Force Staff in consultation with the Secretary of the Department of Defence;
- (d) the regulations and orders applicable to the Defence Force be reviewed to ensure that those dealing with conflict of interest conform with the provisions of the Code of Conduct, and existing regulations be amended or new regulations introduced where this is necessary; and
- (e) breaches of conflict of interest requirements be investigated and penalties determined by the disciplinary machinery already existing for the Defence Force.

#### **In relation to staff of the Parliamentary Departments**

- Para. 9.32 **41.** Those of its recommendations which refer to public servants apply to the staff of the Parliamentary Departments.

#### **In relation to consultants**

- Para. 9.33 **42.** (a) The Public Service Board's *Consultants and Contractors for Services: Guidelines for Departments and Authorities* be amended to include provisions that departments and authorities proposing to employ consultants examine the likelihood of any significant conflict of interest concerning each consultant, and, where appropriate, require any consultant to disclose any information which might be material to an actual or potential conflict of interest; and
- (b) when a consultancy is likely to operate for some time, it be made a condition of the consultancy that the consultant disclose any conflicts of interest which might arise during its term.

#### **In relation to statutory officeholders**

- Para. 10.4 **43.** (a) The Cabinet consider recommending to statutory authorities that the Code of Conduct be adopted as the standard to guide the conduct of the members of such bodies;
- (b) each statutory authority examine for itself, in consultation with the responsible Minister, how the Code of Conduct should be adapted by it for its members, and for its staff, and what form measures supplementary to the Code should take; and
- (c) each statutory authority resolve formally upon its own implementation of the Code.
- Para. 10.6 **44.** There be a review of provisions in relevant legislation establishing statutory authorities to determine whether any existing statutory prohibitions, together with any prohibitions that might have been adopted by resolution of the body concerned, require alteration in the light of the Committee's views expressed in this report.
- Para. 10.9 **45.** A provision requiring declaration of all relevant pecuniary interests to the responsible Minister be standard in all legislation establishing single-member authorities.
- Para. 10.10 **46.** Where a full-time chairman of a statutory authority frequently must make decisions under delegations on behalf of the authority, he be required to declare all pecuniary interests relevant to his office to the Minister.

**47.** Existing disclosure provisions in statutory authority legislation (including Australian Capital Territory Ordinances) be reviewed, with a view to adopting a standard drafting formula which would take into account the points made in para. 10.8. Para. 10.12

**48.** Where relevant, each statutory authority supplement any statutory disclosure requirements by its own rules, adopted by resolution or otherwise, covering such matters as disclosure of relevant non-pecuniary interests. Para. 10.13

**49.** If a decision is taken to require registration of interests by the members of a statutory authority, the matters referred to in Appendix 6 be taken into account. Para. 10.17

**50.** (a) Statutory officeholders have any authorisations recorded in the minutes of meetings or other appropriate records of the bodies to which they belong; and Para. 10.19

(b) when authorisation relates to suspension of a requirement relating to conflict of interest which requires divestment or prohibits holding an interest, the responsible Minister be notified forthwith.

**51.** (a) A Minister responsible for the appointment of a statutory officeholder should, prior to the appointment, carefully investigate any personal interests likely to create, or appear to create, conflicts of interest with the duties of the office; Para. 10.20

(b) subject to any legislative provision requiring a statutory officeholder to possess specified interests as part of his qualifications for appointment, the Minister obtain from the proposed appointee explicit confirmation that he does not currently hold such interests and an undertaking to divest himself of such interests should he subsequently come into possession of them; and

(c) when an undertaking has been given to the responsible Minister by a statutory officeholder that he will divest himself of certain sorts of interests, a sanction be provided in the event of a breach of such an undertaking.

**52.** In suitable cases, an approach be adopted which would allow either the Minister or the disinterested members of an authority to determine whether a member should be authorised to take part in discussions or vote on a matter in which he has an interest. Para. 10.25

**53.** Consideration be given to removing requirements, whether created by statute or resolution, that would prevent a member of a statutory authority who is a representative of a particular group or particular persons from taking part in deliberations or voting, provided always that a declaration of interest is made before speaking. Para. 10.26

#### **In relation to the staffs of statutory authorities**

**54.** (a) Those statutory authorities in statutory relationship with the Public Service Board consider adopting those recommendations in this report which apply to public servants, with any necessary modification to fit the circumstances of the authority; Para. 10.29

(b) those authorities which have independent staffing powers examine the position with respect to their staff, with a view to adopting, by way of staff rules or regulations, or otherwise, such of the Committee's recommendations as are appropriate to the public duties of their staff and the likelihood of conflicts of interests occurring in respect of such duties, and which are not already adequately covered in existing staff rules or regulations; and

(c) each such statutory authority consider how to ensure that its staff disclose any actual or potential conflicts of interest to their superiors or, in the case of senior staff, to the members of the statutory authority.

Para. 10.30 **55.** If registration of interests is adopted for the Australian Public Service, then equivalent registration practices be adopted by each statutory authority for its staff.

Para. 10.30 **56.** The details of any registration practices concerning the staffs of statutory authorities, but not the contents of any registers which may be established, be made public.

#### **In relation to certain analogous officeholders**

Para. 10.33 **57.** The attention of the managements of Commonwealth-owned or controlled companies be drawn to the proposed Code of Conduct for possible incorporation in their staff rules, in a modified form if necessary.

Para. 10.34 **58.** The attention of joint Commonwealth-State bodies and of bodies established under international agreements be drawn to the proposed Code of Conduct for consideration, in consultation with the relevant governments, whether the Code should be incorporated in their staff rules, in a modified form if necessary.

#### **In relation to members of tribunals**

Para. 10.37 **59.** (a) There be no omnibus prohibition embodied in a single statute to avoid bias in tribunals; but

(b) there be as much uniformity as possible through adherence to general rules.

Para. 10.38 **60.** An examination be made of the conflict of interest provisions regarding disclosure applying to existing statutory and non-statutory tribunals when exercising quasi-judicial functions, with a view to introducing provisions along the lines of the *Administrative Appeals Tribunal Act 1975*, s. 14, or bringing existing provisions up to this standard where appropriate.

Para. 10.39 **61.** Consideration be given to deleting the qualification contained in some statutes which restricts interests which must be disclosed to those arising from a 'business carried on in Australia'.

#### **In relation to the media**

Para 11.27 **62.** No form of government control be introduced to regulate conflicts of interest involving the media, but that it be suggested to the bodies presently concerned with the maintenance of standards of conduct in the Australian media that they should consider adoption, with such modifications as may be necessary, of any recommendations of the British Royal Commission on the Press 1977 which are relevant to the disclosure of interests.

#### **In relation to lobbyists**

Para. 11.29 **63.** No special measures be taken in relation to lobbyists.

#### **In relation to the machinery for the regulation of conflicts of interest**

Para. 12.26 **64.** Each House of the Parliament be invited to:

(a) establish a Standing Ethics Committee empowered to:

(i) report to the House, from time to time, on any changes in the Code of Conduct that it deems desirable; and



- (ii) receive, investigate and report upon any complaints of departures by Members from the Code of Conduct, and, in particular, upon allegations involving conflicts of interest; and
  - (b) determine the procedures for the operation of the Committee and the extent of its powers.
65. (a) A statutory body, to be known as the Public Integrity Commission, be created, comprising part-time members appointed by the Prime Minister after consultation with the Leader of the Opposition; Para. 12.4
- (b) its Chairman be a retired judge or person likely to be acceptable as of sufficient standing and experience;
  - (c) there be a standing panel of five (or seven) members from whom three, one of whom might be the Chairman himself, would be selected by the Chairman for a particular inquiry; and
  - (d) a secretariat be established and located in an administratively convenient department or authority.
66. The Commission have the powers of a Royal Commission under the *Royal Commissions Act* 1902, including power to compel persons to attend, be sworn and give evidence, and to produce documents. Para. 12.4
67. The Public Integrity Commission have: Para. 12.4
- (a) power to employ counsel to assist it, with provision for examination of witnesses by counsel equivalent to s. 6FA of the *Royal Commissions Act* 1902;
  - (b) the same privileges and protection as a Royal Commission; and
  - (c) power to take evidence in private when it considers it to be in the public interest so to do.
68. Provision be made in the *Public Service Act* 1922 to the effect that, where the Public Integrity Commission has received a request to investigate allegations concerning an officer, any action in progress or to be taken under that Act be delayed, pending completion of the Commission's investigation and presentation of its finding. Para. 12.4

#### **In relation to post-separation employment**

69. Part-time statutory officeholders be enjoined to exercise discretion in taking up subsequent employment which might reflect on the previous conduct of their public duties, imply the possibility of their seeking to apply influence on their former authorities or give an appearance of their being in a position to afford improper advantage to their new employers by reason of their previous service as statutory officeholders. Para. 13.1
70. (a) Rules be adopted which would require senior public servants, or equivalents, and others in sensitive areas of public employment, to obtain official assent if they wish to take up employment within two years of resignation or retirement from public employment in the following businesses or other bodies: Para. 13.1
- those in, or anticipating, contractual relationships with the Government;
  - those in which the Government is a shareholder;
  - those in receipt of government loans, guarantees or other forms of capital assistance;

- those with which the officer's department is otherwise in a special relationship; and
  - those associations whose primary purpose is to lobby Ministers, Members of Parliament, and government departments and authorities;
- (b) the rules apply to all officers in the First and Second Divisions of the Australian Public Service and their equivalents, except such statutory officeholders as are specifically exempted by the Prime Minister; officers, or classes of officers, at lower levels be included where they are or recently have been in a special relationship with prospective employers by virtue of their duties;
- (c) departments assume the responsibility for identifying the positions which should be included and keep the resulting list under regular review to allow the addition and deletion of designated positions or persons.

Para. 13.20 **71.** Procedures be laid down which would require an applicant to obtain the assent of a committee, which would make a recommendation to the applicant's Minister or the Prime Minister as specified below:

- (a) In the case of a First Division officer or equivalent seeking permission to undertake post-separation employment in commerce or industry of a kind falling within the rules, the ultimate decision should lie with the Prime Minister, advised by a committee of Permanent Heads chaired by the Chairman of the Public Service Board.
- (b) In the case of officers in the Second Division of the Public Service and their equivalents and other designated officers, the committee would be chaired by a member of the Public Service Board and would ordinarily consist of senior public servants. The ultimate decision would lie with the Minister in charge of the losing department. Ministers might, however, delegate, for example to Permanent Heads or to the Public Service Board, decisions on defined categories of cases.
- (c) Variations might need to be made to the composition of the committees depending on the case being dealt with, for example whether it related to a public servant, a member of the Defence Force or a statutory officeholder. The committees should therefore have power to co-opt, both from within the Commonwealth sector and outside, for example an independent business or professional person.

Para. 13.21 **72.** The Public Service Board monitor the implementation and effectiveness of these rules and procedures in relation to the public service and statutory authorities; the Defence Department do so in relation to Defence Force personnel.

Para. 13.23 **73.** Having regard to the views of the proposed committees on post-separation employment, the responsible Minister or the Prime Minister, in the case of a Permanent Head, be empowered to determine that:

- the two-year bar on taking up employment of a specified nature, or with a named employer, apply;
- the period of the bar be reduced, whether subject or not to conditions; and
- the bar be waived completely, subject or not to conditions.

Para. 13.26 **74.** In exercising his discretion the Prime Minister or the Minister concerned consider such factors as the following:

- the importance and sensitivity of the position most recently held and, if appropriate, other positions;

- the nature of the business appointment and its relationship to the official's former position(s) and area(s) of work;
- the relationship of the firm concerned with the Government, for example if it is a regular supplier of services or equipment; and
- the period during which information gained or contacts made within the public service would continue to be of value to the official and his new employer.

75. There be no requirement to report all job offers. Para. 13.28

76. If the officer does not reject the suggestion of employment, and it would lie within a 'sensitive' area, reporting be immediate. Para. 13.28

77. The rules on post-separation employment require public servants, or others covered by the rules, intending to move from the public to the private sector, where the public servant is in one of the designated categories and intends to be employed in one of the designated areas of private enterprise, to report this fact. Para. 13.29

78. No additional legislation or penal sanctions be introduced in the post-separation employment area at this stage. Para. 13.33

79. If sanctions are to be imposed to enforce decisions in the post-separation employment area, they be ordinary penal sanctions. Para. 13.35

80. Any such sanctions operate against the ex-staff member, not against the new employer. Para. 13.35

81. Prosecutions take place only with the consent of the relevant Minister or the Attorney-General. Para. 13.35

82. The standards expected of them in relation to post-separation employment be brought to the attention of Ministers and ministerial staff when they take office, and again upon their departure from office. Para. 13.38

#### **In relation to the criminal law**

83. Section 73 of the *Crimes Act* 1914 be amended to cover the situation where a Commonwealth officer obtains, or attempts to obtain, a bribe for a third party. Para. 14.6

84. The culpability of intermediaries who arrange, or attempt to arrange, bribes be clearly expressed in the *Crimes Act*. Para. 14.6

85. There be included within s.73 of the *Crimes Act* a provision dealing with agreements to accept bribes similar to that in the *Secret Commissions Act* 1905, s. 4 (1). Para. 14.7

86. Section 73 of the *Crimes Act* be amended to cover Members of Parliament. Para. 14.12

87. The relevant provision of the *Tasmanian Criminal Code* be used as a guide for the extension of bribery legislation to Members of Parliament so as to cover activity outside the Parliament. Para. 14.14

88. The *Crimes Act* 1914 be amended to include a simple proscription on the misuse of government information with a penalty equivalent to that attaching to s. 70. Para. 14.20

- Para. 14.23 **89.** The proposed new offence of misuse of official information require *mens rea*.
- Para. 14.25 **90.** Members of Parliament fall within the proposed prohibition on the misuse of official information.
- Para. 14.25 **91.** The new offence of misuse of information apply to those persons who misuse official information which comes into their hands, provided that they have the necessary *mens rea*, whether or not they are officeholders.
- Para. 14.26 **92.** Public Service Regulation 34 (a) be retained and similar provisions be adopted for the staff of statutory bodies where these do not already exist.

# Persons or organisations who made written submissions to the committee

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Administrative and Clerical Officers' Association	
Advertiser Newspapers Limited	
Austarama Television Pty Ltd (ATV Channel 0)	
Australia Council	
Australian Apple and Pear Corporation	
Australian Atomic Energy Commission	
Australian Broadcasting Commission	
Australian Broadcasting Tribunal	
Australian Capital Territory Police	
Australian Council of Trade Unions	
Australian Dairy Corporation	
Australian Egg Board	
Australian Greek Welfare Society	
Australian Honey Board	
Australian Parliamentary Labor Party, Federal Opposition Parliamentary Leaders	
Australian National Airlines Commission	
Australian National Railways Commission	
Australian Postal Commission	
Australian Shipping Commission	
Australian Telecommunications Commission	
Australian Tourist Commission	
Australian Wheat Board	
Bailey, Mr P. H., O.B.E.	Special Adviser on Human Rights, Attorney-General's Department (appearing in private capacity)
Baume, Senator P. E.	Senator for New South Wales
Brisbane TV Limited (Channel Seven)	
Brown, Mr N. A., M.P.	Member for Diamond Valley
Cairns, The Hon. K. M., M.P.	Member for Lilley
Cameron, The Hon. C. R., M.P.	Member for Hindmarsh
Charles, Mr A. E.	Lurnea, N.S.W.

Commonwealth Banking Corporation	
Council of Australian Government	
Employee Organisations	
Customs Agents Federation of Australia	
Davies Brothers Limited	
Davies, The Hon. R., M.L.A.	Leader of the Opposition, Parliament of Western Australia
Defence Force, Chief of Defence Force Staff and the Chiefs of Staff	
Department of Aboriginal Affairs	
Department of Administrative Services	
Department of Business and Consumer Affairs	
Department of Construction	
Department of Defence	
Department of Education	
Department of Employment and Industrial Relations	
Department of Environment, Housing and Community Development	
Department of Finance	
Department of Foreign Affairs	
Department of Health	
Department of Home Affairs	
Department of the Northern Territory	
Department of Primary Industry	
Department of Trade and Resources	
Department of Transport	
Department of the Treasury	
Department of Veterans' Affairs	
Dowd, Mr J. R. A., M.L.A.	Member for Lane Cove, Legislative Assembly of N.S.W.
Eastman, Mr D.	Mawson, A.C.T.
Edwards, Mr E. V.	Ainslie, A.C.T.
Ellicott, The Hon. R. J., Q.C., M.P.	Minister for the Capital Territory and Minister for Home Affairs
Encel, Professor S.	School of Sociology, University of New South Wales
Evans, Senator G. J.	Senator for Victoria
Everingham, The Hon. Dr D. N., M.P.	Member for Capricornia
Everingham, Mr P. A. E., M.L.A.	Chief Minister and Attorney-General, Northern Territory Legislative Assembly

Federation of Australian Radio Broadcasters

Finn, Dr P. D.	Senior Lecturer in Law, Australian National University
Guest, The Hon. J. V. C., M.L.C.	Member for Monash, Legislative Council of Victoria
Hamer, The Hon. R. J., E.D., M.L.A.	Premier of Victoria
Harrison, Mr F. L.	Brisbane, Qld
Hasluck, The Rt Hon. Sir Paul, K.G., G.C.M.G., G.C.V.O.	Dalkeith, W.A.
Herald and Weekly Times Ltd	
Hird, Mr H. J., M.L.A.	Member, A.C.T. Legislative Assembly
Hoggart, Mr L.	Yarraville, Vic.
Holding, Mr A. C., M.P.	Member for Melbourne Ports
Hyde, Mr J. M., M.P.	Member for Moore
Institute of Public Affairs (N.S.W.)	
Institute of Public Affairs in Victoria	
Isaacs, Mr J., M.L.A.	Leader of the Opposition, Northern Territory Legislative Assembly
Jacobi, Mr M.	Sherwood, Qld
John Fairfax Limited	
Joint Government Parties of Western Australia	
Keeffe, Senator J. B.	Senator for Queensland
Kelly, Mrs R. J., M.L.A.	Member, A.C.T. Legislative Assembly
Kilgariff, Senator B. F.	Senator for the Northern Territory
Killen, The Hon. D. J., M.P.	Minister for Defence
Leedman, Mr J. W., M.L.A.	Leader, Liberal Party, A.C.T. Legislative Assembly
Lindgren, Professor K. E.	Professor of Legal Studies, University of Newcastle
Macdonald, Mr C. R.	Managing Director, David Syme and Company Limited; Publisher, <i>The Age</i>
McMahon, The Rt Hon. Sir William, G.C.M.G., C.H., M.P.	Member for Lowe
Mason, Mr W. R.	Pearce, A.C.T.
Metherell, Dr T.	Office of the Minister for Education
Morris, Mr P. F., M.P.	Member for Shortland
Neil, Mr M. J., M.P.	Member for St George
New South Wales Privacy Committee	
News Limited	
Palmer, Mr C. V. L.	Chartered Engineer, Kaleen, A.C.T.
Poulgrain, Mrs A.	Cairns, Qld

Premier's Department, South Australia	
Public Service Board	
Puplick, Senator C. J. G. . . . .	Senator for New South Wales
Pye, Mr T. W. W., M.B.E., M.L.A. . . . .	Member, A.C.T. Legislative Assembly
Queensland Newspapers Pty Ltd	
Rae, Senator P. E. . . . .	Senator for Tasmania
Reid, Professor G. S. . . . .	Department of Politics, University of Western Australia
Renard, Mr I. A. . . . .	Adviser to the Prime Minister
Rocher, Senator A. C. . . . .	Senator for Western Australia
Ruddock, Mr P. M., M.P. . . . .	Member for Dundas
Scholes, Mr G. G. D., M.P. . . . .	Member for Corio
Shack, Mr P. D., M.P. . . . .	Member for Tangney
Snedden, The Rt Hon. Sir Billy Mackie, K.C.M.G., Q.C., M.P.	Speaker of the House of Representatives
Swan Television and Radio Broadcasters Limited	
Tonkin, Mr A. R., M.L.A. . . . .	Member for Morley, Parliament of Western Australia
Tonkin, Mr D. O., M.H.A. . . . .	Leader of the Opposition, South Australia
Tuxworth, Mr I., M.L.A. . . . .	Cabinet Member for Resources and Health, Northern Territory Legislative Assembly
United Telecasters Sydney Limited	
Webster, Senator the Hon. J. J. . . . .	Minister for Science
Whitlam, The Hon. E. G., A.C., Q.C. . . . .	Visiting Fellow, Australian National University
Wran, The Hon. N. K., Q.C., M.L.A. . . . .	Premier of New South Wales
Yates, Mr W., M.P. . . . .	Member for Holt



## Persons who appeared before the committee to give oral evidence

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Bailey, Mr P. H., O.B.E.	Special Adviser on Human Rights, Attorney-General's Department (appearing in private capacity)
Besley, Mr M. A.	Secretary, Department of Business and Consumer Affairs
Boulton, Mr A. J.	Lecturer in Law, Australian National University (appearing on behalf of the Australian Council of Trade Unions)
Bowen, The Hon. L. F., M.P.	Deputy Leader of the Opposition
Button, Senator J. N.	Deputy Leader of the Opposition in the Senate
Cairns, The Hon. K. M., M.P.	Member for Lilley
Cameron, The Hon. C. R., M.P.	Member for Hindmarsh
Cameron, Mr J. R. A.	General Manager, Australia Council
Christie, Mr V. T.	Deputy Managing Director, Common- wealth Banking Corporation
Cole, Mr R. W.	Secretary, Department of Finance
Collins, Mr F. M.	First Assistant Secretary, Wool Division, Department of Primary Industry
Crisp, Professor L. F.	Chairman, Commonwealth Banking Corporation
Daniels, Mr L. J., O.B.E.	Secretary, Department of the Capital Territory
Davies, The Hon. R., M.L.A.	Leader of the Opposition, Western Australia
Davis, Mr L. G.	Secretary, Australian Shipping Commission
Dowd, Mr J. R. A., M.L.A.	Member for Lane Cove, Legislative Assembly of N.S.W.
Doyle, Ms M.	Senior Legal Officer, Attorney- General's Department, South Australia
Doyle, Mr R. S.	Senior Research Officer, Administrative and Clerical Officers Association
Duckmanton, Mr T. S., C.B.E.	General Manager, Australian Broadcasting Commission

Dyason, Mr V. H., M.B.E.	General Manager, Australian National Railways Commission
Evans, Senator G. J.	Senator for Victoria
Finn, Dr P. D.	Senior Lecturer in Law, Australian National University
Foster, Mr D. L.	Federal Director, Federation of Australian Radio Broadcasters
Fraser, The Rt Hon. J. M., C.H., M.P.	Prime Minister of Australia
George, Professor D. W., A.O.	Chairman, Australian Atomic Energy Commission
Gordon, Mr H.	Executive Editor, Herald and Weekly Times
Gradwell, Mr R. L.	Federal Secretary, Council of Australian Government Employee Organisations
Guest, The Hon. J. V. C., M.L.C.	Member for Monash, Legislative Council of Victoria
Gyngell, Mr B.	Chairman, Australian Broadcasting Tribunal
Halton, Mr C. C.	Secretary, Department of Transport
Hansen, Ms I.	Privacy Commissioner, Canadian Human Rights Commission
Hasluck, The Rt. Hon. Sir Paul, K.G., G.C.M.G., G.C.V.O.	Dalkeith, W.A.
Hawker, Mr D. N.	Editor, <i>The Mercury</i> , Hobart
Hayden, The Hon. W. G., M.P.	Leader of the Opposition
Hodgman, Mr W. M., M.P.	Member for Denison
Holding, Mr A. C., M.P.	Member for Melbourne Ports
Hyde, Mr J. M., M.P.	Member for Moore
Jenner, Mr N. G.	Chairman, Australian Shipping Commission
Jones, Mr K. N., C.B.E.	Secretary, Department of Education
Keeffe, Senator J. B.	Senator for Queensland
Killen, The Hon. D. J., M.P.	Minister for Defence
Lanigan, Mr P. J., O.B.E.	Director-General, Department of Social Security
Lansdown, Mr R. B., C.B.E.	Secretary, Department of Environment, Housing and Community Development
Lawler, Mr P. J., O.B.E.	Secretary, Department of Administrative Services
Leedman, Mr J. W., M.L.A.	Leader, Liberal Party, A.C.T. Legislative Assembly
Lenihan, Mr D. M.	Assistant Secretary, Department of Administrative Services
Lewis, The Hon. A. A., M.L.C.	Secretary, Joint Government Parties of Western Australia

Low, Mr G. A.	First Assistant Secretary, Purchasing Division, Department of Administrative Services
Lynch, The Rt Hon. P. R., M.P.	Minister for Industry and Commerce
McCubbin, Mr G.	Assistant Director, Personnel Management, Department of Trade and Resources
MacDonald, General Sir Arthur, K.B.E., C.B., O.B.E.	Chief of Defence Force Staff
Macdonald, Mr C. R.	Managing Director, David Syme and Company Limited; Publisher, <i>The Age</i>
MacDonald, Mr H. B.	First Assistant Secretary, Department of the Prime Minister and Cabinet
MacDonald, Mr K. A.	General Manager, Australian Tourist Commission
McKenzie, Mr K. C.	Secretary, Department of Employment and Industrial Relations
McLelland, Mr A.	Vice-President, Institute of Public Affairs (N.S.W.)
McLeod, Mr. R. N.	Secretary, Public Service Board
McMahon, The Rt Hon. Sir William, G.C.M.G., C.H., M.P.	Member for Lowe
McMichael, Dr D. F.	Secretary, Department of Home Affairs
McMillan, Mr J.	Pamela Coward and Associates, representing Ms R. Kelly, M.L.A.
McQuitty, Mr D. G.	Acting Managing Director, Australian Postal Commission
Mercer, Mr D.	Chairman, Public Service Board of South Australia
Neave, Mr R.	Director, Institute of Public Affairs in Victoria
Neil, Mr M. J., M.P.	Member for St George
Nixon, The Hon. P. J., M.P.	Minister for Transport
Norgard, Mr J. D.	Chairman, Australian Broadcasting Commission
Orme, Mr. W. J.	Executive Member, N.S.W. Privacy Committee
Pearce, Mr J. W.	Assistant Secretary, Department of Construction
Pitt, Mr R. G.	Principal Executive Officer, Department of Construction
Price, Sir Leslie, K. B., O.B.E.	Chairman, Australian Wheat Board
Puplick, Senator C. J. G.	Senator for New South Wales
Renard, Mr I. A.	Adviser to the Prime Minister
Richardson, Professor J. E.	Commonwealth Ombudsman
Robinson, The Hon. E. L., M.P.	Minister for Finance

Rocher, Senator A. C.	Senator for Western Australia
Ryan, Mr D. M.	Policy Division, Premier's Department, South Australia
Scully, Mr J.	Secretary, Department of Trade and Resources and Department of the Special Trade Representative
Smith, Mr I. H.	Deputy Secretary, Department of Primary Industry
Smith, Mr W. J.	Executive Officer, Council of Australian Government Employee Organisations
Snedden, The Rt Hon. Sir Billy Mackie, K.C.M.G., Q.C., M.P.	Speaker of the House of Representatives
Somervaille, Mr R. D.	Chairman, Australian Telecommunications Commission and Overseas Telecommunications Commission
Spiller, Ms J.	Acting General Manager, Corporate Affairs Department, Australian Postal Commission
Stone, Mr J. O.	Deputy Secretary, Department of the Treasury
Tange, Sir Arthur, A.C., C.B.E.	Secretary, Department of Defence
Taylor, Mr J. C.	Acting Chairman, Public Service Board
Tonkin, Mr A. R., M.L.A.	Member for Morley, Legislative Assembly of Western Australia
Tonkin, Mr D. O.	Leader of the Opposition, South Australia
Tune, Mr J. M. L.	Partner in Duffield, Hastwell, Tune and Co.
Vallee, Mr R. P., M.L.A.	Leader, Australian Labor Party, A.C.T. Legislative Assembly
Vial, Sir Kenneth, C.B.E.	Chairman, Australian National Airlines Commission
Wallace, Mr D.	Senior Inspector, Public Service Board
Webster, Mr A. A. S.	Chairman, Australian Dairy Corporation
Webster, Senator the Hon. J. J.	Minister for Science
Whitlam, The Hon. E. G., A.C., Q.C.	Visiting Fellow, Australian National University
Wilcox, The Hon. V. F., C.B.E., Q.C.	Carwoola, Alexandria, Vic.
Wriedt, Senator the Hon. K. S.	Leader of the Opposition in the Senate
Yates, Mr W., M.P.	Member for Holt
Yeend, Mr G. J., C.B.E.	Secretary, Department of the Prime Minister and Cabinet
Young, Mr R. J.	Commissioner, Public Service Board

# Recent overseas measures for the regulation of conflicts of interest

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1. This appendix surveys some recent overseas measures for the regulation of conflicts of interest amongst officeholders. It deals in particular with action taken in Britain, Canada and the United States of America, but makes reference to measures in a number of other countries. In some instances it has been found desirable to look back in time to trace the antecedents of arrangements which are still operative, but the appendix does not purport to attempt to set down a detailed history of measures to regulate conflicts of interest.

2. For convenience of reference, the material presented has been broken down into sections corresponding to the categorisation of measures for resolving or avoiding conflict used in the main report. Additional information on overseas practices in relation to the registration of officeholders' private interests is to be found in Appendix 6.

## Introduction

3. Measures for the regulation of conflicts of interest amongst officeholders have a long history in many countries. In Britain they date from at least the seventeenth century, when the House of Commons adopted resolutions concerning the conduct of Members within the Parliament, and in the United States of America there have been statutes regulating conflicts of interest of officeholders since the Civil War period.<sup>1</sup>

### *Britain*

4. Two periods can be distinguished in Britain, the first covering the years up to the middle of the nineteenth century, and the second the years since. The first period saw three main developments—exclusion of government contractors from the House in 1782, formulation of the rule relating to disallowance of votes in 1811, and a requirement for declaration of disinterestedness from members of railway Bill committees in 1855. The second period saw the development of the custom of *ad hoc* declaration of interests in the first half of the twentieth century and the movement for the establishment of a register of interests which emerged in the 1960s. This period saw the establishment of a code of conduct for Ministers and the establishment of inquiries to investigate breaches of conflict of interest provisions in the local government area and the civil service. Parliamentary Committees also investigated allegations of misconduct amongst Members.

### *Canada*

5. The survey of Canadian measures for the regulation of conflict of interest situations is confined to the period of the 1960s and 1970s. It begins with the introduction of rules of conduct for Ministers in 1964, and covers the moves to implement the principles outlined in a 1973 green paper on Members of Parliament and conflict of interest and guidelines for public servants, and concludes with reference to the provisions of the 1978 Independence of Parliament Bill.

### *United States of America*

6. In the United States of America, attempts to regulate conflicts of interest have led to an elaborate system of statutes, primarily dating from 1872 but given new impetus by scandals at various times up to the present day. Scandals in the Federal Government in the immediate post-World War II years produced one of the first recognitions of the need for codes of government ethics.<sup>2</sup>

7. In the decade of the 1960s, renewed Congressional concern with the ethics of the three branches of government became apparent. Cases of misconduct involving a Senator, a Congressman and a Senate aide led to the establishment of a Senate Ethics Committee in 1964, a House of Representatives Committee on Members' Conduct in 1968 and the adoption of ethics codes for both Houses in 1968.<sup>3</sup> Regulation of the conduct of the executive branch was strengthened in the Kennedy and Johnson Administrations by a series of executive orders, the final one in 1965 requiring separate codes of conduct for each department and agency of the executive branch.<sup>4</sup>

8. Moves to tighten the existing codes of ethics for members of the judiciary followed in the wake of the resignation of a Supreme Court judge and the rejection by the Senate of the nomination of his replacement.<sup>5</sup> The Watergate scandal early in the present decade and more recent cases of Congressional misconduct led to moves to tighten the existing codes and practices. Both Chambers extended their ethics codes in 1977 and more recent Bills and supplementary measures have aimed at requiring public financial disclosure by legislators, members of the executive branch of the Administration and the judiciary.

9. Congress passed an Ethics in Government Act in 1978 requiring public disclosure of interests by the legislative, executive and judicial branches, with machinery for enforcement of the requirement including an Office of Government Ethics. New restrictions were placed on the 'revolving door' between government and private enterprise. In addition, procedures were laid down for investigations of allegations of wrong-doing by a President or high officials of the executive branch.

### A code of conduct

#### *Britain*

10. In Britain, the first systematic attempt to formulate an extensive set of rules for officeholders came from the Redcliffe-Maud Committee on Local Government Rules of Conduct in 1974. The Committee recommended a national code of conduct to supplement statutes and standing orders for elected local government councillors (Attachment 1). That Committee expressed the hope that the code would be extended to local government employees, through the negotiation by the relevant bodies of changes to the standard conditions of service for employees. The proposed code comprised nine articles drafted in accordance with the Redcliffe-Maud criterion that 'it should be a short, simple, and lucid statement of principles and of their practical application . . . of such length and format as to enable the user to carry it about with him easily'.<sup>6</sup> With minor modifications, it was promulgated in 1975 for local government councillors, and was subsequently endorsed by the Salmon Commission as 'an admirable document that gives local councillors an unambiguous description of the standards of conduct that are expected of them'.<sup>7</sup>

11. There already existed in Britain a code of conduct for Ministers, which had evolved gradually during the twentieth century under several Prime Ministers, beginning with Sir Henry Campbell-Bannerman's prohibition on the retention of directorships in public companies by Ministers in 1906. This was added to by Mr Asquith's

statement on Ministers' pecuniary interests in 1913, and Mr Chamberlain's statement on private practice by solicitor Ministers in 1937 and his extension of the prohibition on the holding of directorships by Ministers to cover certain types of private company in 1939. This code was consolidated by Mr Churchill in 1952 in a statement incorporated in *Hansard* (Attachment 2).

**12.** Its text influenced the basic principles on Ministers' private interests adopted in New Zealand in 1956, following investigation by a Select Committee of that country's House of Representatives.<sup>8</sup> These, in turn, were recommended for adoption almost verbatim by the Qualifications Committee of the Victorian Parliament in 1974, and eventually endorsed in the Code of Conduct for Members of Parliament laid down in the *Members of Parliament (Register of Interests) Act 1978*, s. 3. (See Appendix 5, Attachment 1). The Churchill statement has also been adopted by Fiji as the basis for its code of Ministerial conduct.

### *Canada*

**13.** In Canada in 1964, the then Prime Minister laid down rules of conduct for Ministers and ministerial staff. In 1973, his successor prescribed guidelines as standards of conduct for Ministers.<sup>9</sup> The 1973 green paper, *Members of Parliament and Conflict of Interest*, outlined eight basic principles but did not suggest they constitute a code:

No proposal is intended to flow directly from any particular principle; rather, these principles are designed as a framework for reform and an attempt to delineate some basic moral and theoretical guidelines to follow in approaching the conflict of interest problem as it applies to Members of Parliament.<sup>10</sup>

That same year, the Canadian Federal Government issued *Guidelines to be Observed by Public Servants Concerning Conflict of Interest Situations*, and the Prime Minister made a statement to the House of Commons explaining their underlying principles.<sup>11</sup>

**14.** Certain of the Canadian provinces have also laid down codes of conduct for their public servants. These have taken various forms, such as a regulation made under the Public Service Act defining classes of conflict of interest situations (Ontario), an Order-in-Council formulating the duties of the public service (Quebec) and, more recently, a comprehensive code of conduct and ethics (Alberta).

### *United States of America*

**15.** In the United States, the idea of a Commission on Ethics to recommend standards of conduct to both the executive and the legislative branches was raised as early as 1951.<sup>12</sup> A code of ethics for government employees was set out in a 1958 Joint Resolution of the House of Representatives and Senate.<sup>13</sup> In 1965, the President issued an Executive Order which prescribed standards for regular public servants and special employees, such as consultants and advisers, and also made detailed provision for registration of interests.

**16.** In 1968, both Houses of Congress adopted rules relating to financial disclosure by their members and the House of Representatives introduced a code of official conduct. In 1977, the House amended its code slightly, but the Senate left its equivalent provisions unchanged. Presidential guidelines for White House staff were issued in 1975. In 1977, the Comptroller General's report, *Action Needed 'o Make the Executive Branch Financial Disclosure System Effective*, revived proposals for an Office of Ethics within the executive branch to lay down uniform and clearly stated standards of conduct.<sup>14</sup> The Office of Government Ethics was established within the Office of Personnel Management by the Ethics in Government Act of 1978.

## *Papua New Guinea*

**17.** In Papua New Guinea, a comprehensive Code of Conduct has been adopted for national leaders, including all important officeholders. The *Parliamentary Integrity Ordinance* 1971 had imposed obligations on Members of the House of Assembly to declare and to register interests, and, if a Ministerial Member or holder of parliamentary office, not to act as director of a company. The final report of the Constitutional Planning Committee in 1974 suggested a Leadership Code, later incorporated in the Constitution, comprising a number of general items, additional items relating to Ministers, and further items relating to specified officeholders.<sup>15</sup> The *Organic Law on the Duties and Responsibilities of Leadership* 1975 was made under those Constitutional provisions. In 1978, alterations were proposed to the Constitution to extend the prohibitions of the Leadership Code but the proposals were subsequently withdrawn.

## Prohibition

### *Britain*

**18.** An early use of prohibitions to regulate the conduct of officeholders is to be found in the disqualification of holders of offices of profit and government contractors from membership of the House of Commons in Britain, discussed at paras 7.8–9 of the main report.

**19.** In addition, a ruling by Mr Speaker Abbott given in the House of Commons on 17 July 1811 confirmed an earlier rule that a Member whose pecuniary interest would be affected by the result of a vote should not participate in that vote and expressed the view that:

. . . this interest . . . must be a direct pecuniary interest, and separately belonging to the persons whose votes were questioned, and not in common with the rest of his Majesty's subjects, or on a matter of state policy.<sup>16</sup>

**20.** Similar formulations have been adopted by other legislatures patterned upon the House of Commons, including those of the Australian States. (See Appendix 5, paras 3–6.) In Canada, although the language of what is now Standing Order 11 of their House of Commons omits any phrase such as 'and not in common with the rest of his Majesty's subjects', since the nineteenth century it has been given the same restrictive meaning by Speakers, who relied on the British rulings.

**21.** Each phrase of Mr Speaker Abbott's ruling has been glossed by later Speakers so as to limit the effect of the prohibition. Thus the qualification 'and not in common with the rest of his Majesty's subjects' has been held to mean that membership of a class or group which stands to benefit financially from a measure does not prevent a Member from voting for it. For example, Members may vote to increase their own salaries, because the personal private gain is only incidental to the public or general benefit. Votes on private Bills, because they do not concern matters of state policy, are not covered.<sup>17</sup>

### *Canada*

**22.** In Canada, the Independence of Parliament Bill 1978, introduced while this Committee was conducting its inquiry, would prohibit Members of Parliament holding certain widely defined offices, commissions and employments.



### *United States of America*

23. In the United States, both the Code of Ethics of the Senate and the Code of Official Conduct of the House of Representatives contain prohibitions against acceptance by a Member, officer or employee of the Senate or the House of Representatives, as the case may be, of compensation the receipt of which would occur by virtue of influence improperly exerted from his position in the Congress. There is also a prohibition on the holding by a Federal Government employee of any direct or indirect financial interest that conflicts, or appears to conflict, substantially with his government duties and responsibilities, and on engaging in, directly or indirectly, a financial transaction on the basis of information obtained through his government employment. Employees are also subject to statutory prohibitions, such as that requiring them to refrain from participating personally and substantially in their governmental capacity in any matter in which they, their spouses, minor children or outside business associates have a financial interest. The Constitutional requirement for the Senate to consent to any executive branch (and judicial) appointments led a variation on prohibition in the 1950s whereby consent to such an appointment would be withheld unless the appointee complied with divestment requirements tailored to his official duties.

24. In both Britain and the United States, the use of prohibition appears to have had a limited impact on conflict of interest situations. The British prohibitions have narrow ambits. The American statutes carry severe penalties, but there appears to have been a reluctance to invoke them. For example, the effect of legislation passed in 1944 as an attempt to tighten up controls in relation to post-separation employment was restricted in its scope by a decision of the Supreme Court.<sup>15</sup>

### **Declaration**

25. The custom of declaring a pecuniary interest during debate appears to have taken shape in the British House of Commons only in the twentieth century.<sup>19</sup> No such custom developed in the United States Congress, whilst in Canada the green paper of 1973 could say only: 'While a very uncertain tradition of verbal disclosure may exist in Canada, a review of Parliamentary precedents indicates no consistent adherence to this custom.'<sup>20</sup>

### *Britain*

26. Mr Speaker Morrison (later Viscount Dunrossil) in 1953 explained the development of a custom, rather than a rule, where Members of the House of Commons 'frequently' declared any interest they had when they spoke in debate:

I think myself that (it) has grown up as a matter of custom, because hon. Members desire to be frank with their fellow Members, and it is sometimes a matter of prudence, in case an hon. Member should be suspected of unavowed motives.<sup>21</sup>

27. The Strauss Committee recommended in 1969 that existing practice in the House of Commons be clarified and the area of declaration enlarged to 'achieve the main object of declaration which is that a Member's outside interests should be made known to the House whenever they touch his duty and activity as a Member of the House'.<sup>22</sup> However, no action was then taken on the Committee's recommendation. It was not until 22 May 1974, simultaneously with the adoption in principle of a register of interests, that the House of Commons resolved that disclosure should be obligatory.<sup>23</sup>

### *Papua New Guinea*

**28.** Before the House of Commons voted to regularise its custom, at least two other legislatures had taken the practice a stage further by imposing the obligation to make *ad hoc* declarations by statute. One has been noted, the Papua New Guinea *Parliamentary Integrity Ordinance* 1971, which required that any Member who had 'a direct or indirect financial interest' in a matter before the House of Assembly or one of its committees should disclose 'the nature of his interest in the matter' before speaking (s. 29). If asked to do so, he should give 'reasonable particulars' of the interest. The disclosure should be recorded in the minutes of proceedings, and any alleged failure to comply with the requirement should be reported to the House by the Speaker.

### *Canada*

**29.** The other instance occurred in the Canadian province of Newfoundland. Its Conflict of Interest Act 1973 extended the obligation to make *ad hoc* declarations to both Members of the House of Assembly and members of statutory bodies with more than one member. The Act prohibited their speaking on any matter unless at the commencement of the speech any conflicting interest of the Member, his spouse or minor children had been stated.

**30.** A requirement for a declaration of interest in non-parliamentary contexts may be expressed in less explicit terms; for example, the 1973 Canadian Public Service Guidelines concerning conflict of interest situations require all public servants to disclose to their superiors 'all business, commercial or financial interest where such interest might conceivably be construed as being in actual or potential conflict with their official duties'.<sup>24</sup> Similarly, the 1978 Alberta Code of Conduct for public servants requires written disclosure 'where the business or financial interests of employees, their spouses or of their children under the age of eighteen, are affected or appear to be affected by actions taken or decisions made in the course of their public service employment'. Such formulations cover both declaration and registration.

## Registration

### *United States of America*

**31.** In 1965, President Johnson issued Executive Order 11222 which required senior public servants and full-time presidential nominees to committees, boards or commissions to lodge statements with the Chairman of the Civil Service Commission disclosing their own interests and those of their spouses, minor children and other members of their immediate households. The statements were to show:

- company, partnership and other organisational connections, whether as a director, officer, employee, or otherwise, or where the officeholder had a continuing financial interest;
- names of creditors, other than for a home mortgage or ordinary household expenses; and
- real property interests, other than a personal residence.

Information on organisations not conducted as a business, such as professional, religious or social bodies, was not required.

**32.** In the same year, the Civil Service Commission issued instructions requiring agencies to make regulations establishing a system of registration for certain of their employees and published a model financial disclosure form. About 30 000 persons were thus covered by registration requirements, most of whom were employees engaged in sensitive posts such as contracting, procurement, and making grants or awarding subsidies.

**33.** In addition to the registration requirements of the Federal Government, the great majority of American States eventually imposed on some public officials some form of registration.

**34.** Registration by Members of Congress followed in 1968, when the House of Representatives and the Senate introduced registration requirements. These differed in their emphasis. The Senate Rule required the disclosure of more information, including a copy of the Senator's income tax return, but on the basis that this and certain other disclosures would be kept in a sealed envelope by the Comptroller General and examined only on a resolution of the Senate's Select Committee on Standards and Conduct. The House required Members and staff to provide less information, for example sources of income but not amount, but allowed public access to the information collected except details of amounts and values, which were listed in a separate disclosure kept under seal. The House requirements were extended slightly in 1970 to identify major creditors and sources of honoraria.

**35.** From the early 1970s, there was pressure on Congress to establish more uniform and extensive registration requirements.<sup>25</sup> Impetus was provided by the 1977 Comptroller General's report, *Action Needed to Make the Executive Branch Financial Disclosure System Effective*, which was highly critical of existing arrangements, and by the Commission on Administrative Review Financial Ethics Report of the same year.<sup>26</sup>

**36.** In March 1977, the House of Representatives adopted a new version of the relevant Rule, to require more extensive disclosure, including information on items of income from a single source aggregating \$100 or more, with value of items to be indicated on a five-category scale. The Senate followed suit with a similar Rule a month later.

**37.** During 1977 and 1978, Congress considered a variety of Bills which would put the House and Senate provisions on a statutory basis. These included one initiated by the President. Following negotiations and compromise on the various proposals in the Bills, Congress approved the Ethics in Government Act of 1978, which was signed by the President on 26 October 1978.<sup>27</sup>

**38.** The new Act laid down a uniform system of annual registration of private interests, with provision for public access, for the three branches of government. Its principal effects were:

- to give statutory form to the financial disclosure provisions of the ethics codes adopted by the Senate and the House of Representatives in 1977;
- to apply disclosure requirements to the President, the Vice-President, high level executive branch officials, Supreme Court justices, federal judges and other employees of the judicial branch and candidates for federal office;
- to provide civil, but not criminal, penalties for violations of the disclosure requirements;
- to establish an Office of Government Ethics to develop rules on government conflicts of interest and other ethical problems and to monitor and investigate federal ethics laws;
- to place restrictions on the post-employment activities of federal workers leaving government service; and
- to set up a mechanism for the court appointment of a special prosecutor to investigate criminal allegations against high level government officials.

Its provisions thus went wider than formalising and expanding the existing disclosure requirements in that they established elaborate machinery for enforcement. The Act did not overtake entirely the Senate disclosure requirements, which are in certain respects more detailed than those in the Act, and the Senate Rule continues to apply with respect to Senators and Senate employees in conjunction with the Act.

**39.** Details of the disclosure requirements under the new Act are discussed in Appendix 6 to this report.

### *Canada*

**40.** The Canadian experience may be described more briefly. The Newfoundland Conflict of Interest Act 1973 required registration of the financial interests of Members of the House of Assembly and members of statutory bodies, their spouses and minor children, in companies or firms doing business with the provincial government. The same year, the Federal Government's green paper, *Members of Parliament and Conflict of Interest*, recommended that Members of Parliament should be required annually to register interests in companies with government contracts, and that the public should be given access to that information.

**41.** In 1974, British Columbia passed the Public Officials and Employees Disclosure Act, which required registration by Members of the provincial Parliament, public servants, local government officials, both elected and appointed, and candidates for elected office at both the provincial and local government levels. The interests to be registered were those of the officeholder himself, and, in the disclosure, shareholdings, sources of remuneration, creditors and real property were to be identified. Information relating to elected officeholders would be accessible to the public.

**42.** In October 1978, following publication of an earlier version, the Canadian Government introduced into the Federal Parliament a Bill for an Independence of Parliament Act to establish rules and guidelines to govern Senators and Members of the House of Commons in conflict of interest situations. The Bill, which was seen as the culmination of the process of review and study by committees of the Parliament of the Government's 1973 green paper, proposed, amongst other things, that Parliamentarians would be required to disclose publicly each year details in respect of:

- certain government contracts and grants;
- outside employment;
- gifts received by the Parliamentarian or his spouse of a value greater than \$100;
- honoraria;
- sponsored travel of the Parliamentarian or his spouse outside Canada;
- shares and bonds of the Parliamentarian or his spouse;
- unsecured debts over \$5000; and
- other sources of income worth more than \$1000.

The Bill also made provision for the appointment of a Registrar for each House of Parliament to maintain a register of disclosures filed, to provide for public access to the disclosures and to advise Members of their obligations under the legislation. Failure to comply with the disclosure requirements could result in imposition of a fine or possible disqualification from sitting in the Parliament.

**43.** At the time of completion of the Committee's report, the Independence of Parliament Bill had not been enacted.

## *Britain*

**44.** In Britain, a statutory basis was given to registration at the local government level by the Local Government Act 1933. The current Act, which has substantially the same provisions, imposes an obligation on a councillor to declare a pecuniary interest held by himself or his spouse in a contract or other matter before the council, and prohibits the councillor's speaking or voting on a subject on which he has made a declaration. The obligation to declare is waived if the councillor has lodged a general notice of his interests in named companies and other bodies with the clerk. Under the legislation, all disclosures and general notices are required to be recorded in a book to to which any member of the local authority has access. Failure to disclose an interest attracts a fine on summary conviction.<sup>28</sup>

**45.** In the parliamentary area, demand for registration of Members' interests emerged gradually after World War II, when concern developed as to the adequacy of existing practices on disclosure of private interests in debate. Questions arose regarding contractual arrangements involving Members of the House of Commons, trade union sponsorships, the employment by private enterprise of former Ministers, the retention of shareholdings by members of the Ministry, and newspaper consultancies held by Members.

**46.** In 1965, Mr W. Hamilton, M.P., in a Parliamentary Question, raised the possibility of legislation to establish a public register of financial interests of Members of both Houses.<sup>29</sup> In May 1967, he sought leave to introduce a Bill to that effect.<sup>30</sup> Mr Hamilton's register would have shown all company directorships, shareholdings in excess of £500, and income sources in excess of £500 from an outside body. His motion failed, but in the following month the Liberal Party initiated a register for its own Members of Parliament.<sup>31</sup>

**47.** When Mr Hamilton raised the subject again in March 1969, the idea was taken up by leading journals of opinion.<sup>32</sup> It was revealed about this time that a Member of the House of Commons was employed by a public relations firm retained by an overseas government then unpopular in Britain. A Select Committee of the House of Commons, the Strauss Committee, was appointed to report on the matter. It reported in December 1969 in favour of extending the practice of *ad hoc* declaration, and suggested two new Standing Orders to extend the existing restriction on professional advocacy to new forms of activity such as public relations. However, the Strauss Committee, after weighing the arguments for and against, came down against compulsory registration of Members' interests. It commented that:

The public scrutiny of the whole range of a Member's financial interest may be a proper activity for journalists, compilers of reference books and academics; it is not essential to the way in which the House conducts its business.<sup>33</sup>

**48.** The report of the Strauss Committee was not brought up for debate. The 1970 general election intervened, and then, early in 1971, the new Leader of the House of Commons indicated that the Committee's proposals for changes to Standing Orders had been abandoned. In July 1972, the first disclosure of the Poulson affair, involving widespread corruption in respect of public construction, reopened the question of conflicts of interest. Further scandals in 1973 added to concern. The idea of a register was revived, and was endorsed, first by the Scottish Council of the Labour Party and then by the Parliamentary Labour Party. Discussions began between the main parties in the House of Commons. In the meantime a Royal Commission under Lord Redcliffe-Maud investigated conflicts of interest at the local government level, and endorsed the idea of statutory registers, open to the electors of the local authorities.

**49.** Immediately before the Redcliffe-Maud Report was issued, the House of Commons debated several motions by which it adopted the wider principles for declaration of interest formulated by the Strauss Committee. In May 1974, the House of Commons, contrary to the recommendations of the Strauss Committee, decided to adopt compulsory registration of Members' interests and appointed a new Select Committee to recommend how a register could be conducted. That Select Committee, the Willey Committee, reported in December of the same year. The introduction of a register was justified on the following grounds:

- it was additional to, and not a replacement of, the obligation to declare interests;
- its purpose was to provide information on a Member's pecuniary interests or any other material benefit he might receive which might be thought to affect his conduct as a Member;
- the proposed limitation on the disclosures required recognised that the Member was also a private individual and entitled to a proper degree of privacy;
- the register balanced what should be publicly known about a Member of Parliament with the proper right of that Member to some privacy.

The Willey Committee specified nine classes of 'pecuniary interest or other benefit' to be registered.<sup>34</sup> Its report was debated in June 1975, when the House of Commons agreed to establish a register.

**50.** Since 1975, two parliamentary papers setting out details of the interests registered have been published. However, the refusal of one Member to provide information led the Select Committee charged with responsibility for oversight of the register to decline to continue to publish it until the House made compliance mandatory.<sup>35</sup> This has not happened, and the register has not been published since May 1976, although many Members have continued to update their own entries.

#### *Papua New Guinea*

**51.** The Leadership Code of Papua New Guinea is set out in the *Organic Law on the Duties and Responsibilities of Leadership* 1975. Leaders, that is national elected officeholders and the more senior appointed officeholders, are required to submit to the Ombudsman Commission a very full statement of total assets and sources of income (see Appendix 6, para. 13) for themselves, their spouses and children under 18.

#### *Jamaica*

**52.** In 1969, the Leader of the Opposition in the Jamaican House of Representatives proposed legislation to require disclosure of Members' assets and liabilities. A Select Committee was appointed by the House to consider the proposal, but had not reported when the 1972 general election led to a change of government. A non-parliamentary committee then investigated the matter, and its recommendations were embodied in the Parliament (Integrity of Members) Act 1973, which requires extensive disclosure of Members' interests (see Appendix 6, para. 13) and established an Integrity Commission to receive, examine and, as it sees fit, investigate disclosures. Enforcement of the disclosure requirements is through the courts.

## Authorisation

### *Britain*

**53.** Authorisation, as a means of overcoming conflict of interest situations, is not very well documented. Explicit authorisation appears to arise most often in a public service context, where it may be provided for by formal rules. Thus, the British rules

advise any officer who has doubts about accepting gifts to consult his Establishment Officer. The British rules about shareholdings illustrate the close interconnection between disclosure and authorisation:

*Shareholdings by civil servants.* There is no objection to civil servants holding private investments. But, if a shareholding might raise a question of possible conflict with the interests of the officer's department, the officer should consult his Establishment Officer about the desirability of acquiring or retaining it.

Responsibility for deciding the appropriate action in cases of this kind rests with the Permanent Head of the Department, but the Civil Service Department should be consulted in advance wherever it is proposed to allow the acquisition or retention of a controlling shareholding.<sup>37</sup>

The rules relating to acceptance of outside business appointments by former civil servants provide another British example. Those considering applications may recommend refusal, or unqualified approval, or approval subject to conditions which are suggested in the rules.<sup>38</sup>

#### *United States of America*

**54.** Public negotiations conducted in the United States between presidential nominees and Congressional committees scrutinising their appointments provide an example where authorisation is only conditional. Thus, the Armed Services Committee authorised a nominee for Deputy Secretary of Defense, Mr David Packard, to retain his substantial block of shares in the Hewlett-Packard Company subject to conditions about the disposition of income, capital gains and retirement rights.<sup>39</sup>

#### *Canada*

**55.** A non-public-service example of authorisation is provided by the Canadian Independence of Parliament Bill. Clause 3 prohibits Members from participating in government contracts or government-regulated activities. However, Clause 10 allows either House or a designated committee of that House to authorise one of its Members to engage in activities otherwise prohibited under Clause 3, where it 'considers it just and equitable to do so'. However, a record of the authorisation must be placed on the register of Members' interests and the Member concerned must give details of any such activities in his disclosure.

**56.** The extent to which authorisation interacts with other measures is illustrated by the Manual of Administration of the province of Ontario, which requires public servants to disclose to their departmental heads any possible conflict of interest, even though marginal. It gives the departmental head authority to determine the course of action required to resolve any conflict disclosed to him. The options which may be exercised by him are an instruction to the public servant to divest the outside interest, or transfer it to 'a neutral third party'; transfer of the public servant; publicising the potential conflict; temporary removal of the public servant in question; having the the public servant's decisions checked by a superior; accepting the resignation of the public servant; or deciding that there is no conflict with the 'best interests of the Crown'.<sup>40</sup>

## **Divestment**

#### *United States of America*

**57.** Divestment of assets has developed mainly in North America. In the United States, the starting point has been that the holding of sensitive assets by government employees may be prohibited. But, apart from this restriction, employees are free to

engage in lawful financial transactions to the same extent as private citizens. Agencies may, however, further restrict such transactions in the light of the special circumstances of their individual responsibilities.<sup>41</sup>

58. The practice of requiring divestment by presidential nominees begins with the first appointment to President Eisenhower's administration.<sup>42</sup> In recent years the emphasis in the United States has shifted from divestment to disclosure, at least partly, it appears, as a result of fears that certain able people would not be prepared to accept public office if they were required to divest.

60. In North America, the blind trust has also been advanced as a mechanism for resolving conflict of interest problems. Suitable persons will not be dissuaded from public office, it is said, if there is no need for them to dispose permanently of their interests. Once in office, if their interests are in a blind trust, they will not have to excuse themselves from considering matters in which they have an interest. Moreover, when they act there cannot be accusations that they have done so in a conflict of interest situation.

61. The first reference to blind trusts in the United States appears to have been in 1958, when Mr John McCone was nominated as Chairman of the Atomic Energy Commission.<sup>43</sup> In 1961, Mr Robert McNamara's nomination as Secretary of State for Defense was accepted on the basis that he sell some shares and set up a blind trust for the remainder. Similarly, when Mr David Packard was nominated as Deputy Secretary of Defense in 1969, the Senate Armed Services Committee approved the nomination on the basis that he establish a trust. The Committee apparently accepted that, if he divested himself of his large shareholding in the firm he co-founded, the market would have been depressed and financial hardship to others would have resulted.

62. However, there was considerable criticism of this decision on the basis that, for twenty years, the Senate Armed Services Committee had invariably demanded that high Pentagon officials must divest themselves of stock in any company doing more than \$10 000 worth of business with the Department if they were to be confirmed. For this reason, Mr Charles Wilson, Secretary of Defense in the Eisenhower Administration, was forced to sell \$2.7m worth of shares in General Motors, and McNamara sold \$1.1m worth of Ford shares. In other words, the accusation in the Packard case was that Packard was being treated more leniently than others; clearly a blind trust is less onerous than being required to dispose of an interest. Moreover, it was said that the trust was not really 'blind'—the trustee was not expected to sell the \$300m worth of shares Packard had in Hewlett-Packard.<sup>44</sup>

63. Apart from members of the executive, a few members of the Congress have established blind trusts.<sup>45</sup>

64. The rules for divestment announced by President Carter on his assumption of office were quite elaborate. Persons nominated to senior posts were required to divest financial interests which, under section 208 of Title 18 of the United States Code, would disqualify them 'more than rarely' from acting. That section prohibits an officer or employee from participating 'personally and substantially' in a decision or rendering advice in a matter in which he, his immediate family or an organisation with which he has a connection has a financial interest, unless either the interest has been disclosed, and authorisation granted, on the ground that the interest is not so substantial as to be likely to affect his integrity, or there is a general rule exempting the financial interest from disclosure. Persons nominated to senior posts are also



required to divest assets or liabilities which might 'be broadly affected by governmental monetary and budgetary policies', except for realty, government securities and diversified holdings, for example a holding of less than 1 per cent in a well-diversified mutual fund, or diversified assets of a total approximate value of not more than \$500 000. Persons nominated for less senior posts should divest if the disqualification would 'seriously impair the capability of the officer to perform the duties of the office to which nominated'. A blind trust would constitute sufficient divestment.<sup>46</sup>

**65.** Aspects of the Carter Administration's policy on divestment and blind trusts are incorporated in the Ethics in Government Act of 1978. The current Congressional rules, which appear to have been only partially superseded by the Ethics in Government Act, are directed towards disclosure rather than divestment.

**66.** The 1977 Obey report held that far more serious conflicts of interest arose for legislators from business and professional connections than from asset holdings. These lead, it said, to practices ranging from overt attempts to curry favour by private groups to subtle distortions in the judgment of Members on particular issues. It continued:

For example, if a Member receives \$10 000 from stock dividends from a company, there is far less of a potential conflict of interest than if a company pays a Member \$10 000 as a director's fee or in the form of honoraria over a period of years.<sup>47</sup>

**67.** Following the recommendations of the Obey Commission, the House of Representatives adopted a Resolution that no Member can have outside earned income which exceeds 15 per cent of aggregate salary. The definition of outside earned, as opposed to unearned, income was wide. In the case of a Member engaged in a trade or business in which the Member or his family held a controlling interest and in which both personal services and capital were income-producing factors, the definition did not include 'any amount received by such Member so long as the personal services actually rendered by the Member in the trade or business do not generate a significant amount of income'.<sup>48</sup>

**68.** The Senate adopted a similar 15 per cent limit on outside income, although the exemption for family enterprises applied only if the services provided did not consume significant amounts of time when the Senate was in session, and were necessary to protect the Senator's interests in the enterprise.<sup>49</sup>

**69.** As stated in paragraph 64, public servants are prohibited by statute from participating personally and substantially in a matter in which they know that they have a financial interest unless they make full disclosure of the interest beforehand and receive written authorisation from a supervisor. Clearly a public servant would divest if he was constantly obliged to disqualify himself, although the words 'to his knowledge' in the statute appear to imply that a blind trust avoids infringement of the legislation.<sup>50</sup>

**70.** Legislation applying to particular agencies may contain prohibitions on the ownership of shares. For example, members of the Civil Aeronautics Board must not have any pecuniary interest in or own shares or bonds in any civil aeronautics enterprise.<sup>51</sup> Similar provisions apply to certain staff of the Department of Agriculture and to the directors and members of the United States Geological Survey.<sup>52</sup> Employees of the Federal Reserve Board are forbidden, under Federal Reserve regulations, to hold shares in a bank, a bank affiliate or a government security dealer, and must not engage in speculative dealings (as distinguished from investments) in securities, commodities, real estate, exchange, or otherwise.<sup>53</sup>

## *Canada*

71. In 1973, the Canadian Prime Minister announced in Parliament that he had laid down guidelines offering his Ministers the choice between divesting and placing in trust their business holdings, especially those which could be directly affected in value by government decisions. Either a blind trust or a frozen trust was acceptable but Ministers were urged to select a trustee who could be seen to be at arm's length from the Minister in the management of the trust. A further option, disclosure to a registrar, with public access to disclosures, might be used for property not easily affected by government decisions, such as real property.<sup>54</sup>

## Disqualification

### *Britain*

72. Disqualification as a means of resolving conflict of interest situations is illustrated by an extract from the British rules relating to the handling of government contracts:

An officer who comes into official contact with any matter concerning a business organisation in which he has an interest must disclose his interest to the Permanent Head of Department and ask that some other officer may deal with the matter.<sup>55</sup>

73. Apart from such formal requirements, the Committee has had little opportunity to appraise how such provisions work in other countries, but it expects that the simplicity and obviousness of the option renders comparative material less valuable than for other options.

## Machinery for dealing with conflict of interest cases

### *Britain*

74. In a number of countries, various special arrangements have been developed to deal with serious allegations of impropriety in public affairs. The British experience was discussed in 1966 by the Royal Commission on Tribunals of Inquiry.<sup>56</sup> The Royal Commission contrasted the general public dissatisfaction with the inquiry into the Marconi Affair by a Select Committee of Parliament, which divided on party lines, with the high regard in which the earlier Parnell Commission had been held. That Commission had been constituted under its own legislation, the Special Commission Act 1888, which provided the precedent for the Tribunals of Inquiry (Evidence) Act 1921.

75. The latter Act was passed to provide for, in the first instance, an investigation of allegations made by a Member of Parliament against officials of the Ministry of Munitions. The nature, powers and functions of Tribunals established under the Act are summarised in paragraphs 12.31 and 12.32 of the Committee's report.

76. The special importance of tribunals set up under the provisions of the Act is demonstrated by the sparing use made of them. From 1921 to 1977 only twenty tribunals were appointed. Four of these investigations resembled the conflict of interest situations with which this Committee has been concerned:

- 1936—leak of Budget secrets;
- 1948—bribery of Ministers and civil servants;
- 1957—disclosure of information relating to the raising of the Bank Rate;
- 1971—leak of official information about an insurance company and the circumstances of the company's collapse.<sup>57</sup>

### *United States of America*

77. The use in the United States of Congressional committees to investigate allegations of public misconduct has been referred to in paragraphs 12.33 and 12.34 of the Committee's report. In this connection, it may be noted that several members of Congress were charged with unethical or illegal behaviour during 1978. Some of these charges resulted from the House Committee on Standards of Official Conduct investigation of official misconduct involving cash contributions from South Korean agents. Three Members were charged with a violation of the House Code of Conduct and were reprimanded by the House of Representatives.<sup>58</sup>

### *India*

78. In India, the Lokpal Bill 1977 proposed creation of the office of the Lokpal 'to inquire into allegations of misconduct against public men', to be appointed by the President after consultation with the Chief Justice and the two Presiding Officers of Parliament. The Lokpal would be authorised to receive complaints, conduct a preliminary scrutiny of complaints and conduct inquiries, with the powers of a civil court to compel the attendance of witnesses and the production of documents. The Bill was referred to a Parliamentary committee, which, it appears, has not yet reported.

### *Papua New Guinea*

79. In Papua New Guinea, the Ombudsman Commission has the power to declare, in relation to a person or persons or a class of persons to whom the Leadership Code applies, and in relation to any associate of such persons, that certain interests, benefits or property are prohibited interests. A leader who seeks or obtains any prohibited interest is guilty of misconduct in office, unless he has obtained the approval of the Ombudsman Commission. Should the Ombudsman Commission be satisfied that a prima facie case of misconduct in office has been made out against a leader, and that that misconduct merits prosecution, it is required to put the matter before the Public Prosecutor, who decides whether to lay charges against the leader.

80. If the Public Prosecutor lays charges, they are heard by a Tribunal set up for the purpose. The composition of the tribunal varies according to the office held by the leader. In general, the tribunal would consist of either three judges, or alternatively a judge and two senior magistrates. Should the Public Prosecutor decline to refer a matter to a tribunal, or if the Commission considers that he has not acted quickly enough, then the Commission has the right to refer the matter directly to a tribunal. Where a case is referred to a tribunal, the law provides that the leader concerned is suspended from duty on full pay.<sup>59</sup>

### Post-separation employment

81. The Public Service Board's background paper *Acceptance of Business Appointments by Public Servants on Retirement or Resignation*, submitted to the Royal Commission on Australian Government Administration in 1975, included a description of the then practice of overseas public services in relation to the acceptance of business appointments on retirement or resignation.<sup>60</sup> The British practice has subsequently been amended and in March 1977 the President proposed some minor changes to the United States rules, which were incorporated in the Ethics in Government Act of 1978.

82. In its submission to this Committee, the Board noted that essentially only two countries surveyed in the background paper, Britain and Japan, rely on administrative or legislative procedures to regulate acceptance of business appointments by

public servants. The United States relies on legislative sanctions to regulate the conduct of former officials in some areas after separation, but does not seek to monitor acceptance of appointments in advance. Other countries surveyed, Canada, New Zealand, Republic of Ireland, Sweden and Switzerland, rely on tradition and convention in much the same way as is currently the case in the Commonwealth and State public services in Australia.

### *Britain*

**83.** In summary, the British rules require that all officials, civil and military, above specified levels or ranks should obtain prior approval from the Government before accepting a business appointment with specified categories of firms or agencies up to two years from retirement or resignation. A decision on the acceptance of a given appointment may be made by the Prime Minister after report by an advisory committee, or by the Minister in charge of the officer's department. Ministers may delegate decisions to departmental heads in specified categories of cases.

**84.** The Eleventh Report from the House of Commons Expenditure Committee 1976-77 noted that there was no legal sanction whatsoever to enforce the existing rules on post-separation employment. That Committee suggested that there should be a contractual relationship requiring individuals to abide by the rules or, if necessary, legislation which might penalise companies which appoint ex-civil-servants from specified jobs without obtaining the concurrence of the Government.<sup>61</sup>

**85.** The 1978 British white paper on the Civil Service subsequently noted that:

The Government are advised that agreements which restrict the right of an individual to take up employment are normally invalid as being in restraint of trade, and that it cannot be said that a contractual condition requiring a civil servant to obtain the Government's assent before taking up new employment falls within any of the recognised exceptions. Furthermore, even if it did, enforcement would often be impracticable if the person concerned had already entered into a contract of employment with a new employer. Legislation would therefore seem to be necessary before an effective legal obligation could be imposed on an officer to obtain such assent.<sup>62</sup>

**86.** On 20 November 1962, the then Prime Minister, Mr Macmillan, was asked if he would consider introducing legislation prohibiting Ministers from moving to executive positions in industry and commerce during a specified period. In replying to this and a related Question he said:

I do not think that such legislation would be wise or necessary . . . I think that it is desirable and beneficial to the country that men of considerable experience should be available, when they leave the Government, to the service of industry and commerce.<sup>63</sup>

**87.** On 20 June 1968, the then Prime Minister, Mr Wilson, when asked whether he would seek to require a minimum period of four years to elapse before Ministers took up appointments in commercial concerns with which they or their departments had had administrative relations, replied:

No. I think that these matters are better left to the discretion and good sense of the individuals concerned.<sup>64</sup>

### *Japan*

**88.** Practice in Japan is described in the Public Service Board's background paper to the Royal Commission on Australian Government Administration. In summary,

the Japanese National Personnel Authority is responsible for administering Article 103 of the National Public Service Law, which states that:

Personnel are hereby prohibited for a period of two years after leaving the service from accepting or serving in a position with a profit-making enterprise which involves a close connection with any agency of the State defined by rule of the Authority with which such persons were formerly employed within five years prior to separation from the Service.

The Personnel Authority has discretion to determine the relevance of previous employment history in the Public Service in such cases, and is required to report to the Diet and the Cabinet on cases in which it has approved acceptance of a business appointment by an ex-public servant on separation.

### *United States of America*

**89.** In 1872, legislation was introduced by Representative Garfield (later President) which forbade an employee of an executive department from acting as counsel, attorney or agent in the prosecution of claims pending in his former department while he was in office, for a period of two years after he had left. However no penalty was attached.<sup>65</sup>

**90.** In 1944, new legislation (subsequently incorporated in the federal criminal code in 1948) repeated the two-year prohibition, but covered all agencies, not merely departments, extended past 'pending' claims to any case where there was a relationship between the officer's duties and the claim, and introduced a criminal penalty.<sup>66</sup> Its scope was restricted by a United States Federal Court in *United States v. Bergson* (1954) to claims seeking recovery of money or property from the government.<sup>67</sup>

**91.** The 1951 Report of the United States Senate Sub-Committee on Labor and Public Welfare (Chairman, Senator P. H. Douglas) discussed the matter of public employees accepting business appointments upon retirement or resignation. The report, *Ethical Standards in Government*, viewed the possibility of compromise of impartiality as highly undesirable and made a number of recommendations, including a two-year time lapse between leaving government employment and taking up work in a firm with which the person has had dealings as a public employee.<sup>68</sup>

**92.** In 1962, the relevant sections of the United States Code were substantially revised. Section 207 of Title 18, which replaced the earlier provisions, contained restrictions on the post-separation activities of former officers or employees of the executive branch, the independent agencies or the District of Columbia.<sup>69</sup> In summary, these provided:

- a former official of the executive or an independent agency might not knowingly act as agent or attorney for anyone in connection with any judicial or other proceeding, application, contract, claim or other matter involving specific parties in which the government had an interest and in which he participated personally and substantially when an official;
- for one year after leaving the government, a former official might not appear personally as agent or attorney before any court, department or agency in connection with any such matter in which the government had an interest and which was under his official responsibility within the year prior to his leaving government; and
- former partners of someone who was then an official could not act as agent or attorney in connection with any matter in which the government had an interest and in which the official had participated personally and substantially or which was the subject of his official responsibility.

**93.** In March 1977, the President proposed that the one-year prohibition should be extended to two years and that the type and extent of prohibited contacts with an official's former department should be extended. The Ethics in Government Act of 1978 amended the rules relating to post-separation employment. These provisions, which are due to come into force from 1 July 1979:

- prohibit former executive branch, independent agency or District of Columbia employees from representing anyone before their former agencies in connection with any proceeding, investigation or other matter that the former employees personally and substantially participated in while working for the government;
- prohibit former government employees from appearing before a federal agency for two years on matters that were under their official responsibility before leaving the government;
- prohibit former officials above a specified status who have significant decision-making or supervisory authority and high ranking military officers from representing anyone, formally or informally, in any matter pending before their former agency for one year after leaving government;
- authorise the director of the Office of Government Ethics to apply the one-year ban to other former officials not covered by the Act;
- set the maximum penalties for violation of the permanent, one- and two-year bans at \$10 000 and two years in prison;
- provide that former employees may provide information to their former agencies about an area in which they have special knowledge, as long as they receive no compensation other than that normally paid to witnesses;
- provide that, in lieu of criminal penalties against a former employee who violates any of the bans on contact, a department or agency head may take disciplinary action against him, including barring any business communication between the former employee and the agency for five years; and
- exempt from the conflict of interest provisions persons who left government prior to 1 July 1979.<sup>70</sup>

**94.** In addition to the provisions described in paragraph 92, there are specific provisions in other legislation. For example, under the Federal Deposit Insurance Act, members of the Board of Directors of the Federal Deposit Insurance Corporation are restricted from immediately joining the banks they have regulated.<sup>71</sup>

#### *Canada*

**95.** Until 1976, there were no legislative provisions or formal rules on this matter applicable to Canadian public officeholders. In 1976, the Canadian Government adopted rules respecting the commercial activities of public officeholders designed to counter post-employment practices considered by the Government to be undesirable.

**96.** The rules or guidelines applied to all officeholders including Ministers, Parliamentary Secretaries, Governor-in-Council appointees, public servants and exempt staff at the executive equivalent level or above. Junior officials in sensitive positions were also required to comply with the guidelines.

**97.** In 1977, the guidelines were amended to correct minor weaknesses which had come to notice. Modifications were made to the guidelines applying to employment and commercial activities of former holders of public office. In summary, the guidelines, which came into effect on 1 January 1978, require current and former holders

of public office to observe certain principles to ensure that their actions do not cast doubt on the objectivity and impartiality of government service; that current officeholders should not allow themselves to be influenced by plans for, or offers of, outside employment; that officeholders should disclose all serious offers of positions outside government service and any job offer under serious consideration or accepted.

**98.** Former officeholders are requested not to engage in outside employment of certain kinds for a 'cooling off' period of two years to six months, depending on the nature of public office and of the type of subsequent employment. Advisory committees were established to determine the application of the guidelines in particular cases or for particular categories of officeholder and to grant exemptions where desirable.





## Redcliffe-Maud proposed local government rules of conduct (1974)

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### The National Code of Local Government Conduct

This Code is an authoritative guide for all councillors elected or co-opted to local authorities in England, Wales and Scotland. It supplements both the law enacted by Parliament and the standing orders made by individual councils.

#### 1. *Law, Standing Orders and National Code*

Make sure that you fully understand the rules of conduct which the law, standing orders and the national code require you to follow. It is your personal responsibility to apply their requirements on every relevant occasion. Seek any advice about them that you need from your council's senior officer.

#### 2. *Public duty and private interest*

- (i) Your over-riding duty as a councillor is to the whole local community.
- (ii) You have a special duty to your own constituents, including those who did not vote for you.
- (iii) Whenever you have a private or personal interest in any question which councillors have to decide, you must not do anything to let that interest influence the decision.
- (iv) Do nothing as a councillor which you could not justify if it became public.
- (v) The reputation of your council, and of your party if you belong to one, depends on your conduct and what the public believes about your conduct.

#### 3. *Disclosure of pecuniary and other interests*

- (i) The law makes specific provision requiring you to disclose pecuniary interests, direct and indirect. But interests which are not pecuniary can be just as important. Kinship, friendship, membership of an association, society, or trade union, trusteeship and many other kinds of relationship can sometimes influence your judgment or give the impression that they might do so. A good test is to ask yourself whether others would think the interest close enough to influence someone in your position. If you think they would, or if you are in doubt, treat the interest as if it were a pecuniary one, disclose it and withdraw from the meeting.
- (ii) You must follow the principles about disclosure of interest in your unofficial relations with other councillors—at party group meetings, or other informal occasions and in casual conversation—no less scrupulously than at formal meetings of the council, its committees and sub-committees.

#### 4. *Membership and Chairmanship of Council Committees and Sub-committees*

- (i) You, or some firm or body with which you are personally connected, may have professional business or personal interests within the area for which the council is responsible, and such interests may be closely related to the work of one or more of the council's committees or sub-committees, concerned (say) with planning or developing land, council housing or the letting of contracts for supplies, services or works. Before seeking or accepting membership of any such committee or sub-committee, you should seriously consider whether your membership would involve you (a) in disclosing an interest so often that you could be of little value to the committee or sub-committee, or (b) in weakening public confidence in the impartiality of the committee or sub-committee.

- (ii) You should not seek or accept the chairmanship of a committee or sub-committee whose business is closely related to a personal interest of yourself or of any body with which you are associated.

#### 5. *Councillors and officers*

- (i) Both councillors and officers are servants of the public, and they are indispensable to one another. But their responsibilities are distinct. Councillors are responsible to the electorate and serve only so long as their term of office lasts. Officers are responsible to the council and are permanently appointed. An officer's job is to give advice to councillors and to carry out the council's work under the direction and control of councillors.
- (ii) Mutual respect between councillors and officers is essential to good local government. Close personal familiarity between individual councillor and officer can damage this relationship and prove embarrassing to other councillors and officers.
- (iii) If you are called upon to take part in appointing an officer, the only question you should consider is which candidate would best serve the whole council. You should not let your personal or political preferences influence your judgment. You should not canvass the support of colleagues for any candidate and you should resist any attempt by others to canvass yours.

#### 6. *Use of confidential information*

As a councillor you necessarily acquire much information that has not yet been made public. You should not normally reveal such information to anyone outside the council's membership or staff. It is a grave betrayal of trust to use confidential information for the personal advantage of yourself or of anyone known to you.

#### 7. *Gifts and hospitality*

Treat with extreme caution any offer or gift, favour or hospitality that is made to you personally by any person or organisation that is doing or seeking to do business with the council or is applying to the council for any planning or other kind of decision. Working lunches and other social occasions arranged or authorised by the council or by one of its committees or sub-committees may be a proper way of doing business, provided that no extravagance is involved. Nor can there be any hard and fast rule about acceptance or refusal of tokens of good will on special occasions. But you are personally responsible for all such decisions and for avoiding the risk of damage to public confidence in local government.

#### 8. *Use of allowances*

Observe scrupulously the rules entitling you to claim

- (a) allowances for performing 'approved duty' as a councillor and
- (b) repayment of expenses incurred for travel and subsistence while doing business on the council's behalf.

#### 9. *Use of council facilities*

Make sure that any facilities—such as transport, stationery, or secretarial services—provided by the council for your use in your official duties are used strictly for those duties and for no other purpose.

## Churchill ministerial code (1952)

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- (1) It is a principle of public life that Ministers must so order their affairs that no conflict arises, or appears to arise, between their private interests and their public duties.
- (2) Such a conflict may arise if a Minister takes an active part in any undertaking which may have contractual or other relations with a Government Department, more particularly with his own Department. It may arise, not only if the Minister has a financial interest in such an undertaking, but also if he is actively associated with any body, even of a philanthropic character, which might have negotiations or other dealings with the Government or be involved in disputes with it. Furthermore Ministers should be free to give full attention to their official duties, and they should not engage in other activities which might be thought to distract their attention from those duties.
- (3) Each Minister must decide for himself how these principles apply to him. Over much of the field, as is shown below, there are established precedents; but in any case of doubt the Prime Minister of the day must be the final judge, and Ministers should submit any such case to him for his direction.
- (4) Where it is proper for a Minister to retain any private interest, it is the rule that he should declare that interest to his colleagues if they have to discuss public business in any way affecting it, and that he should entirely detach himself from the consideration of that business.
- (5) Ministers include all members of the Government except unpaid Assistant Government Whips.

### *Directorships*

- (6) Ministers must on assuming office resign any directorships which they may hold, whether in public or in private companies and whether the directorship carries remuneration or is honorary. The only exception to this rule is that directorships in private companies established for the maintenance of private family estates, and only incidentally concerned in trading, may be retained subject to this reservation—that if at any time the Minister feels that conflict is likely to arise between this private interest and his public duty, he should even in those cases divest himself of his directorship. Directorships or offices held in connection with philanthropic undertakings should also be resigned if there is any risk of conflict arising between the interests of the undertakings and the Government.

### *Shareholdings*

- (7) Ministers cannot be expected, on assuming office, to dispose of all their investments. But if a Minister holds a controlling interest in any company considerations arise which are not unlike those governing the holding of directorships and, if there is any danger of a conflict of interest, the right course is for the Minister to divest himself of his controlling interest in the company. There may also be exceptional cases where, even though no controlling interest is involved, the actual holding of particular shares in concerns closely associated with a Minister's own Department may create the danger of a conflict of interest. Where a Minister considers this to be the case, he should divest himself of the holding.
- (8) Ministers should scrupulously avoid speculative investments in securities about which they have, or may be thought to have, early or confidential information likely to affect the price of those securities.

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# Recent Australian experience at the Commonwealth level in regulating conflicts of interest

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1. This appendix provides a brief survey of the steps which have been made in Australia at the Commonwealth level to regulate conflict of interest. It sets out both an outline of current practice, which does not seek to be exhaustive, and details of significant recent developments or proposals.

## Members of Parliament

### *Constitutional provisions*

2. The Constitutional provisions relating to Members of the Commonwealth Parliament holding offices of profit, s. 44 (iv), being government contractors, s. 44 (v), or taking fees or honoraria for services rendered to the Commonwealth or in Parliament, s. 45 (iii), were discussed extensively in Chapter 7.<sup>1</sup>

### *Parliamentary Standing Orders*

3. In addition to the above Constitutional provisions, the pecuniary interests of Members of the House of Representatives are governed by precedent and practice evolved under Standing Orders 196 and 326 and the practice of the British House of Commons as provided in House of Representatives Standing Order 1.

4. Standing Order 196, the text of which was set out at para. 5.17 and which was discussed in Chapter 7, prohibits a Member of the House from voting 'in any division upon a question in which he has a direct pecuniary interest not held in common with the rest of the subjects of the Crown'. This Standing Order follows the rule of the House of Commons, which derives from a ruling by Mr Speaker Abbott on 17 July 1811 (see Appendix 3, paras 19 to 21).

5. There have been several challenges to the right of individual Members to vote in the House of Representatives on the ground of pecuniary interest and, in each case, the motion was negatived or ruled out of order. The positions taken by various Speakers of the House of Representatives in interpreting the provisions of the Standing Order may be summarised:

- the Standing Order does not apply to questions of public policy or to public questions at all<sup>2</sup>;
- the inclusion in the Standing Order of the words 'not held in common with the rest of the subjects of the Crown' determines the issue whether Members are in order in recording a vote if they may benefit from the distribution of money raised under the relevant legislation<sup>3</sup>;
- the interest held must be personal and immediate, not merely general and remote; if a Member is simply one of a class holding an interest, his vote would not be disallowed<sup>4</sup>;

- a financial interest in the ownership of a commercial enterprise held jointly and severally with other persons does not affect the entitlement of a Member to vote on a related measure before the House<sup>5</sup>;
- a Member who is financially interested in a Bill, other than as a shareholder in the concern under discussion, should declare his interest<sup>6</sup>;
- the Speaker cannot have a knowledge of the private business of Members and therefore cannot know whether certain Members have or have not an interest in a Bill<sup>7</sup>; and
- the practice of both the Australian and the British Parliaments is that the Speaker should not rule on whether a Member's vote in a division should be disqualified or disallowed, although the Speaker may participate in debate to set out the precedents involved. Rather, such questions are for the House to determine, as a matter of privilege, on a substantive motion by the Member who raises the issue.<sup>8</sup>

There is no comparable Standing Order of the Senate under which the right of a Senator to vote may be challenged on the ground of pecuniary interest.<sup>9</sup>

6. Standing Order 326 of the House of Representatives and the equivalent Senate Standing Order, 292, which deal with the committee service of Members who have a 'personal interest' in the committee's work, were discussed in Chapter 7 of the main report.

7. Other than the above, there appear to be no requirements in relation to conflict of interest matters applying to ordinary Members. For example, there is no bar on Members undertaking private employment, such as continuing to practise as lawyers, in addition to carrying out their parliamentary duties. Nor are there any rules in relation to the acceptance of gifts, hospitality or travel, nor to post-separation employment. As discussed in Chapter 14, the law in relation to bribery by Members of Parliament is also unclear.

#### *Recent developments*

8. There have been several important recent developments relating to the regulation of conflict of interest involving Members of the Commonwealth Parliament.

9. In 1973, the Australian Labor Party adopted a new item in its platform that all Ministers and Members should table statutory declarations in their Parliaments stating the directorships and shares they held in companies, including shares held in trust for them.<sup>10</sup>

10. Following the inclusion of this item in the Labor platform, the then Special Minister of State introduced a motion in the House of Representatives on 1 August 1974 that the House be of the opinion that:

- (a) in any debate or proceeding of the House or its committees or transactions or communications which a Member may have with other Members or with Ministers or servants of the Crown, he should disclose any relevant pecuniary interest or benefit of whatever nature, whether direct or indirect, that he may have had, may have or may be expecting to have;
- (b) every Member of the House of Representatives should furnish to the Clerk of the House of Representatives such particulars of his pecuniary interests, supported by statutory declaration, as shall be required, and shall notify to



the Clerk any alterations which may occur therein, and the Clerk shall cause these particulars to be entered in a Register of Members' Interests which shall be available for inspection by the public; and

- (c) a Joint Committee be appointed to inquire into and report on what arrangements need to be made to give effect to the above principles.<sup>11</sup>

Debate on the resolution was adjourned and the resolution subsequently lapsed.

**11.** On 31 October 1974, by a separate resolution, the Joint Committee on Pecuniary Interests of Members of Parliament was established, under the chairmanship of the Hon. J. M. Riordan, M.P. The Joint Committee was required, by its terms of reference:

to inquire into and report whether arrangements should be made relative to the declaration of the interests of the Members of Parliament and the registration thereof, and, in particular:

- (a) what classes of pecuniary interest or other benefit are to be disclosed;
- (b) how the register should be compiled and maintained and what arrangements should be made for public access thereto; and
- (c) what classes of person (if any) other than Members of the Parliament ought to be required to register; and to make recommendations upon these and any other matters which are relevant to the implementation of the said resolution.<sup>12</sup>

The Committee's report, which was tabled on 30 September 1975, covered Members of Parliament, Ministers, ministerial staff, the media, public servants and employees of statutory instrumentalities.

**12.** Notice of motion was given in the House of Representatives on 6 November 1975 of a resolution seeking to implement by Joint Standing Orders those recommendations relating to the establishment of a register for Members, the holding of shares and directorships by Ministers, disclosure by staff of Ministers and shadow Ministers, and the media. It also proposed the setting up of a Joint Standing Committee on Pecuniary Interests, with power to supervise generally the operation of the register of pecuniary interests, the media register and to modify, on the authority of both Houses of the Parliament, the disclosure requirements set out in the resolution. In addition, the Committee was to have power:

- (a) to draft a Code of Conduct based on standing orders, conventions, practices and rulings of the Presiding Officers of the Australian and United Kingdom Parliaments and such other guidelines as it may consider appropriate;
- (b) to supervise the Code of Conduct agreed to by both Houses of the Parliament; and
- (c) to act during recess, and to send for persons, papers and records.<sup>13</sup>

The notice of motion lapsed upon the dissolution of both Houses on 11 November 1975. A similar motion was placed on notice on 18 February 1976, but lapsed upon the dissolution of the House of Representatives in 1977.<sup>14</sup>

**13.** On 18 February 1976, Prime Minister Fraser told the House of Representatives that the Government had not finally determined its attitude on the report of the Joint Committee on Pecuniary Interests of Members of Parliament. However, all Ministers had been asked to make declarations to him, and recommendations of the Committee were taken into account in formulating that requirement.<sup>15</sup> Similar requirements had also been imposed on ministerial staff. Subsequently, on 16 August 1977, he tabled the text of the letter to Ministers in which he had set out those requirements, and stated that an interdepartmental committee was considering the recommendations of the Royal Commission on Australian Government Administration in relation to

registration of interests by public servants, along with those of the Joint Parliamentary Committee, to see to what extent they were compatible ‘. . . so that the Government may be in a position to make a decision on the overall question of pecuniary interests in relation not only to parliamentarians but also to public servants’.<sup>16</sup> It is understood, however, that the committee lapsed on the establishment by the Government of this Committee of Inquiry.

**14.** The background to and details of the establishment of this Committee of Inquiry were set out in Chapter 1.

## Ministers

**15.** The prohibition upon holding offices of profit under the Crown which applies to Members is removed for Ministers by ss. 44 and 66 of the Constitution and the successive Ministers of State Acts. Section 44 specifically limits the scope of the relevant prohibition by excluding from its scope ‘the office of any of the Queen’s Ministers of State for the Commonwealth’. Section 66 provides for the payment of Ministers from Consolidated Revenue, and the successive Ministers of State Acts have provided the means whereby the Parliament has appropriated moneys for the payment of salaries and allowances of Ministers.

**16.** Evidence available to the Committee on Ministerial practice in Australia focuses on three main issues:

- the holding of directorships by Ministers;
- the right of Ministers to hold shares and engage in share transactions; and
- declaration by Ministers, either of directorships, where permitted, and significant shareholdings to the Prime Minister, or *ad hoc* disclosure of relevant interests, to the Cabinet or to the Prime Minister prior to a Cabinet meeting.

Other themes have been outside employment by Ministers, for example the holding of retainers from outside organisations or acceptance of fees for newspaper articles, subsequent employment of former Ministers, and acceptance of gifts.

### *Holding of directorships by Ministers*

**17.** The practice in relation to the holding of directorships by Ministers is both most clear cut and best documented. There was reference in Parliamentary debates in 1913 to the fact that the then Postmaster-General had resigned his directorship of a private bank on becoming a Minister.<sup>17</sup>

**18.** On 3 November 1938, another Postmaster-General resigned from the Ministry following a question on the House of Representatives Notice Paper concerning his activities as a director of a company which had contracts with his department.<sup>18</sup> The Prime Minister, Mr Lyons, accepted his resignation and on 9 November 1938 made a statement on the issue of the holding of seats on boards of directors by Ministers in those cases not covered by s. 44 of the Constitution.

**19.** The Prime Minister ruled out any total prohibition upon the holding of directorships by Ministers and went on to distinguish companies which had direct dealings with the Government, whether by way of the sale of goods or the provision of services, from companies which had no business dealings with the Government at all. In the first case, ‘it would appear that, prima facie, no Minister should be a director of such a company’. The rule did not apply to arrangements which were technically contracts, which were made on a non-selective or non-discriminatory basis. However, as soon

as the slightest element of judgment or choice was involved in the placing of government business, no Minister should be a director of a company which was the recipient of that business. In the second case, he did not regard the holding of a directorship as inconsistent with membership of Cabinet.<sup>19</sup>

**20.** In 1949, all members of the Menzies Ministry were required to submit to the Prime Minister a list of directorships held in any company, public or private. There is some evidence that not all Ministers complied, in that one Minister was subsequently revealed to have held a non-active unremunerated directorship while in office.

**21.** In 1950, the Prime Minister indicated, in reply to a parliamentary question, that he had not required Ministers to surrender any directorships held, but that, to his knowledge, no member of the Cabinet was at that time a director of a public company, although 'one or two' Ministers who had private family investments carried on their activities in connection with these.<sup>20</sup>

**22.** Evidence given by former members of Menzies Ministries to the Joint Committee on Pecuniary Interests indicates that there was an understanding that a Minister should not be a director or a partner in a company or a private concern.<sup>21</sup> Ministers were expected to divest themselves of any involvement in any public company that stood in any prospect whatsoever of dealing with the Government.<sup>22</sup>

**23.** Practice under the Holt Government was stated by the Prime Minister in answer to a parliamentary question in 1967. In his experience, very few directorships were held by Ministers of the Crown and each Minister acted in accordance with his own sense of judgment and responsibility in such matters.<sup>23</sup>

**24.** Under the Gorton Ministries, the Cabinet recognised the convention that Ministers should not hold directorships in public companies; directorships in private companies were in a different category and not subject to prohibition, except in so far as a prohibition arose under s. 44 of the Constitution. Ministers gave verbal assurances that they held no directorships in public companies.

**25.** In 1969, the Prime Minister stated, in reply to a question, that he had been assured by all the members of the Ministry that none of them held any directorships in any public company. Some Ministers held directorships in private pastoral companies or small businesses but none of these companies had any dealing with any government department or instrumentality.<sup>24</sup>

**26.** Later, an interpretation was given to Ministers that directorships could be retained in private companies which were principally family companies but not in private companies which were in their operations more akin to public companies, nor in any companies having dealings with the Government or its instrumentalities. In cases of doubt, Ministers were to discuss the matter with the Prime Minister.

**27.** Under the McMahon Ministry, Ministers were referred to s. 44 of the Constitution; they were to resign directorships in public companies; directorships in private companies, principally family concerns, might be retained unless akin to public companies, when they must be resigned. All Ministers were asked to provide written confirmation that they held no directorships contrary to the above. As new members were appointed to the Ministry, they were also asked for written confirmation.

**28.** Under the Whitlam Ministries, the approach taken on this and other conflict of interest issues was in line with that of the McMahon Ministry.<sup>25</sup>

29. The conventions previously agreed to by the McMahon and Whitlam Ministries have also been followed by the Fraser Ministry. These requirements were restated in a letter sent by the Prime Minister to all Ministers on 13 January 1976, which was subsequently tabled in the House of Representatives on 16 August 1977. (Another part of this letter was quoted at para. 8.10 of the main report.)

#### *Shareholdings by Ministers*

30. Evidence given to the Joint Committee on Pecuniary Interests by a former Minister indicated that, under the Menzies Ministries, the matter of shareholdings by individual Ministers was left in general to the 'common sense and the integrity' of individual Ministers. If a Minister intended to engage in a sensitive transaction, such as the purchase of mining shares, it was seen as desirable that he let the Prime Minister know, and the Prime Minister might then object if he wished. However, the rule was that no Minister should buy shares at all when he had access to privileged information not available generally to members of the public.<sup>26</sup> There is evidence that at least one of Prime Minister Menzies's Ministers and his wife were asked to establish blind trusts for their holdings.

31. Under the Gorton Ministries, the issue of shareholdings by Ministers came up several times and a number of principles was established. Firstly, in 1958, in reply to a parliamentary question, the Prime Minister said there was nothing improper in Ministers investing in companies in the ordinary way, and referred to his own small holdings in the Broken Hill Proprietary Company Limited and Canberra Television Pty Ltd.<sup>27</sup> Secondly, Ministers should exercise care in relation to shareholdings which had some relationship to their portfolio. On 4 March 1969, the Prime Minister replied to another parliamentary question, on whether Ministers were permitted to own shares in oil or mineral companies, that there was no prohibition but that the Minister for National Development had divested himself of such shares at great personal sacrifice, because he felt it improper to hold them and remain in that particular portfolio.<sup>28</sup> Thirdly, Ministers should not take up offers of shares which were made on terms more advantageous than those available to members of the public. During the Gorton Ministries, there was a specific offer of shares to Ministers and public servants. It was agreed that Ministers should not take up the offer. In 1970, the Prime Minister stated, in reply to a parliamentary question, that the Government did not believe that offers of shares which might have a capital appreciation as a result of their being taken up ought properly to be taken up by Ministers. Nor should a Minister, when the Government was engaged in particular arrangements with a business, have shareholdings in that business or accept offers which could lead to a capital profit.<sup>29</sup>

32. Under the McMahon Ministry, Ministers were not precluded from operations on the stock market, but were required not to operate as traders and were to exercise discretion; they were not to purchase or hold shares where this could expose them to challenge. Any Minister in any doubt about his position was to discuss it with the Prime Minister.

33. Under the Whitlam Ministries the same approach was taken as under the McMahon Ministry.<sup>30</sup> In 1973, in answer to a parliamentary question, the Prime Minister indicated that he would be disturbed if it was thought that any Ministers avoided the understandings in relation to shareholdings by holding shares in nominee companies or by adopting the device of transferring them to their wives or dependent families.<sup>31</sup>

34. The Fraser Government has again followed the conventions agreed to by the McMahon and Whitlam Ministries, and these were restated in the letter by Mr Fraser to Ministers referred to above.

*Disclosure of interests by Ministers*

35. The existence of a practice of *ad hoc* disclosure in relation to matters coming before the Cabinet was revealed by Prime Minister Holt in an answer to a question without notice in 1967. He stated that, in his experience, when any question arose in the Cabinet and a Minister had a shareholding in a company which could be involved, the practice was for the Minister to declare that to be the case and for the Prime Minister then to be invited to decide whether the shareholding was so substantial or of such a relevant nature that the Minister should withdraw from the discussion.<sup>32</sup>

36. A specific requirement to declare ahead of Cabinet discussion a private interest that might give rise to conflict with public duty was adopted by the McMahon Ministry. On 26 April 1972, the Prime Minister was asked in the Parliament whether he would request members of Cabinet to disclose the shareholdings of themselves and their families in big firms which had enjoyed subsidies, tariff protection or other government support. The Prime Minister replied that, while no Minister should be unreasonably debarred from ordinary rights of ownership of shares or other property by virtue of his position as Minister, it was the practice of Ministers to disclose to Cabinet colleagues any interests likely to colour their judgments.<sup>33</sup>

37. Several examples where *ad hoc* disclosure had occurred at or prior to Cabinet meetings were given in evidence and submissions by Ministers and former Ministers to the Joint Committee on Pecuniary Interests and to this Committee of Inquiry.<sup>34</sup>

38. Under the Whitlam Ministries, the approach taken was in line with that of the McMahon Ministry. It appears that the Prime Minister required his Ministers both to inform him of any shareholdings and also to make *ad hoc* disclosures ahead of any relevant Cabinet discussions. In 1974, the Prime Minister stated, in reply to a parliamentary question, that Ministers had been made aware that it was incumbent upon them, ahead of Cabinet discussions, to declare a private interest that might reasonably be held to give rise to conflict with their public duty.<sup>35</sup> In addition, he indicated in evidence to the Joint Committee on Pecuniary Interests that, in accordance with what he believed was the practice beforehand, he had required all his Ministers to let him know any shareholdings they had.<sup>36</sup> It appears, from a reply supplied by the Prime Minister to a further question, that this requirement took the form of a letter but that an oral declaration of private interests was sufficient.<sup>37</sup>

39. The Fraser Ministries have followed the practices adopted by the McMahon and Whitlam Ministries on this matter. In his letter to Ministers of 13 January 1976, the Prime Minister laid down both a requirement for *ad hoc* disclosure ahead of Cabinet meetings and set down detailed requirements for the written disclosure of the pecuniary interests of Ministers. The relevant extract from this letter was set out at Chapter 8.

*Outside employment or income and Ministers*

40. Debate as to the propriety of Ministers who were lawyers accepting briefs against the Crown antedates Federation. In 1905, Sir Joseph Cook raised in the Parliament the fact that the Government of South Australia had retained Isaac Isaacs, Attorney-General in the Deakin Ministry, and Josiah Symon, who was Attorney-General in a previous ministry, in connection with possible litigation over

the use of the waters of the Murray River. Isaacs, in reply, stated that the Commonwealth was unlikely to be involved in this case, but if it were he certainly would withdraw, nor would he give advice which reflected on the position of the Commonwealth.<sup>38</sup>

41. In 1913, a case arose concerning an admission by the Attorney-General that he had accepted a retainer from a company that was in litigation with the Commonwealth. A motion was moved that Ministers of the Crown should not violate the code of rules laid down by the British Prime Minister, Mr Asquith (see Appendix 3). These rules related to the possible conflict of private pecuniary interest and public duty and the acceptance of favours from those negotiating with the Government. However, the motion was not carried.<sup>39</sup>

42. On 19 August 1971, the question was raised in the House of Representatives whether payments to Ministers of the Crown for writing newspaper articles were in order. In reply, Prime Minister McMahon stated that, in his own case, he had passed on any such payments to his departmental social club or to social organisations in his electorate. His attitude to the retention of payments by Ministers was that he did not like the idea and would not countenance it himself.<sup>40</sup>

43. The Committee is aware of no evidence as to a specific instruction on outside employment or income by Ministers prior to Prime Minister Fraser's letter to Ministers of 13 January 1976. This stated that 'Ministers may not accept retainers or income from personal exertion other than that laid down as their remuneration as Ministers and Members of Parliament'. The letter also required written confirmation by Ministers that they observed this policy.

*Acceptance of gifts, hospitality and travel*

44. Prime Minister Whitlam, in answer to a parliamentary question on 6 November 1975, stated that practice under his Government, which was in line with that of previous Governments, was that Ministers or their wives might retain personal gifts they were given in the course of overseas visits. He indicated that no record was kept of such personal gifts.<sup>41</sup>

45. The current rules relating to the acceptance of gifts by Ministers were stated in the previously mentioned letter by Prime Minister Fraser to Ministers. This letter provided:

Ministers should not accept gifts other than of a token nature. Gifts received on overseas visits are to be declared to the Prime Minister on return. If they are of more than token value they will be valued and Ministers will be given the opportunity to purchase.

In addition, it asked that details be provided of sponsored travel.

46. Further particulars concerning the rules were provided in answers given by the Prime Minister to two Questions on Notice on 8 June 1978.

47. Firstly, in reply to a question as to whether these rules applied to acceptance of offers of overseas travels by a Minister's family, the Prime Minister stated that the guidelines governing the acceptance of gifts by Ministers and their families did not specifically mention offers of free overseas travel. However, it was expected that a Minister would not accept for himself or his family offers of free overseas travel from commercial sources, whether the commercial activities involved were connected directly with the Minister's responsibilities or not.<sup>42</sup>

48. He replied to a second question, seeking details of the number and value of gifts received and observance of the guidelines, by referring to previous practice, as stated by his predecessor in office. He went on to say that, when his Government came to office, new procedures were instituted in relation to gifts. Under these guidelines, significant gifts received by Ministers or their families in the course of their official duties are declared and valued. Where a gift presented by another government is valued at \$250 or a gift from any other source is valued at more than \$100, the gift is surrendered unless the recipient pays the determined valuation. On the matter of disclosing the value of individual gifts or lists of gifts, he stated that he believed that such a practice would breach the rules of courtesy, and that this was also the view of previous governments.<sup>43</sup>

#### *Post-separation employment of Ministers*

49. The Committee is not aware of any guidelines or practices, past or present, concerning the employment of Ministers on ceasing to hold office.

#### Public servants

50. The *Public Service Act* 1922 and regulations contain a number of provisions designed to eliminate the possibility of conflict of interest. These cover such topics as the solicitation or acceptance of gifts (regulation 37), acceptance of fees (s. 91A and regulation 38), outside employment and the holding of directorships (s. 91), borrowing between officers (regulation 39), and misuse or unauthorised disclosure of official information (regulations 34 (a) and 35). Breach of these provisions constitutes misconduct and is subject to disciplinary action under the relevant provisions of the *Public Service Act*.

51. These legal requirements are supplemented by Public Service General Orders and Public Service Board Circulars which set out in more detail Public Service Board policy or instructions in several areas directly relevant to conflict of interest, for example General Order 14/D—Performance of Outside Work.

52. In addition to the general provisions applying to all public servants, departments may issue supplementary instructions on particular issues. For example, the Department of Foreign Affairs has laid down detailed instructions in relation to the acceptance of gifts, hospitality and travel, including inaugural flights, and on the ownership of property in foreign countries.

53. As discussed at Chapter 14, Ministers, public servants and statutory officeholders and the staff of statutory bodies are Commonwealth officers for the purposes of Part VI of the *Crimes Act* 1914 and are therefore subject to its provisions relating to disclosure of official information, s. 70, and bribery, s. 73.

54. The *Secret Commissions Act* 1905 is of particular relevance to officers acting as agents of the Commonwealth or for a department or an authority or an officer of the Commonwealth in arranging contracts. Section 4 relates to the offering and acceptance of gifts or inducements intended as bribes. Section 6 has particular application to public servants involved in Commonwealth procurement who are at the same time shareholders in companies dealing with the Commonwealth. This section provides substantial penalties where an agent engages in a transaction on behalf of his principal (in this case, the Commonwealth or the agent's department) in which he has a personal interest which has not been disclosed to and authorised by his principal.

55. In addition to those recommendations of the Joint Committee on Pecuniary Interests which relate to public servants, there have been several recent developments which relate specifically to public servants.

56. Recommendations in relation to possible conflict of official and personal interests in relation to public servants were made by the Royal Commission on Australian Government Administration, which reported in July 1976. The Royal Commission recommended that a system of registration of declarations of direct and indirect pecuniary interests be developed. It also suggested, as part of a recommendation that the duties of public servants be set out in statute, that such a statute should specifically require that:

- (d) a person employed shall so regulate personal interests and dealings of a kind involving financial gain that they do not conflict or appear to conflict with his or her public duty;
- (e) unless specifically exempted by the minister, a person employed and classified at or above a specified level shall declare any direct or indirect financial interest in a register held by his head of department or statutory authority or, in the case of head of department or statutory authority, held by the Board. The minister shall have access to such a register.<sup>44</sup>

It expressed the view that the establishment of such a register would not make less important the obligation to draw attention to an actual or an apparent conflict when it in fact emerged.

57. Following on the recommendations of the Royal Commission, a subcommittee of the Joint Council of the Australian Public Service, a joint staff-management consultative body established under the Public Service Act, was set up in December 1976 to examine the relationship between official and personal interests and, in particular, current rules relating to outside employment, the acceptance of fees, the holding of offices in public corporations and the holding of paid office in connection with commercial businesses.<sup>45</sup>

58. Subsequently, in 1977, the Government requested the Public Service Board to draw up a set of guidelines on official conduct for Commonwealth public servants and the Board issued a Discussion Paper, *Draft Guidelines on Official Conduct of Commonwealth Public Servants*, in March 1978.<sup>46</sup> This set out in a single document the legal requirements and conventions in areas where public servants may encounter ethical problems in relation to their employment. The document also offered guidelines to appropriate conduct in situations not covered by existing provisions. For example, the Draft Guidelines suggested that public servants had a clear responsibility to make *ad hoc* disclosures of any actual or potential conflict of interest to their Permanent Head. There is no existing legal provision or instruction applying to officers generally which required such disclosure, although the *Secret Commissions Act* 1905 may apply in certain circumstances and some departments have internal instructions requiring disclosure, especially in relation to senior officers.

59. The Joint Council Sub-committee is currently inactive, pending the Government's consideration of a later version of the Draft Guidelines, revised in the light of comments received.

60. It is also understood that the law on corruption as it relates to Commonwealth officials is currently under review by the Attorney-General's Department. The review covers the *Secret Commissions Act* 1905 and those provisions of the Crimes Act, Public Service Act and Regulations, Electoral Act and common law which relate to aspects of corruption.



## Statutory officeholders

**61.** The conduct of statutory office holders in relation to conflict of interest is governed by specific statutory provisions in the legislation establishing such offices, by rules and practices voluntarily adopted by statutory authorities and, to some extent, the common law applying to public officeholders.

**62.** Most, but not all, the legislation establishing statutory authorities which the Committee has examined contains specific provisions relating to conflict of interest. The form such provisions take varies widely. Such provisions may include prohibitions upon the appointment of persons holding certain interests as members, or upon members of the authority entering into contracts with the authority, requirements to declare interests in contracts or in matters under discussion at meetings of the authority, requirements to declare all interests in writing to the Minister; and, in the case of full-time officeholders, restrictions upon engaging in outside employment. One reason for the diversity of provisions appears to be differences in drafting approach at different periods.

**63.** At the time of the Twenty-first and Twenty-second Reports of the Joint Committee of Public Accounts on the Australian Aluminium Production Commission, in 1955, the legislation establishing a number of Commonwealth statutory corporations contained prohibitions upon entering into or participating in any benefit from contracts with the authority, on pain of removal from office.<sup>47</sup> The Joint Committee gave as an example s. 5 (4) of the *Coal Industry Act* 1946, which is still current (see Attachment 1).<sup>48</sup> However, such provisions were not standard in legislation establishing Commonwealth statutory corporations.<sup>49</sup>

**64.** The Joint Committee stated that it had been informed that the stringent requirements in existing legislation such as the *Coal Industry Act*:

have made it difficult always to appoint suitable persons to the boards in question. Men of the calibre and experience required, acting with the scrupulousness that is properly demanded of people in positions of public trust, have been unwilling to accept appointments to boards because of their difficulties in regard to the 'financial interest' provision.<sup>50</sup>

It noted that the *Australian National Airlines Act* 1945 had been amended in 1952 for this reason.

**65.** The Solicitor-General, in an Opinion provided to the Joint Committee dated 11 February 1955, drew attention to s. 5 of the United Kingdom Atomic Energy Authority Act 1954. This provision, which he stated was 'probably based on the rules applicable in ordinary companies', required disclosure of interests in contracts or proposed contracts, followed by disqualification from consideration of that contract.<sup>51</sup>

**66.** The Committee went on to recommend that consideration be given to standardising the provision for the disqualification of members of boards on account of financial interest:

If some statutory provision is considered necessary, then a provision along the lines of the United Kingdom Atomic Energy Authority Act 1954, the most satisfactory of the statutory provisions brought to our notice, should be adopted for all boards.<sup>52</sup>

**67.** The Sixty-seventh Report of the Joint Committee sets out a Treasury Minute dated 20 April 1964, indicating the action which was taken following on the Committee's findings. The Minute stated that the practice at that point was to include a prohibition upon having any interest in or benefiting from any contract with the authority, except as a member of a company with twenty-five or more members, in legislation

setting up authorities consisting of full-time members. In cases where members were not all full time, the practice was to include a provision requiring declaration of interests in contracts, combined with disqualification.<sup>53</sup> A current example of the latter type of provision, which became standard in legislation establishing authorities which conduct meetings, is s. 13 of the *Atomic Energy Act* 1953 (see attachment 1).

**68.** There is some evidence in recent years of the replacement of earlier provisions prohibiting interests in contracts with the authority by requirements for disclosure of interests in contracts. For example, a provision prohibiting interests in contracts or agreements with the authority, which existed in the *Australian National Railways Act* 1917, was replaced in 1975 by a provision requiring declaration of interests in contracts followed by disqualification.<sup>54</sup>

**69.** A change in drafting approach during 1975 has led to a widening of the disclosure requirement inserted in legislation establishing authorities which conduct meetings, to require disclosure of any direct or indirect pecuniary interest in a matter under consideration by the authority. A recent example is s. 18 of the *Commonwealth Legal Aid Commission Act* 1977, the text of which is at Attachment 1. Failure to comply with this provision may lead to removal from office, by virtue of s. 12 (2) (b) of that Act.

**70.** There exist a large number of variations of the older and newer types of 'standard' disclosure clause quoted above. These appear to be the result both of variations in and progressive refinements of drafting approach over the years and of variations requested to meet the circumstances of particular authorities. For example, s. 14 (4) of the *Australian National Airlines Act* 1945 exempts from the general disclosure requirement contracts 'between a Commissioner and the Commission for the carriage of a Commissioner or another person or of any goods'.

**71.** The same factors may explain the occurrence, in a few Acts, of a number of other forms of pecuniary interest clause, for example the prohibition upon the appointment to the authority of persons holding relevant positions or interests in s. 12 (2) of the *Insurance Acts* 1973 and the prohibition upon entering into any contract with Australia found in s. 15 (2) of the *Public Service Act* 1922.

**72.** In addition to such legislative requirements, some statutory authorities have adopted their own rules or procedures relating to conflict of interest. For example, the Australia Council has adopted by resolution a policy statement on conflict of interests. This deals with such matters as receipt of grants by members of the Council or its various Boards, Advisory Panels and Committees and members of staff. The Council is one of several authorities which indicated that it maintained or was establishing an internal register of the relevant interests of its members (see para. 10.15 of the main report).

**73.** In addition to specific statutory requirements, it appears that statutory office-holders may be subject to the common law offence of misbehaviour in public office. This embraces a wide variety of misconduct, including acts done with a dishonest, oppressive or corrupt motive. The Report of the British Royal Commission on Standards of Conduct in Public Life concluded 'that the common law offence has a useful, though small, part to play in the battery of criminal sanctions against malpractice in public life, and that it should be retained'.<sup>55</sup>

**74.** The types of provisions which exist for the staff of statutory authorities were set out in Chapter 10.

**75.** Apart from the developments in drafting practice mentioned above, there have been few significant developments in relation to the conflict of interest provisions applying to statutory officeholders since the 1955 and 1964 Reports of the Joint Committee on Public Accounts. The Joint Committee on Pecuniary Interests of Members of Parliament did not make any recommendations in relation to statutory officeholders, but envisaged that ‘employees of statutory instrumentalities’ should be under ‘no lesser obligation in respect of declarations of interest than are others located in other key constituent parts of the decision-making process of parliamentary democracy’.<sup>56</sup> Heads of statutory authorities were, however, included by the Royal Commission on Australian Government Administration in its recommendations in relation to registration.

**76.** There has occasionally been parliamentary comment on the drafting of such provisions when legislation establishing statutory authorities has been debated.<sup>57</sup> The Senate Standing Committee on Finance and Government Operations is currently examining questions relating to statutory authorities of the Commonwealth.<sup>58</sup>



## Examples of conflict of interest provisions in statutory authority legislation

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### (a) *Coal Industry Act 1946*

5. (4) A member of the Board shall be deemed to have vacated his office if—

- (d) he becomes in any way (otherwise than as a member of the Board) concerned or interested in any contract or agreement entered into by or on behalf of the Board or in any way (otherwise than as a member of the Board) participates or claims to be entitled to participate in the profit thereof, or in any benefit or emolument arising therefrom;

### (b) *Atomic Energy Act 1953*

13. (1) If—

- (d) a member of the Commission fails to comply with his obligations under the next succeeding sub-section,

the Governor-General shall, by notice in the *Gazette*, declare that the office of the member is vacant, and thereupon the office shall be deemed to be vacant.

(2) A member of the Commission who is directly or indirectly interested in a contract made or proposed to be made by the Commission, otherwise than as a member, and in common with the other members, of an incorporated company consisting of not less than twenty-five persons, shall, as soon as possible after the relevant facts have come to his knowledge, disclose the nature of his interest at a meeting of the Commission.

(3) A disclosure under the last preceding sub-section shall be recorded in the minutes of the Commission, and the member of the Commission—

- (a) shall not take part after the disclosure in any deliberation or decision of the Commission with respect to that contract; and
- (b) shall be disregarded for the purpose of constituting a quorum of the Commission for any such deliberation or decision.

### (c) *Commonwealth Legal Aid Commission Act 1977*

18. (1) A Commissioner who has a direct or indirect pecuniary interest in a matter being considered or about to be considered by the Commission, otherwise than as a member of, and in common with the other members of, an incorporated company which consists of more than 25 persons and of which he is not a director, shall, as soon as possible after the relevant facts have come to his knowledge, disclose the nature of his interest at a meeting of the Commission.

(2) A disclosure under sub-section (1) shall be recorded in the minutes of the meeting of the Commission and the Commissioner shall not be present during any deliberation of the Commission with respect to that matter.

1. See also Gareth Evans, 'Pecuniary Interests of Members of Parliament under the Australian Constitution', *Australian Law Journal* 49, 1975, pp. 464–77 and Gareth Evans, Submission and evidence given 15 April 1975, in Australia, Parliament, Joint Committee on Pecuniary Interests of Members of Parliament, *Official Hansard Report*, vol. 2, AGPS, Canberra, 1975, pp. 1570–615.
2. See, for example, Australia, *Parliamentary Debates* 1923, vol. 105, pp. 3380–3: Australia, House of Representatives, *Debates* 1957, vol. 17, pp. 2447–9; 1958, vol. 18, pp. 478–9.
3. Australia, *Parliamentary Debates* 1934, vol. 145, p. 1130.
4. Australia, *Parliamentary Debates* 1923, vol. 105, pp. 3380–3: Australia, House of Representatives, *Debates* 1957, vol. 17, 2447–9.
5. Australia, *Parliamentary Debates* 1948, vol. 200, p. 3470.
6. Australia, *Parliamentary Debates* 1951, vol. 215, pp. 2154–5.
7. Australia, *Parliamentary Debates* 1934, vol. 145, p. 1130: Australia, House of Representatives, *Debates* 1951, vol. 215, pp. 2154–5.
8. Australia, *Parliamentary Debates* 1924, vol. 109, pp. 4334–6.
9. J. R. Odgers, *Australian Senate Practice*, 5th edn, AGPS, Canberra, 1976, p. 283.
10. Australian Labor Party, *Platform, Constitution and Rules as approved by the 30th Federal Conference*, Surfers Paradise, 1973.
11. Australia, House of Representatives, *Debates* 1974, vol. 89, pp. 949–51.
12. Australia, Parliament, *Declaration of Interests: Report of the Joint Committee on Pecuniary Interests of Members of Parliament* (J. M. Riordan, Chairman), AGPS, Canberra, 1975, p. vii.
13. Australia, House of Representatives, *Debates* 1975, vol. 97, pp. 2867–73.
14. Australia, House of Representatives, *Notice Paper*, 1976, No. 2, pp. 12–14 (19 February 1976).
15. Australia, House of Representatives, *Debates* 1976, vol. 98, p. 35.
16. Australia, House of Representatives, *Debates* 1977, vol. 106, pp. 9–10.
17. Australia, *Parliamentary Debates* 1913, vol. 70, pp. 944–1001.
18. Australia, *Parliamentary Debates* 1938, vol. 157, p. 1189.
19. Australia, *Parliamentary Debates* 1938, vol. 157, pp. 1373–4.
20. Australia, *Parliamentary Debates* 1950, vol. 207, pp. 2242–3.
21. Riordan Committee, *Official Hansard Report*, vol. 1, p. 402.
22. Riordan Committee, *Official Hansard Report*, vol. 1, p. 88.
23. Australia, House of Representatives, *Debates* 1967, vol. 54, pp. 593–4.
24. Australia, House of Representatives, *Debates* 1969, vol. 63, p. 2602.
25. David Solomon, *Inside the Australian Parliament*, George Allen and Unwin, Sydney, 1978, pp. 129–30.
26. Riordan Committee, *Official Hansard Report*, vol. 1, p. 402.
27. Australia, House of Representatives, *Debates* 1968, vol. 61, pp. 1989–90.
28. Australia, House of Representatives, *Debates* 1969, vol. 62, p. 324.
29. Australia, House of Representatives, *Debates* 1970, vol. 67, pp. 1562–3.
30. David Solomon, loc. cit.
31. Australia, House of Representatives, *Debates* 1973, vol. 84, p. 2170.
32. Australia, House of Representatives, *Debates* 1967, vol. 54, p. 593.
33. Australia, House of Representatives, *Debates* 1972, vol. 77, p. 2058.
34. Riordan Committee, *Official Hansard Report*, vol. 1, pp. 403, 633, 659–60.
35. Australia, House of Representatives, *Debates* 1974, vol. 91, p. 3389.
36. Riordan Committee, *Official Hansard Report*, vol. 1, pp. 619–20.
37. Australia, Senate, *Debates* 1975, vol. S. 63, pp. 828–9.
38. Australia, *Parliamentary Debates* 1905, vol. 26, pp. 1329–79.
39. Australia, *Parliamentary Debates* 1913, vol. 70, pp. 944–1001.
40. Australia, House of Representatives, *Debates* 1971, vol. 73, p. 297.
41. Australia, House of Representatives, *Debates* 1975, vol. 97, p. 2911.
42. Australia, House of Representatives, *Debates* 1978, No. 11, p. 3348.
43. Australia, House of Representatives, *Debates* 1978, No. 11, p. 3343.
44. Australia, Royal Commission on Australian Government Administration (Dr H. C. Coombs Chairman), *Report*, AGPS, Canberra, 1976, pp. 234–5.
45. Australia, Public Service Board, *Report of the 56th Meeting of the Joint Council of the Australian Public Service: Adelaide, 1 and 2 December 1976*, AGPS, Canberra, 1977; and *Report of the 59th Meeting of the Joint Council of the Australian Public Service: Darwin, 31 May–1 June 1978*, AGPS, Canberra, 1978, pp. 14–15.
46. Australia, Public Service Board, *Discussion Paper: Draft Guidelines on Official Conduct of Commonwealth Public Servants*, Public Service Board, Canberra, 1978.

47. Australia, Parliament, Joint Committee of Public Accounts *Twenty-first Report: Australian Aluminium Production Commission*, Part I, Government Printing Office, Canberra, 1955; id., *Twenty-second Report, Australian Aluminium Production Commission*, Part II, Government Printing Office, Canberra, 1955.
48. Joint Committee of Public Accounts, *Twenty-first Report*, para. 105, p. 18.
49. *ibid.*, paras 103–4, 109, pp. 18–19.
50. Joint Committee of Public Accounts, *Twenty-second Report*, paras 79–80, p. 64.
51. *ibid.*, Appendix No. 7, pp. 86–7; see also *Twenty-second Report*, para. 86, pp. 64–5.
52. *ibid.*, paras 87–8, p. 65.
53. Joint Committee of Public Accounts, *Sixty-seventh Report: Treasury Minutes on the Twenty-first, Twenty-second and Fifty-eighth Reports*, Government Printer, Canberra, 1964, pp. 11–12.
54. *Australian National Railways Act 1975*, s. 6; on the other hand, other types of prohibition, such as prohibitions upon the appointment of persons holding certain types of interest, have been inserted in some recent legislation, e.g. *Australian Film Commission Act 1975*, s. 21 and *Insurance Acts 1973*, s. 12 (2).
55. Great Britain, Royal Commission on Standards of Conduct in Public Life 1974–1976 (Lord Salmon, Chairman), *Report*, Cmnd. 6524, HMSO, London, 1976, pp. 58–9.
56. Riordan, *Report*, p. 49.
57. See, for example, Australia, Senate, *Debates 1978*, no. 6, pp. 1202–4.
58. Australia, Parliament, Senate Standing Committee on Finance and Government Operations, *Statutory Authorities of the Commonwealth: First Report* (P. E. Rae, Chairman), AGPS, Canberra, 1979.





# Recent practice and developments at Australian State and Local Government level in regulating conflicts of interest

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1. This appendix outlines the types of provisions which exist in the various States and Territories in relation to conflicts of interest and details of those recent developments of which the Committee is aware. It focuses particularly on the position of Members of Parliament and Ministers, although some material is also included on provisions affecting public servants and statutory officeholders. Because it is an area with relatively long-standing and detailed conflict of interest provisions, material on the statutory requirements in relation to members and staff of local government authorities is also included.

## Members of Parliament and Ministers

2. As at the Commonwealth level, the two principal types of provision which currently apply to State Members of Parliament are Constitutional provisions relating to parliamentary disqualification in respect of conflicts of interest, and Standing Orders, similar to those of the House of Representatives, relating to voting by Members on matters in which they have a pecuniary interest and to participation in committees. However, in addition, there have been recent moves in several States towards the development of codes of conduct for Ministers and Members and the introduction of registration of pecuniary interests.

## Constitutional provisions

3. Each of the State Constitutions contains provisions relating to disqualification of persons holding offices of profit under, or having contracts with, the Crown from being Members of Parliament. The relevant provisions are:

New South Wales	. Constitution Act, 1902, ss. 13, 13B, 14.
Victoria . . . . .	. <i>Constitution Act</i> 1975, ss. 49–61. <i>Constitution Act Amendment Act</i> 1958, ss. 21, 22, 30.
Queensland . . . . .	. <i>Constitution Act</i> 1867–1978, ss. 6, 7, 7A. <i>Constitution Act and Another Act Amendment Act</i> 1977 s. 5. <i>Legislative Assembly Act</i> 1867–1978, ss. 7A–7D. <i>Legislative Assembly Act and Another Act Amendment Act</i> 1978. <i>Officials in Parliament Act</i> 1896, ss. 5, 6.
South Australia	. Constitution Act, 1934–1978, ss. 45–54a.
Western Australia	. <i>Constitution Act</i> , 1889, s. 6. <i>Constitution Act Amendment Act</i> , 1889–1977, ss. 31–49.
Tasmania . . . . .	. <i>Constitution Act</i> 1934, ss. 32, 33, 35.

In addition, s. 21 of the *Northern Territory (Self-Government) Act 1978* lays down similar provisions with respect to qualification for membership of the Northern Territory Legislative Assembly. There is evidence of dissatisfaction with these provisions in at least four States.

4. In 1971, the Western Australian Law Reform Committee produced a report, *Disqualification for Membership of Parliament: Offices of Profit under the Crown and Government Contracts*.<sup>1</sup> This drew attention to defects in the present legislation, both of obscurity and of rigidity, and made a number of recommendations for changes. In 1975, this issue was again examined by a Joint Committee of the Parliament but, because of the withdrawal of Opposition Members in October 1976, the Committee never reported. On 17 November 1976, the Premier of Western Australia stated, in reply to a parliamentary question, his desire 'that there should be a code clearly setting out—preferably on an Australia-wide basis—what should be done so that all Members of Parliament will know not only what they should declare about their interests, but also to overcome the vexed question which arises when a Member of Parliament gets involved in an office of profit under the Crown . . .'<sup>2</sup>

5. In evidence before this Committee of Inquiry, the Joint Government Parties of Western Australia raised what were seen as the difficulties caused by the current provisions for Members who own businesses upon entering Parliament.

6. In 1972, the Victorian Parliament legislated to establish a Joint Select Committee 'to inquire into and report on the existing law relating to Parliamentary disqualifications and to make such recommendations as it thinks necessary to improve and simplify such laws'. In introducing this legislation, the then Attorney-General referred to the lack of precision in the existing provisions which 'has led to many suggestions that certain transactions that have taken or are taking place without the knowledge of a Member may lead to that Member's disqualification from membership of the Parliament'.<sup>3</sup> The Interim Report of the Joint Select Committee, the Qualifications Committee, which was tabled in April 1973, contained Appendixes by the Solicitor-General and Chief Parliamentary Counsel which suggested that amendments of the relevant provisions were desirable.<sup>4</sup> Since this report, the Victorian Constitution Act has been re-enacted and some of the suggestions made have been taken up, for example abolition of the 'common informer' provision.<sup>5</sup>

7. In 1978, the New South Wales Joint Committee upon Pecuniary Interests commented that it found the relevant provisions of the New South Wales Constitution Act, 1902 'inadequate and did not overcome the problem of declaration of interests', but made no recommendations specifically in relation to amending them.<sup>6</sup>

8. In May 1978, the qualifications of a Queensland Minister and a backbench Member to retain their seats in the Queensland Legislative Assembly came into question as a result of their holding or being appointed to positions, in one case as a members of a grammar school board of trustees, in the other case to the Board of a statutory authority, contrary to 1977 amendments to the Constitution Act and the Legislative Assembly Act.<sup>7</sup> This legislation, the *Constitution Act and Another Act Amendment Act 1977*, provided that a Member of the Legislative Assembly was ineligible to accept Ministerial or Governor in Council appointments to any authority, corporation, board or other body, and that, in the case of such an appointment, the Member's seat would become vacant.<sup>8</sup>

9. In May 1978, the Parliament passed the *Legislative Assembly Act and Another Act Amendment Act 1978*, which retrospectively provided that a Member's seat was not vacant because he accepted or held before the Act was passed an office of profit

under the Crown and that, where an office or appointment was held and could cause a Member's seat to become vacant, the position would terminate upon the adoption of the Act. In introducing the Act, the Premier stated that he would recommend that the Queensland Parliament establish a Select Committee to decide those Crown positions to which Members of Parliament might be appointed.<sup>9</sup> However, to date, such a Committee has not been established.

### *Standing Orders*

**10.** The Standing Orders of most State Houses of Parliament and of the Australian Capital Territory Legislative Assembly provide that a Member is not entitled to vote on a matter in which he has a 'direct pecuniary interest' and that the vote of such a Member either 'shall', or 'may' on a motion of the relevant House, be disallowed. The exact form of such Standing Orders varies. For instance, the interests to which such a Standing Order applies may be restricted to those which are 'immediate and personal, and not merely of a general or remote description' or 'not held in common with the rest of the subjects of the Crown', or it may be expressly stated that the Standing Order does not apply to motions or public Bills which involve questions of state policy.<sup>10</sup>

**11.** There is also a provision in the Standing Orders of most of the State Houses of Parliament and of the Territorial Assemblies that no Member may sit on a select committee if he is personally interested in an inquiry before the committee, although, again, the precise form of such Standing Orders may vary.<sup>11</sup>

**12.** In 1978, the Report of the New South Wales Joint Committee upon Pecuniary Interests concluded, in relation to the relevant New South Wales Standing Orders, that the existing safeguards within the parliamentary institution were not adequate as regards the declaration of pecuniary interest or other benefit. It recommended that a Joint Standing Committee upon Pecuniary Interests should recommend to the Standing Orders Committee in order to ensure that the relevant Standing Orders were interpreted in a way 'that takes cognizance of relevant factors contained in this Report'.<sup>12</sup>

### *Codes of conduct for Members and Ministers*

**13.** In April 1974, the Qualifications Joint Select Committee of the Victorian Parliament (referred to above) made a Progress Report setting out a proposed code of conduct for Members of Parliament, which was supplemented by 'a more stringent series of principles for Ministers of the Crown'.<sup>13</sup>

**14.** In December 1978, a code of conduct for Members, with additional provisions applying to Ministers, was enacted by the Victorian Parliament as Part I of the *Members of Parliament (Register of Interests) Act 1978*—see Attachment 1. The Code is based on that recommended by the Joint Select Committee, with important differences.

**15.** Firstly, whereas the Joint Select Committee proposed that a Member should make full disclosure only of any direct pecuniary interest that he has in relation to any matter upon which he speaks in the Parliament, the Act requires him also to disclose the name of any trade or professional organisation of which he is a member which has an interest in a matter upon which he is speaking and any other relevant material interest, whether of a pecuniary nature or not. Secondly, whereas the Joint Select Committee proposed a voluntary code, breach of the Code set out in the Act is subject to sanctions.

**16.** In the case of Ministers, the Act sets out only the broad principles that Ministers should avoid real or apparent conflicts of interest and that they should devote their time and energy to the carrying out of their public duties. However, s. 3 (2) of the Act requires that regard should be had in the application and interpretation of the code to the Joint Select Committee's Report. This gave certain elaborations of the principles set out in the code in relation to Ministers. The principal of these were:

- A Minister should, on assuming office, resign any directorship in a public or private company where conflict between his public duty and his private interests exists or appears to exist, or where the directorship would give rise to distraction from the carrying out of the duties of his office.
- A Minister is entitled to retain shares held by him in incorporated companies on assuming office or to invest in shares while a Minister. He should dispose of shares in any company where the basic principle of conflict of interest applies.
- A Minister should avoid speculative investments in securities where he has, or may be thought to have, early or confidential information likely to affect the price of those shares.
- A Minister who, prior to assuming office under the Crown, was engaged in professional practice or in the conduct of his own business, whether alone, in partnership or as an incorporated company, should cease to carry on the daily routine work or take active part in its ordinary business. Subject to the application of the basic principles governing conflicts of interest in Ministers, he should not be required to dispose of his business or to dissolve his partnership, nor should he be precluded from continuing to advise in matters of family trusts, guardianships and similar matters of a personal nature.
- A private or personal interest properly retained should be disclosed in Cabinet if any matter of public business coming up for consideration impinges upon it and the Minister should not take part in the discussion or be a party to the decision on that matter.

**17.** Although the terms of reference of the New South Wales Joint Committee upon Pecuniary Interests required it to report specifically upon the disclosure and registration of Members' interests, its report included the following conclusion.

It is considered that a flexible and well-drawn up code of conduct, when allied with an effective registration system, would reflect the Committee's desire to instigate proposals that would safeguard and enhance the public standing of members without making unjustified inroads into their existing rights of privacy.<sup>14</sup>

**18.** Some important observations upon the standard of conduct required of Ministers are found in the Report of a Royal Commission of Inquiry (the Hon. Mr Justice L. J. Herron) concerning a former New South Wales Minister for Housing.<sup>15</sup>

. . . It should be steadily kept in mind that a Minister should carefully avoid all transactions which could give colour or countenance to the belief that he is doing anything which the rules of obligation forbid.

. . . when exercising Ministerial power a Minister must avoid situations which may give rise to incompatibility between public duty and private gain, and not only must the conduct of the Minister be proper in substance but it must also be proper in form. In other words, it must have the appearance of propriety.

. . . in view of the dignity and high public position of a Minister, discretion requires that a Minister must not only act in the correct way in substance but that he also take every reasonable precaution to see that his acts appear to be proper in form.

On the other hand, Ministers are not expected to lead cloistered lives and it is essential that they should, as Parliamentarians, have close acquaintance with people and the

problems with which they have to deal. There is no objection to a Minister of the Government retaining other employment, provided that employment can be carried on without prejudice to the Queen's Service—which has the paramount claim.

Accordingly, there is no objection to a Minister retaining a position as a member of a firm of solicitors provided that he does not allow himself to be brought into a position where his interests in the affairs of his client conflict with his duties as a Minister of State.

In the interests of sound administration a Minister should undertake no professional engagements which might interfere with complete regard for his duties, and he should avoid professional engagements of a kind which give rise to the suggestion that he is preferring personal advantage to State interest.

On this subject, it appears to me that it would be unreasonable to require that a solicitor, on becoming a member of the Cabinet, should dissolve his partnership or should allow his annual Practising Certificate to lapse. On the other hand, he should cease to carry on daily routine work of the firm, or take an active part in its ordinary business, although he should not be precluded from continuing to advise in matters of family trusts, guardianships, and similar cases. A certain amount of discretion must, of course, be allowed, since it is impossible to cover every conceivable case in any rule . . .

When a Minister is acting in his Ministerial capacity he must not exercise his powers for the purpose of private gain either to himself or to his firm, relations and friends.

### *Registration of interests*

**19.** In the last few years, five of the Australian States and the Northern Territory have displayed interest in establishing registers of the interests of Members of Parliament. In 1973, the Federal Conference of the Australian Labor Party adopted declaration of directorships and shares by Ministers and Members as a matter of constitutional policy.

**20.** In September 1974, a Private Member's Bill was introduced in the South Australian House of Assembly to require Members of the State Parliament to disclose annually all sources of income in excess of \$500 received by themselves, their spouses and their infant children.<sup>16</sup> The Bill lapsed.

**21.** The South Australian Government introduced a Bill on 30 November 1977 to establish a register of information relating to the sources of income and financial interests of Members of Parliament and their immediate families, which subsequently passed the House of Assembly in March 1978 but lapsed at the end of the session.<sup>17</sup> On 22 August 1978, the South Australian Government reintroduced the Bill in a modified form as the Members of Parliament (Disclosure of Interests) Bill.<sup>18</sup> The Bill was passed by the House of Assembly in November 1978 but was laid aside in February 1979 after amendments sought by the Legislative Council proved unacceptable to the House of Assembly and a conference of both Houses was unable to resolve the issue.<sup>19</sup> The Legislative Council then passed a resolution seeking the establishment of a joint committee to inquire into declaration of interests by Members of Parliament and 'other persons serving in any public office' and, in particular, to examine who should be required to declare, what interests should be disclosed, access to any register of interests, and the need to amend relevant provisions in the Constitution Act and Standing Orders.<sup>20</sup> At the time of writing, the House of Assembly had not considered this resolution.

**22.** In August 1975, a Private Member's Bill was introduced into the Western Australian Legislative Assembly requiring the disclosure by Members of information relating to certain sources of income received by them.<sup>21</sup> A Committee was subsequently formed to examine the desirability and form of a register for Members along with the Constitutional provisions on disqualification of Members. As

mentioned above, the Committee met on several occasions until October 1976 but, following withdrawal of Opposition Members, the Committee did not produce a report.

**23.** In the meantime, in 1976, the Tasmanian Government had introduced the Constitution (Members' Interests) Bill which provided for a register of declarations of certain pecuniary interests by Members of Parliament. This Bill reached the Committee stage but lapsed on prorogation of the Parliament.

**24.** The New South Wales Parliament appointed a Joint Committee upon Pecuniary Interests in September 1976. The Joint Committee reported in April 1978 in favour of registration of interests by Members of Parliament, ministerial staff, senior public servants, statutory officeholders, members of the media, and local government councillors and officials.<sup>22</sup>

**25.** The Premier of New South Wales subsequently announced on 11 March 1979 that his Government intended to introduce legislation in the forthcoming session of Parliament to establish a public register of the pecuniary interests of all Members of Parliament and their immediate families. He stated that this register would cover all sources of income, shareholdings including foreign shareholdings, directorships, partnerships, trusts and trusteeships, real estate and such matters as sponsored travel, substantial gifts and overseas transactions.<sup>23</sup>

**26.** In Victoria, in June 1976, the State Conference of the Australian Labor Party resolved that, pending implementation of its policy for registration by all Members of Parliament, its own Members would register 'those income-producing business enterprises in which Members or their immediate families have a financial interest'. A publicly accessible register was established under that resolution in November 1976.

**27.** On 2 August 1978, the Legislative Assembly of the Northern Territory became the first Australian legislature to adopt registration when it adopted, by resolution, a system of registration of Members' financial affairs. This requires the disclosure of:

- nature and value of assets, including money due other than by way of salary;
- particulars of any trust;
- location of any realty;
- nature and amounts of liabilities;
- each item of expenditure and source of income, not involved in the ordinary course of business or incidental to the Member's duty as a Member—but including sponsored travel—exceeding \$2000 in the reporting year; and
- nature of involvement in any company, whether private or public and whether as a shareholder or otherwise;

in respect of the Member, his spouse and dependent children below the age of 18 (excepting company interests for children). Any changes involving assets or money in excess of \$2000 must be reported within three calendar months. The register is kept by the Clerk of the Legislative Assembly, who may make it available to any bona fide inquirer, after informing the Member concerned of the request and the name of the inquirer and his interest in the information.

**28.** The same resolution also requires Ministers to resign as directors of public companies within thirty days of their appointment, and requires Ministers and the Leader of the Opposition to secure from their staff members statutory declarations containing the information required from Members of the Legislative Assembly in their registration statements.<sup>24</sup>

29. The only other legislature in Australia, at the time of writing, to adopt registration requirements is the Victorian Parliament, which passed the *Members of Parliament (Register of Interests) Act* 1978 in December 1978. In addition to providing for a code of conduct for Members and Ministers, this establishes a register of Members' interests maintained by the Clerk of the Parliaments, with sanctions, which might be imposed by the House to which the Member belongs, in the event of failure to observe the code or the registration requirements.

30. Part II of the Act sets out the details of the register of Members' interests. The interests required to be registered cover income sources in excess of \$500; the names of all companies, partnerships, associations or other bodies in which a Member has a beneficial interest exceeding \$500 in value; directorships and other company offices held, past and present; the name of any political party, body or association or trade or professional organisation of which the Member is or has been a member; a concise description of any trust in which a Member holds a beneficial interest, or of which the Member is trustee and a member of his family has a beneficial interest; the location of any real estate in which a Member has a beneficial interest, but not its size or value; sources of significant contributions towards the Member's travel outside the State; gifts of \$500 or more in value received from other than relatives; and any other substantial interest, whether of a pecuniary nature or not, of the Member or of a member of his family of which the Member is aware and which the Member considers might appear to raise a material conflict of interest. For registration purposes, 'family' is defined to include a spouse and any child of the Member who is under the age of 18 years and normally resides with the Member.

31. Details of each Member's statement of interests will be kept confidential but a summary will be prepared by the Clerk and tabled in the Parliament and published as part of a Parliamentary Paper. Added protection for the Member will be provided by a stipulation that information derived from the Parliamentary Paper shall not be published unless it constitutes a fair and accurate summary of the information and no comment is made unless it is fair and published in the public interest and without malice. The actual form of the register and of the summaries are not set out in the Act but are left for prescription by regulation.

32. Sanctions in the event of failure to comply with the requirements of the Act will be for the House concerned to impose. Failure to comply will be treated as contempt of the Parliament and a fine of up to \$2000 may be imposed. Default of payment of a fine within the time ordered by the House will result in forfeiture of the Member's seat. The Act makes no provision relating to the procedures for the handling of complaints against Members or others who transgress against the legislation.

33. The Committee is not aware of any developments at State government level in Queensland in relation to registration of Members' interests. The Premier stated in the Legislative Assembly on 23 November 1978 that there was nothing to prevent any Member of the House from declaring his private interests at any stage. He went on implicitly to reject the idea of legislation requiring declaration, saying that it 'sounds good but achieves little'.<sup>25</sup>

## Public servants

34. The Committee received evidence on current practice and recent developments in relation to public servants in New South Wales, Victoria, South Australia and the Northern Territory. In each of these States, there are existing provisions in the

relevant Public Service Act and Regulations or procedures relating to such topics as the acceptance of gifts and rewards, outside employment, misuse and unauthorised disclosure of official information, rights to hold municipal office and the holding of directorships or shares. Similar restrictions appear to apply, to a more limited degree, to other State government employees, such as the staff of statutory authorities.

35. The only existing formal provisions which require the avoidance of conflict or the disclosure of pecuniary interests by public servants appear to be in South Australia and the Northern Territory. Section 121 of the South Australian Public Service Act, 1967–1977 requires that:

Where an Officer becomes in any way interested whether financially or otherwise, otherwise than in the course of his duty, in any contract or agreement made by or on behalf of the State he shall make full disclosure of that interest to the Board.

36. The South Australian Public Service Board has also determined, when acting in its role as disciplinary tribunal under the Public Service Act, that officers who place themselves in situations where there was actual or potential conflict of interests have committed the offence of ‘improper conduct’. In a March 1975 determination, the Board stated:

An officer who places himself in a position where his private interests conflict with the inherent duties of his office is guilty of improper conduct, even though no situation may arise or may be unlikely to arise where he can take advantage of his office to benefit his private interest. Of course if an officer does take advantage of his official position to advance his private interests, he has not only placed himself in a position of conflict of interest, but he has abused his official position.

It is understood that the South Australian Government is currently considering the inclusion of provisions relating to the private interests of public servants as part of wider amendments to the Public Service Act.

37. General obligations to avoid conflicts of interest and to declare any conflict that arose were imposed in the Northern Territory in October 1978 when the Public Service Commission issued a General Order on the declaration of pecuniary interests. This imposed on employees:

- an obligation at all times to regulate their private financial interests so that they do not conflict or appear to conflict with their public duty;
- an obligation to inform their Chief Executive Officers or their delegates, of ‘any direct or indirect pecuniary interests that might conflict or appear to conflict with [their] public duty in relation to a matter under consideration, or likely to come under consideration’ by them—in which case the Chief Executive Officer or his delegate should choose between authorisation, divestment and disqualification;
- an obligation not to engage in private dealings where they might be influenced, or might be seen to be influenced, by possession of official information, and to inform the Chief Executive Officer or his delegate of any contemplated acquisition or disposal of assets which might be influenced by knowledge of official information or appear so; and
- an obligation to pay special attention to private pecuniary interests when taking up duties, to ensure that interests held are not incompatible with the duties.

Chief Executive Officers and the heads of prescribed authorities were required to make their declarations to their Ministers. Failure to comply with the General Order would be a ‘failure to fulfil duty’ under the Northern Territory *Public Service Act 1976*.<sup>28</sup>



38. Both Victoria and New South Wales have considered the provisions relating to conflict of interest and public servants in recent years but, to the date of writing, no amendments to the current provisions have resulted.

39. In May 1974, the Victorian Parliament passed the *Public Servants Ethical Conduct (Joint Select Committee) Act 1974*. The function of the Committee appointed under that Act was to study existing law and practice relating to the legal and ethical duties of public servants where their private interests conflict or might appear to conflict with their public duty, and to make recommendations to ensure proper conduct on the part of public servants where the existing law or practice was inadequate. The Committee reported in mid 1976. Its major recommendation was that the responsibilities and obligations of officers, where their private interests conflict with their public duties, should be provided for in a specific statute dealing with conflicts of interest and have general application to all public servants. Appendix D to the Report included a draft set of Guidelines of Conduct prepared and submitted to the Committee by a Subcommittee of the Permanent Heads Conference in Victoria.<sup>27</sup>

40. Following the tabling of the Joint Select Committee Report, further representations were received by the Victorian Government from the Public Service Board and the Permanent Heads' Conference. The Public Service Board and the Permanent Heads argued against the Committee's recommendation for a special statute, on the grounds that they did not believe these matters should be embodied in legislation. They recommended, instead, that the Government issue a statement of standards of practice to regulate the conduct of public officials, referring to existing legislation such as the Public Service Act and establishing guidelines for situations not adequately covered in existing legislation. It is understood that a draft 'Code of Conduct', prepared by the Public Service Board, is under consideration. It is further understood that the Victorian Government intends to examine the possible extension of the new pecuniary interest legislation for Members of Parliament to senior public servants.<sup>28</sup>

41. The New South Wales Joint Committee upon Pecuniary Interests made a number of recommendations in relation to public servants and staff of statutory authorities. Firstly, it proposed that similar registration requirements to those recommended for Members also be applied to Permanent Heads, chairmen of statutory authorities and officers at or above a certain salary range. The registers would be held by the relevant Minister, in the case of Permanent Heads and chairmen of statutory authorities, and by the relevant Permanent Head or chairman, in the case of all other officers. Permanent Heads would also be able to designate officers below the relevant salary range who should also be required to register. Special provisions should apply to outside consultants. Secondly, it commented on the 'degree of confusion' relating to the relevant provisions of the Public Service Act and Regulations, and recommended the formulation of a code of conduct for public servants and employees of statutory authorities. Thirdly, it recommended that the obligation to register be regarded as additional to a requirement to make written *ad hoc* declarations of any conflicts which arose.<sup>29</sup>

### Statutory officeholders

42. While the Committee did not carry out any survey of State legislation and practice relating to statutory officeholders, its attention was drawn to several relevant provisions. Sections 134 and 135 of the Victorian *Water Act 1958* specify in considerable detail conditions under which a commissioner of a waterworks trust can no longer hold office and those circumstances, related to pecuniary interest, in which he

cannot vote on or discuss any matter before the trust. The Committee was informed that similar provisions relating to the appointment and conduct of sewerage board members are contained in the *Sewerage Districts Act 1958*.

43. A number of New South Wales statutory authorities gave details of the statutory provisions which apply to their members and staff in evidence to the Joint Committee upon Pecuniary Interests. These took a variety of forms, ranging through prohibitions upon the appointment of persons holding certain interests as members or as officers<sup>30</sup>, prohibitions upon holding concessions granted by the authority<sup>31</sup>, or having interests in contracts<sup>32</sup>, and prohibitions upon outside employment<sup>33</sup>, or holding certain offices<sup>34</sup>, to declaration requirements<sup>35</sup> and prohibitions upon the misuse of official information for personal advantage.<sup>36</sup>

44. There is a practice of the Totalizator Agency Board of New South Wales, which has a number of members who are nominated by various groups which have 'a keen interest in the outcome of the Board's operations', of drawing to the attention of newly appointed Board members the judgment in the case of *Bennetts v. The Board of Fire Commissioners of New South Wales and Others*.<sup>37</sup> In this judgment, Mr Justice Street stated that, on Boards where the members owe their membership to a particular interested group:

a member will be derelict in his duty if he uses his membership as a means to promote the particular interests of the group which chose him . . . the predominating element which each individual must constantly bear in mind is the promotion of the interests of the Board itself. In particular a Board member must not allow himself to be compromised by looking to the interests of the group which appointed him rather than to the interests for which the Board exists.<sup>38</sup>

## Local Government

45. In contrast to most other categories of officeholders, the members, and in some cases the staff, of local government authorities are subject in all States and the Northern Territory to detailed and long-standing statutory provisions in relation to conflict of interest, under their respective Local Government Acts.<sup>39</sup>

### *Provisions applying to members*

46. The main types of provision found in such legislation are:

- disqualification from office as mayor or member of a local government authority of any persons holding an office of profit under or in the gift of the authority (New South Wales, Victoria, Queensland, Western Australia) or other forms of disqualification from office on conflict of interest grounds<sup>40</sup>; and
- requirements for the disclosure of any pecuniary interest in any contract or proposed contract or any other matter under consideration by the authority, combined with disqualification from discussions or voting in relation to that matter (New South Wales, Victoria, Queensland, Western Australia, Tasmania)<sup>41</sup>; or
- simple prohibitions upon taking part in discussions or on voting in relation to matters related to contracts or other matters in which a member has a direct or indirect pecuniary interest, without any requirement to declare such an interest (South Australia, Northern Territory).

47. In addition, a range of other types of provision applying to members is found in the local government legislation of one or more States:

- provisions relating to bribery and other forms of malpractice in relation to elections<sup>42</sup>;

- misuse of office for personal advantage or for the advantage of relatives<sup>43</sup>;
- misuse of official information for pecuniary gain or to disadvantage the authority<sup>44</sup>;
- misuse of property of the authority.<sup>45</sup>

48. The provisions requiring disclosure of pecuniary interests, found in five States, all broadly follow the pattern of ss. 94 to 98 and 105 of the British Local Government Act 1972, the provisions of which are derived from earlier provisions dating from between 1815 and 1894 and have been substantially in their present form since 1933<sup>46</sup>.

49. The basic pattern of such provisions is illustrated by s.14 (4) of the Queensland *Local Government Act* 1936–1978. Briefly, this provides that a member of a local authority who has a pecuniary interest, direct or indirect, in any contract, proposed contract or other matter which is before the authority must at any meeting where the matter is under consideration disclose his interest (except in certain cases where he has given a general written notice) and thereafter refrain from speaking or voting on the matter. Any member breaching this provision is liable upon summary conviction to a fine of up to \$200, unless the member proves that he did not know that the matter concerned was under consideration at the meeting. A member's interest includes that of his spouse where it is known to him. An indirect interest arises from the member's connection, as director, shareholder, partner or employee, with a body or person having a direct interest.

50. The Minister for Local Government has power to remove the disqualification from speaking or voting, subject to such conditions as he sees fit:

in any case in which the number of members of the Local Authority so disabled at any one time would be so great a proportion of the whole as to impede the transaction of business, or in any other case in which it appears to the Minister that it is in the interests of the electors or inhabitants of the Area that the disability should be removed.

51. The member must disclose his interest as soon as practicable after the start of the meeting at which the matter concerned is under consideration. Alternatively, where his interest arises because he or his spouse is a member, partner or employee in a company or business which has dealings with the authority, he may give a general written notice of the interest; he need not then make oral disclosure at the meeting. A record of such notices, and of disclosures made at meetings, is to be kept by the clerk of the authority and the book in which such records are kept must be open 'at all reasonable hours' to the inspection of any member of the local authority. The requirement to disclose does not apply to interests which a member has as an elector or inhabitant of that local government area, or as an ordinary user or consumer of gas, electricity or other such publicly available service.

52. While the other States mentioned follow the same pattern, there are significant variations:

- The New South Wales and Victorian provisions both exempt from the declaration requirement interests held in contracts as a result of holding shares, where the total nominal value of shares held is less than \$1000 or less than one-hundredth of the total share capital of the relevant company or body.
- The Tasmanian and Victorian provisions allow interested members to vote on the payment of accounts. The difficulties which can arise through the lack of such a provision were mentioned by the N.S.W. Joint Committee upon Pecuniary Interests.<sup>47</sup>

- The records of disclosures are open only to members of the authority in Queensland and Tasmania, but are open to any ratepayer or elector in New South Wales, Victoria and Western Australia.
- The Western Australian Act provides for an interested member to be authorised to speak and vote in a meeting where the person presiding determines the interest to be so remote or trivial that, if the interested member was to take part, he could not reasonably be regarded as likely to be influenced by that interest. An interested member may also be authorised to speak but not vote by a vote of the majority of the disinterested members. Details of such authorisations are required to be recorded in the minutes.
- The consequences of a breach of such a provision (or of the equivalent South Australian and Northern Territory prohibitions upon taking part in discussions or voting) vary widely, from fines of up to \$160 (Tasmania) to fines of up to \$500 (Victoria), with the additional possibility that a member guilty of a breach of such a provision may be disqualified from holding office as a member of the authority for up to seven years (New South Wales, Victoria) or indefinitely (Northern Territory).
- As a result of a 1973 amendment, the Tasmanian provision has been extended to apply to those members of committees set up under the Act who are not members of the authority.<sup>48</sup>

53. The statutory provisions in the various Local Government Acts may be supplemented by subordinate legislation, and standing orders or other types of measures adopted by individual local government authorities. For example, clauses 32 and 33 of the New South Wales Local Government Ordinance No. 1 specify when members are disqualified from voting at meetings or committee meetings or being present or taking part in discussions in which they or their relatives are interested, and set out in detail the degree of relationship and nature of the interest necessary to create such a disqualification. The City of Sydney Council has supplemented the legislative requirements by a standing order requiring declaration of an interest in a matter under discussion, even if a member who is present at a meeting removes himself from the Chamber while that matter is under consideration.<sup>49</sup>

54. A detailed code of ethics for members, supplementing the relevant standing orders and statutory provisions, was adopted on 11 December 1978 by the Melbourne City Council. This requires councillors to disclose annually a number of categories of pecuniary interest in a register open to inspection by other councillors. In addition, the code requires *ad hoc* disclosure of pecuniary or relevant non-pecuniary interests, such as kinship, friendship or club membership, both at meetings and in unofficial relations with other councillors. The code also covers such topics as participation of interested members on committees as chairmen or members, misuse of confidential and private information for personal advantage, relationships with Council staff, and gifts and hospitality. The code will be administered by an Ethics Committee which will deal with alleged breaches of the code, and which will have power to recommend disciplinary action, such as admonition, against an offending councillor.<sup>50</sup>

*Provisions applying to staff of local government authorities*

55. While the various Local Government Acts generally do not specify in detail the terms and conditions of employment of staff, in most States they contain one or more conflict of interest provisions in relation to staff. The New South Wales, Victorian, Queensland and Tasmanian Acts contain provisions relating to the acceptance or extortion of fees or rewards by the staff of local authorities; in New South Wales, the

offering of bribes to local government staff is also an offence.<sup>51</sup> Victoria prohibits staff from having interests in contracts with the authority and Queensland requires the disclosure of any interests in contracts.<sup>52</sup> The New South Wales and Western Australian Acts contain provisions in relation to outside employment.<sup>53</sup> The New South Wales Act makes former elected members ineligible to be appointed to the staff of the authority until six months after they cease to hold office.<sup>54</sup> In Tasmania, staff are liable to a general offence of misuse of office for personal advantage or for the advantage of relatives.<sup>55</sup> In the Northern Territory, members of the Authority, holders of any other office of profit and contractors with the authority are disqualified from acting as the auditor to an authority.<sup>56</sup>

**56.** In addition to such statutory provisions, local government staff may be subject to rules laid down by the local government authority by which they are employed. For example, the Melbourne City Council announced in February 1979 that it would require staff 'intimately associated with decision making' to register their pecuniary interests with the Town Clerk and that it would impose a code of conduct as a condition of employment upon all staff. The code would cover a range of issues, including *ad hoc* disclosure of pecuniary or other interests, participation in Council elections, relationships with councillors, misuse of official information for personal gain and acceptance of gifts and hospitality. The code would be applied through the individual contracts of employment of staff members. The Council Staff Board would investigate any alleged breaches of the code and recommend on penalties, including whether dismissal should occur.<sup>57</sup>

**57.** The New South Wales Joint Committee upon Pecuniary Interests examined the provisions which apply in that State to members and staff of local government authorities, and recommended that the Local Government Act be amended to require registration by elected members and senior staff.<sup>58</sup> It is understood that the provisions of the Local Government Act regarding declaration of pecuniary interests of members of councils are under review.



## Relevant extracts, Victorian members of Parliament (register of interests) Act 1978

(NO. 9223 OF 1978)

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### PART I.—CODE OF CONDUCT.

3. (1) It is hereby declared that a Member of the Parliament is bound by the following code of conduct:—

(a) Members shall—

(i) accept that their prime responsibility is to the performance of their public duty and therefore ensure that this aim is not endangered or subordinated by involvement in conflicting private interests;

(ii) ensure that their conduct as Members must not be such as to bring discredit upon the Parliament;

(b) Members shall not advance their private interests by use of confidential information gained in the performance of their public duty;

(c) A Member shall not receive any fee, payment, retainer or reward, nor shall he permit any compensation to accrue to his beneficial interest for or on account of, or as a result of the use of, his position as a Member;

(d) A Member shall make full disclosure to the Parliament of—

(i) any direct pecuniary interest that he has;

(ii) the name of any trade or professional organization of which he is a member which has an interest;

(iii) any other material interest whether of a pecuniary nature or not that he has— in or in relation to any matter upon which he speaks in the Parliament;

(e) A Member who is a Minister shall ensure that no conflict exists, or appears to exist, between his public duty and his private interests;

(f) A Member who is a Minister is expected to devote his time and his talents to the carrying out of his public duties.

(2) Without limiting the generality of the foregoing in the application and interpretation of the code regard shall be had to the recommendation of the Joint Select Committee of the Victorian Parliament appointed pursuant to *The Constitution Act Amendment (Qualifications Joint Select Committee) Act 1973* presented to the Legislative Assembly on the 23rd day of April, 1974 (D.14/1973-74) contained in paragraph 12 of that report.

1. Western Australia, Law Reform Committee, *Disqualification for Membership of Parliament: Offices of Profit under the Crown and Government Contracts: Report* (Project No. 14), mimeo, Perth, 1971.
2. Western Australia, Legislative Assembly, *Debates*, 17 November 1976, p. 4083.
3. Victoria, Legislative Assembly, *Debates* 1972–73, 29 November 1972, p. 2700.
4. Victoria, Parliament, *Interim Report from the Qualifications Committee upon the Law Relating to Parliamentary Disqualification in Respect of Conflicts of Interest*, Government Printer, Melbourne, 1973.
5. The *Constitution Act* 1975 incorporated most of the provisions on office of profit and Crown contracts, which were previously located in the *Constitution Act Amendment Act* 1958. For the abolition of the common informer provision, compare the previous s. 31 of the *Constitution Act Amendment Act* 1958 with s. 59 of the *Constitution Act* 1975.
6. New South Wales, *Report from the Joint Committee upon Pecuniary Interests*, para. 2.7, p. 16. Note that this cites sections 13, 17B and 26D of the New South Wales Constitution Act. Since the completion of the report (in April 1978), the New South Wales Constitution Act has been amended (Act No. 75 of 1978) and the corresponding sections are now 13, 13B and 14.
7. *The Courier Mail*, 5 May 1978, 6 May 1978, 9 May 1978, 10 May 1978 and 16 May 1978.
8. Queensland, *Constitution Act and Another Act Amendment Act* 1977, s. 5 (which inserted a new s. 7B in the *Constitution Act of 1867–1978*).
9. Queensland, Legislative Assembly, *Debates*, 16 May 1978, pp. 775–6.
10. Examples of such Standing Orders include New South Wales, Legislative Assembly, Standing Order 204; Victoria, Legislative Assembly, Standing Order 2; A.C.T. Legislative Assembly, Standing Order 163; South Australia, Legislative Council, Standing Order 225; Tasmania, Legislative Assembly, Standing Orders 203 and 204. Such Standing Orders are not universal—see, for example, the Western Australian Legislative Council and Northern Territory Legislative Assembly.
11. See, for example, New South Wales, Legislative Assembly, Standing Order 348; South Australia, Legislative Council, Standing Order 379; Tasmania, Legislative Council, Standing Order 230. The Victorian, Queensland and Tasmanian Legislative Assemblies have no Standing Orders preventing interested Members from serving on select committees, but provide that the vote of an interested Member on a committee may be disallowed (Standing Orders 2, 158 and 205 respectively).
12. New South Wales, Parliament, *Report from the Joint Committee of the Legislative Council and Legislative Assembly upon Pecuniary Interests, together with the Minutes of Proceedings and Evidence* (Keith O'Connell, Chairman), Government Printer, Sydney, 1978, para. 2.31, p. 19 and Recommendation 10, p. 20.
13. Victoria, Parliament, *Progress Report from the Qualifications Committee upon the Question of Conflicts of Interest of Members of Parliament and Ministers of the Crown* (V. F. Wilcox, Chairman), Government Printer, Melbourne, 1974.
14. New South Wales, *Report from the Joint Committee upon Pecuniary Interests*, para. 2.32, p. 19.
15. New South Wales, Parliament, *Report of the Royal Commission of Inquiry (The Honourable Mr Justice L. J. Herron) into Statements Made by the Auditor General in his Annual Report for the year ended 30 June 1958, concerning the Minister for Housing, the Hon. Abram Landa*, New South Wales Parl. Paper No. 53, 1958, vol. 1, pp. 191–218 at pp. 211–12.
16. South Australia, Members of Parliament (Disclosure of Interests) Bill, 1974, introduced by Mr P. Duncan, First reading, 25 September 1974.
17. South Australia, House of Assembly, *Debates*, 30 November 1977, p. 1133.
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19. South Australia, Legislative Assembly, *Debates*, 15 November 1978, p. 2045; Legislative Council, *Debates*, 22 February 1979, pp. 2896–7; 27 February 1979, pp. 2937–44.
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21. Western Australia, Legislative Assembly, Members of Parliament (Disclosure of Interests) Bill, 1975, introduced by Mr A. R. Tonkin, First reading, 27 August 1975.
22. New South Wales, *Report from the Joint Committee upon Pecuniary Interests*.
23. Speech by the Premier, the Hon. N. K. Wran, Q.C., M.P., to the New South Wales State Council of the Australian Labor Party, 11 March 1979.
24. Northern Territory, Legislative Assembly, *Minutes of Proceedings*, 2 August 1978.
25. Queensland, Legislative Assembly, *Debates*, 23 November 1978, p. 2861.
26. Northern Territory, Public Service Commissioner, *Northern Territory Public Service General Orders*, Section 4—Declaration of Pecuniary Interests (Notified by Public Service Commissioner Circular 1978/33, 31 October 1978).
27. Victoria, Parliament, *Report of the Public Servants Ethical Conduct Committee on Conflicts of Interest*, Government Printer, Melbourne, 1976.



28. *The Age*, 23 November 1978.
29. New South Wales, *Report from the Joint Committee upon Pecuniary Interests*, pp. 30–1.
30. *ibid.*, pp. 48, 52, 73.
31. *ibid.*, p. 98.
32. *ibid.*, pp. 50, 51, 63–5.
33. *ibid.*, pp. 50, 51, 52, 63–5.
34. *ibid.*, pp. 63–5.
35. *ibid.*, pp. 63–5, 79–81.
36. *ibid.*, pp. 78–9, but see p. 82.
37. *ibid.*, pp. 43, 46.
38. *Bennetts v. The Board of Fire Commissioners of New South Wales (Street J)*, (1967) 87 WN (NSW) 307 at pp. 309–10.
39. The relevant provisions are as follows:  
New South Wales, Local Government Act, 1919, ss. 30 (3), 30A, 31, 49 (f) and 101 and Local Government Ordinance No. 1, clauses 32, 33; Victoria, *Local Government Act* 1958, ss. 53, 53A, 166, 181; Queensland, *Local Government Act* 1936–1978, ss. 7 (2), 14 (4), 17 (5)–(6); South Australia, Local Government Act, 1934–1978, s.147 (VIII); Western Australia, *Local Government Act*, 1960–1978, ss. 37, 39, 40, 160A, 174, 174A; Tasmania, *Local Government Act* 1962, ss. 48 (2) (c), 123, 822, 827; Northern Territory, *Local Government Act* 1954, ss. 35, 280 (1), 357–9; the Australian Capital Territory has no form of local government but the Standing Orders of the A.C.T. Legislative Assembly contain prohibitions upon voting in divisions and on participation by interested members on committees parallel to those found in the House of Representatives Standing Orders. (Australian Capital Territory Legislative Assembly, Standing Orders 163, 256.)
40. Examples of other types of disqualification on conflict of interest grounds include ss. 280 and 359 of the Northern Territory *Local Government Act* 1954 (which prohibits members, persons holding offices of profit under an authority and persons with interests in contracts with the authority from acting as auditors for an authority) and s. 48 (2) (c) of the Tasmanian *Local Government Act* 1962 (which disqualifies from becoming a member any person who is counsel or solicitor in an action against the authority) and s. 37 (1) (e) of the Western Australian *Local Government Act, 1960–1978* (which disqualifies a person who has a direct or indirect pecuniary interest in any agreement with the authority).
41. New South Wales, Local Government Act, 1919, s. 30A, and Local Government Ordinance No. 1, clauses 32, 33; Victoria, *Local Government Act* 1958, s. 181; Queensland, *Local Government Act* 1936–1978, s. 14 (4); Western Australia, *Local Government Act, 1960–1978*, ss. 174, 174A; Tasmania, *Local Government Act* 1962, s. 123.
42. See, for example, Tasmania, *Local Government Act* 1962, s. 836; South Australia, Local Government Act, 1934–1978, s. 130; Queensland, *Local Government Act* 1936–1978, Schedule III, r. 20.
43. Tasmania, *Local Government Act* 1962, s. 822; New South Wales, Local Government Act, 1919, s. 30 (3) (d).
44. Victoria, *Local Government Act* 1958, s. 53A (inserted by Act No. 9022 of 1977).
45. New South Wales, Local Government Act, 1919, s. 30 (3) (c).
46. United Kingdom, Prime Minister's Committee on Local Government Rules of Conduct (Lord Redcliffe-Maud, Chairman), *Conduct in Local Government*, Cmnd. 5636, HMSO, London, 1974, p. 16. For texts of and a general discussion of the United Kingdom disclosure provisions see Chapter 3, pp. 9–14; Appendix E, pp. 61–3; Appendix F, pp. 67–9; and Recommendation 20, p. ix.
47. New South Wales, *Report from the Joint Committee upon Pecuniary Interests*, para. 4.24, p. 34.
48. Tasmania, *Local Government Act* 1973, s. 3.
49. Council of the City of Sydney, Resolution of 11 September 1978 regarding Pecuniary Interests of Aldermen.
50. *The Age*, 12 December 1978, 24 February 1979; City of Melbourne, General Purposes Committee, *Memorandum on Code of Ethics for Councillors and Conduct towards Staff*, Report No. 84, Document No. 43 GP., December 1978; *id.*, *Memorandum on Establishment of an Ethics Committee*, Report No. 97, Document No. 52 GP., February 1979.
51. New South Wales, Local Government Act, 1919, s. 101; Victoria, *Local Government Act* 1958, s. 166 (1) (a); Queensland, *Local Government Act* 1936–1978, ss. 17 (5) (ii), 17 (6); Tasmania, *Local Government Act* 1962, s. 827.
52. Victoria, *Local Government Act* 1958, s. 166 (1) (b); Queensland, *Local Government Act* 1936–1978, s. 17 (5) (i). Compare the British Local Government Act 1972, s. 117 (1).
53. New South Wales, Local Government Act, 1919, s. 96; Western Australia, *Local Government Act, 1960–1978*, s. 160A.
54. New South Wales, Local Government Act, 1919, s. 95 (2).
55. Tasmania, *Local Government Act* 1962, s. 822.

56. Northern Territory, *Local Government Act* 1954, s. 280.
57. *The Age*, 24 February 1979; City of Melbourne, General Purposes Committee, *Memorandum on Code of Ethics for Officers*, Report No. 117, Document No. 63 GP., March 1979.
58. New South Wales, Parliament, *Report from the Joint Committee upon Pecuniary Interests* pp. 36-7.

# Registration of interests

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1. A brief survey of the events leading to the adoption, or proposals for adoption, of registration of interests by officeholders in Britain, Canada, the United States of America, Papua New Guinea and Jamaica is contained in Appendix 3. The present appendix sets out, in summary form, the categories of register that are operating or are proposed in these countries. The Committee also sets out in this appendix its views on the form of registration which would be desirable in respect of Members of Parliament, public servants and statutory officeholders, in the event that it is decided, contrary to the Committee's recommendations, to institute registration of officeholders' interests.

## Types of registers

2. A variety of forms of register has been implemented or proposed overseas and in Australia. Perhaps the most important dimension in which they vary is in the amount of information which is required to be disclosed. For convenience of discussion, the Committee has divided such proposed or existing registers into three categories, 'limited', 'middle range' and 'extensive', according to the range of interests required to be registered.

### *'Limited' registers*

3. The debate about registration of Members' interests, first in Britain, then in Australia, has tended to focus on what might be called 'limited' scope registers, that is registers in which only a select number of pecuniary interests are disclosed and which may or may not be publicly accessible. The amount of information which is typically required to be disclosed in a limited register is illustrated by the categories of pecuniary interests required to be disclosed by the proposals in the Willey Committee report, subsequently implemented by the British House of Commons, and the proposals in the report of the Joint Committee on Pecuniary Interests of Members of Parliament (Riordan Committee).<sup>1</sup>

4. The nine specific types of interest which Members of the British House of Commons are required to register are:

- (1) remunerated directorships of companies, public or private;
- (2) remunerated employments or offices;
- (3) remunerated trades, professions or vocations;
- (4) the names of clients when the interests referred to above include personal services by the Member which arise out of or are related in any manner to his membership of the House;
- (5) financial sponsorships, (a) as a parliamentary candidate where, to the knowledge of the Member, the sponsorship in any case exceeds 25 per cent of the candidate's election expenses, or (b) as a Member of Parliament, by any person or organisation, stating whether any such sponsorship includes any payment to the Member or any material benefit or advantage direct or indirect;

- (6) overseas visits relating to or arising out of membership of the House, where the cost of any such visit has not been wholly borne by the Member or by public funds;
- (7) any payments or any material benefits or advantages received from or on behalf of foreign Governments, organisations or persons;.
- (8) land and property of substantial value or from which a substantial income is derived;
- (9) the names of companies or other bodies in which the Member has, to his knowledge, either himself or with or on behalf of his spouse or infant children, a beneficial interest in shareholdings of a nominal value greater than one-hundredth of the issued share capital.<sup>2</sup>

5. The Riordan Committee's conclusions in respect of registration of interests by Members of Parliament included:

- the filing of a copy of a Member's income tax return would constitute neither an adequate nor an appropriate form of registration of pecuniary interests;
- Members of Parliament should disclose the names of all companies in which they have a beneficial interest in shareholdings, no matter how insignificant, whether as an individual member of another company, or partnership, or through a trust;
- it should be left to the discretion of individual Members of Parliament as to whether or not they should register the actual value of any shareholdings;
- Members of Parliament should disclose the location of any realty in which they have a beneficial interest;
- Members of Parliament should declare the names of all companies of which they are directors, even if the directorship is unremunerated; and
- Members of Parliament should declare any sponsored travel.<sup>3</sup>

6. It is at once apparent that in both cases many important categories of interest are not required to be disclosed. Nor is very much detail required in respect of those interests which are listed for disclosure. Furthermore, while the British register is accessible to the public, subject to an appointment being made at least forty-eight hours in advance and to the applicant identifying himself, the Australian proposal was that the applicant would have to establish to the satisfaction of the Registrar that there was a bona fide reason for seeking access, and the application might be resisted by the Member of Parliament concerned.

7. Section 45 (iii) of the Australian Constitution may have obviated the need to identify clients of Australian Members of Parliament, although, as noted elsewhere, it is uncertain how far the concept of services rendered in the Parliament extends.<sup>4</sup>

8. Leaving this aspect aside, the House of Commons register still appears marginally more extensive than the one the Joint Committee proposed for the Commonwealth Parliament. However, the restriction of company holdings to instances where the Member's interest is at least 1 per cent of issued share capital would omit identification of quite substantial interests in large corporations. Disclosure of gifts, hospitality and travel is directed towards showing foreign influences, which had been a particular cause of concern in Britain. The requirement recommended by the Riordan Committee seems to reflect that concern, but only in respect of sponsored travel.

*'Middle-range' registers*

9. Examples of what might be called 'middle-range' registers, again which may or may not be publicly accessible, are provided by the Canadian Independence of Parliament Bill introduced in October 1978 and the United States Ethics in Government Act of 1978.

10. Under the Canadian proposals, Members of Parliament will be required by clause 8 (1) of the Bill to disclose annually details of:

- participation in certain government contracts and grants or subsidies from the Crown;
- outside employment, including directorships and any leave arrangements;
- gifts received by the Parliamentarian or his spouse of a value greater than \$100;
- honoraria for speaking or writing;
- sponsored travel of the Parliamentarian or his spouse outside Canada;
- real property of the Parliamentarian or his spouse, except home or recreational home;
- shares and bonds of the Parliamentarian or his spouse and the company name if the holding is worth \$1000 or more;
- unsecured debts over \$5000;
- other sources of income worth more than \$1000; and
- any trust of which the Parliamentarian is the beneficiary.

11. In the United States of America, the Ethics in Government Act of 1978 applied disclosure requirements to the President, the Vice-President and senior executive branch officers, the Congress including candidates, and the judiciary. Members of Congress are required to disclose:

- (i) The source, type and amount of earned income from any source (other than their government salaries) and the source, date and amount of honoraria received during the preceding calendar year and aggregating \$100 or more in value.
- (ii) The source and type of unearned income received from dividends, interest, rent and capital gains received during the preceding calendar year and aggregating \$100 or more in value.  
Each item of unearned income in one of the following categories: not more than \$1000, greater than \$1000 but not more than \$2500, greater than \$2500 but not more than \$5000, greater than \$5000 but not more than \$15 000, greater than \$15 000 but not more than \$50 000, greater than \$50 000 but not more than \$100 000 or greater than \$100 000.
- (iii) The source and a brief description of any gifts of transportation, lodging, food or entertainment aggregating \$250 or more in value received from any source other than a relative during the preceding calendar year. (Gifts of food, lodging or entertainment received as personal hospitality are exempted from the reporting requirements.)
- (iv) The source, a brief description and estimated value of all gifts (other than transportation, lodging, food or entertainment) aggregating \$100 or more in value received from a source other than a relative during the preceding calendar year. (Gifts with a fair market value of \$35 or less are exempted from the reporting requirement.)

- (v) The source and a brief description of reimbursements from a single source aggregating \$250 or more in the preceding calendar year.
- (vi) The identity and category of value of any interest in property held in a trade or business, or for investment or production of income, with a fair market value over \$1000 at the close of the preceding calendar year. (Personal liabilities owed by relatives to the reporting individual or any deposit of \$5000 or less in a personal savings account are exempted from the reporting requirements.)
- (vii) The identity and category of value of the total liabilities owed to any creditor (other than a relative) exceeding \$10 000 at any time during the preceding calendar year, not including a mortgage on the individual's personal residence or loans for cars, household furniture or appliances. (Outstanding liabilities on revolving charge accounts are exempted from the reporting requirement unless the liability was more than \$10 000 at the close of the preceding calendar year.)
- (viii) A brief description, the date and category of value of real property (other than personal residence) or stocks, bonds or other securities purchased, sold or exchanged in the preceding calendar year, if the amount involved exceeded \$1000. (Any transaction solely between the reporting individual and his spouse or dependent children is exempted from the reporting requirement.)
- (ix) Any positions held during the current calendar year with businesses, non-profit organisations, labour groups or other institutions, except for religious, social, fraternal or political groups.
- (x) The terms of agreement about any future employment planned by the reporting individual.
- (xi) The following information about a spouse's finances:  
source of any earned income over \$1000; source and type of unearned income received from dividends, interest, rent and capital gains received during the preceding calendar year and aggregating \$100 or more in value; source and brief description or estimated value of any gift or reimbursement which is not received totally independent of the spouse's relationship to the reporting individual; certain assets, liabilities and transactions of the spouse (unless the reporting individual certified that he had no control over them and would not receive any economic benefit from these interests); unearned income of dependent children, their assets, liabilities and transactions, unless the individual certifies that he had no control over them and did not receive any economic benefit from them. (A spouse permanently separated from the reporting individual is exempted from the reporting requirement.)
- (xii) Where an individual has holdings in a 'qualified blind trust', the category of the amount of income received by the individual, the individual's spouse or dependent children, but not the holdings or source of income.<sup>5</sup>

**12.** In the 'middle-range' registers, category of value is required for many items. In the United States and the Canadian proposals, disclosure of gifts, hospitality and travel is much more extensive than in the limited registers discussed above. The requirements to disclose income sources are more demanding than the requirement to disclose remunerated employment in the limited registers, and liabilities are included.

*'Extensive' registers*

**13.** The third class of registers might properly be regarded as extensive in their scope. Examples are those established under the Jamaican Parliament (Integrity of

Members) Act 1973 and by the Papua New Guinea Leadership Code, laid down in the *Organic Law on the Duties and Responsibilities of Leadership*, 1975. The registrable items for these registers are:

- *companies*: directorships and other company offices (Papua New Guinea); directorships, if a source of income (Jamaica); shareholdings would be caught in Papua New Guinea by requirements to disclose total assets and total income, business connections and all business transactions, and, in Jamaica, their face value and other particulars must be disclosed;
- *realty*: to be disclosed among total assets (Papua New Guinea); description, location and purchase price (Jamaica);
- *gifts, travel and hospitality*: gifts, except from relatives (Papua New Guinea); substantial gifts might be caught as 'property acquired' (Jamaica); travel and hospitality as a 'business connexion' (Papua New Guinea);
- *liabilities*: description and amount (Jamaica); liabilities incurred and discharged in the reporting period (Papua New Guinea);
- *other*: total assets including money and personal property (Papua New Guinea); bank accounts, cash in excess of \$J200 not in a bank, money invested in mortgages, motor vehicles owned or on hire, contents of safety deposit boxes, insurance policies with value and identifying particulars (Jamaica); any assets acquired in the reporting period, business transactions (Papua New Guinea); any property acquired or disposed of in the preceding twelve months, and any other property in trust or otherwise (Jamaica).

**14.** With these registers, disclosure of personal interests is nearly as complete as rules can make it. However, the idea of public access to the resulting register has disappeared. While the Jamaican Member of Parliament is required to disclose in considerable detail all pecuniary interests of himself, his spouse and children, unless over 21 and not living with him, including any trusts from which any of them benefit, the information is confidential to the Integrity Commission. The Commission members and staff are liable to fines and imprisonment for communicating disclosed information to unauthorised persons, while any person who knowingly receives such illegally communicated information is liable to severe penalties. In Papua New Guinea, Leaders' disclosures are made confidentially to the Ombudsman Commission.

### Suggested ingredients for a register of interests for Commonwealth officeholders

**15.** In Chapter 6 of the Committee's report, the view was expressed that, should a decision be taken to require officeholders to register their pecuniary interests, the register should be as comprehensive as practicable. For the reasons now outlined, a comprehensive register of interests should, in the Committee's opinion, include the following ingredients:

- (a) *Disclosure of interests of the officeholder and members of his immediate family for whom he has responsibility.* For the purposes of this requirement, the definition of immediate family is to be regarded as the same as that appearing in item 5 of the proposed Code of Conduct recommended in Chapter 4. It could thus cover *de facto* spouses, dependent children of whatever age, and any other dependent relatives whose affairs were so closely connected with those of the officeholder that a benefit to them might flow on to a significant extent to the officeholder.

- (b) *Disclosure of pecuniary interests as to identity, nature and amount as follows:*
- (i) *Directorships* of companies, both public and private and whether the directorship is remunerated or not. As a director, duties are accepted to the company and its shareholders which may come into conflict with the public duty of an officeholder. It is not necessary to postulate a clash between public duty and private interest, for the possibility of conflict between two duties is sufficient to require disclosure.
  - (ii) *Shareholdings*. The Committee does not think that meaningful thresholds can be established, whether in relation to the face value of the holding, its proportion of the total capital of the company, or its relation to the total wealth of the holder. An interest, however small, may create a conflict of interest or it may reasonably be thought to do so. In the absence of any logical or universal cut-off point, complete disclosure appears the only acceptable course, even though it will frequently reveal trifles. The Committee is concerned to ensure that the procedures for registration prevent private companies being used as a screen to mask holdings in other companies which may be, or are, akin to public companies. When the company in which the shares are held is a private holding company, its investment portfolio and its subsidiary companies, the extent of ownership of such companies and the nature of the business activities of all should be included in the disclosure.
  - (iii) *Realty*. All real property should be described sufficiently by location and such other specifications as to leave no uncertainty as to its identity. It would not be right to exempt the principal residence or a holiday home from disclosure.

Realty is capable of raising conflicts of interest in respect of government action, and its financing has considerable potential for abuse if improper advantages are being secured. However, there appears to be no advantage in providing a notional capital value for particular pieces of realty in annual returns, provided that any income derived was shown under 'sources of income' and capital gains when they were realised were also included.
  - (iv) *Trusts*. It should not be possible to avoid the obligation to disclose an interest, whether by registration or by declaration, through concealment in a trust arrangement. An interest in certain assets or income might be established by the officeholder being the beneficiary of a trust, a member of his immediate household being the beneficiary of a trust, the officeholder being a trustee with duties under the trust which might conflict with his public duty, or the officeholders having created the trust for the benefit of some other person apart from members of his immediate family or of some cause or object, in which case he might be expected to continue to be favourably disposed to the assets held in that trust. The Committee believes that all these sorts of interests should be registered. Such disclosure should cover not only the existence of the trust, but the nature of the trust property and its principal activities.
  - (v) *Other assets*. The purpose of a register should be to disclose potential conflicts of interest, but a register is a blunt instrument by which to reveal unexpected or suspicious accretions of wealth or income that might indicate misconduct. The list of assets which may create a conflict of interest is open ended. Rather than attempt to label all possible sorts of asset, a reasonable solution would be to require registration of all



assets not otherwise listed which have been acquired primarily for their income or capital gain potential.

- (vi) *Liabilities.* It appears to the Committee that the exclusion of liabilities from some 'limited' registers is one of their greatest failings. A simple listing of assets, without any offsetting liabilities, could lead to grossly misleading comparisons being made and to the situations of particular persons being quite misunderstood. Moreover, the terms under which liabilities are created and operated may be manipulated to constitute inducements as direct and substantial as any transfer of asset, or gift or favour. Full particulars of liabilities will need to be listed to meet this possibility.
- (vii) *Gifts, travel and hospitality.* If there is to be a register, there would be obvious convenience in having such items included in its pages. Gifts subject to rules applicable to the category of officeholder in excess of \$100 or \$250, as appropriate, in value received other than from relatives, and provision of, or reimbursement for, travel whether within Australia or overseas unless paid for directly from Australian government funds, should be registered.
- (viii) *Sources of income.* Requiring registration of all sources of payments by way of salaries, wages, fees, honoraria or otherwise should not impose an excessive burden on officeholders. On the other hand, there could be many transactions, such as forms of trading operations on the stock market or in foreign exchange, that could not be identified by any other requirement in items (i) to (vii), above, for registration of interests and yet would be extremely significant in respect of conflicts of interest. This might be one of the rare cases where setting a threshold is appropriate. For example, when an officeholder engages in transactions which are speculative in nature, and have a total gross value during the reporting period in excess of, say, \$1000, descriptions of all transactions of this sort should be disclosed whether or not income was received from them during the period.

After careful consideration, the Committee doubts that it would be practicable to require registration of the indirect sources of income channelled through a professional practice, partnership or business enterprise. Accordingly, an officeholder who is a Member of Parliament or a part-time statutory officeholder who was, say, a practising solicitor or accountant would register the income from that practice without identifying particular clients. He would, of course, be obliged to identify the client when declaring an interest that the professional relationship had created in relation to a particular discharge of his public duty.

- (c) *The required information should be lodged annually and updated regularly to show major changes in an officeholder's interests.*

It was suggested to the Committee that registration of interests should operate retrospectively, for a period as long as five or seven years. In other words, officeholders should be required to register interests which they no longer possessed and transactions in which they had previously engaged, to provide a more comprehensive disclosure of the influences which might have affected, or might still affect, the discharge of their public duties. The Committee does not agree with such a proposal. The purpose of disclosure, whether made *ad hoc* or by periodic registration, is to inform those currently having official business with the Member in question. There may be occasions, for

example when there was previously a professional relationship with a client, when it would be appropriate to declare that interest. The same might apply to a former directorship with a company. But the Committee considers it unlikely that such previous connections, much less previous ownership of shares or realty, could exercise sufficient influence on an officeholder's conduct to warrant their inclusion in a register of his interests.

The Committee notes the argument that any register should be retrospective to the date of the announcement that it would be introduced. This would prevent officeholders from anticipating the introduction of a register by rearranging their affairs so that they would not be registrable, by capturing a picture of their affairs as they were before being rearranged.

The Committee does not agree with the suggestion put forward by the Joint Committee on Pecuniary Interests of Members of Parliament that disclosures take the form of a statutory declaration, a proposal that was also contained in submissions received. The possible intervention of the courts in respect of a breach of the *Statutory Declarations Act* 1959 would be an unwarranted intrusion into an area which should be left to self-regulation.

- (d) *For elected officeholders, the registers of interests should be publicly accessible; for appointed officeholders, the registers should be kept confidential.*

It is possible to distinguish between Members of Parliament and the other three major categories of officeholders in respect of registration of interest on two counts. One is that Members of Parliament (apart from those holding ministerial office) are less likely to have access to confidential information in the course of their official duties, nor are they in a position to make binding decisions unilaterally. The second is that the public accountability of Members of Parliament derives from their election by the public whom they represent. The other three categories of officeholder (apart from some elected) are appointed by someone else. Thus, one can accept that their accountability to the public may be channelled through a third party who can scrutinise their conduct on behalf of the public.

The first count suggests the conclusion that Members of Parliament might not need to register when other categories of officeholders did. The second point suggests that a register of the interests of Members of Parliament, if established, should be open to the public, whereas registers of the interests of other categories of officeholders need not be, provided that they are examined by someone acting on behalf of the public.

### Special considerations applying to the registration of interests by the different categories of officeholders

**16.** Because of the different situations of the various categories of officeholders, any system of registration of pecuniary interests would need to be adapted to take into account the differences. In the following paragraphs, the Committee sets out what it would regard as necessary adaptations.

#### *Members of Parliament*

**17.** In relation to Members of Parliament, the Committee considers that the following arrangements should form part of the registration system:

- *Responsibility for ensuring that disclosure by registration requirements are complied with should rest with the Parliament itself*, with each Chamber in respect of its own Members. Whether that responsibility should be discharged in the first instance by Ethics Committees such as recommended in Chapter 12 or by the existing Committees of Privileges or a Joint Committee is a matter which the Parliament should decide.

- *A breach of the rules, whether by failing to lodge a return or lodging an incomplete or inaccurate return, should be considered by Parliament as breach of privilege with the attendant sanctions available. The experience of the British House of Commons, where no sanction for non-compliance has been provided, proves the necessity for some sanction.*
- *The information contained in the register should be published annually as a Parliamentary Paper. This would ensure that any member of the Australian public who wishes to consult it may do so with a minimum of inconvenience. Given the size of this country and the scatter of its population, access to a register kept only in Canberra or even with copies available in the other capital cities would totally fail to meet real needs. Even if one copy was kept in each electoral division, for example at the electoral office, it could be hundreds of kilometres from some members of the public, whose right to examine its contents would be nugatory in such circumstances. Annual publication of the register would not rule out public access to the information in the register between publication dates.*
- *Maintenance of the register be the responsibility of one or more Registrars, who would be officers of the Parliament. The Registrars should be empowered to receive submissions from any persons claiming that entries in the register were incomplete or defective, and, acting on such submissions or on their own volition, they should be able to ask Members of Parliament to reconsider disclosures they have lodged. All such communications should be submitted subsequently to the Standing Committee or Committees responsible for the register to consider what further action, if any, was required.*

**18.** These arrangements would not preclude reference of an allegation concerning non-compliance with a requirement from being referred to the Public Integrity Commission which the Committee has recommended in Chapter 12 should be established. It would be a matter for determination by the Parliament itself as to whether such an allegation should be referred for investigation by the Public Integrity Commission or dealt with within the Parliament.

#### *Ministers*

**19.** With the institution of a system of registration applicable to Members of Parliament generally, the need for the maintenance of a separate register for Ministers would disappear. The only additional requirement which the Committee foresees would be for routine reporting to the Prime Minister, as Chairman of the Cabinet, of changes in particulars of their interests registered by Ministers so that the Cabinet may be aware of any interests which may conceivably affect their attitudes in matters coming before the Cabinet or for which they have administrative responsibility.

#### *Public servants*

**20.** In addition to the general features outlined earlier in this appendix, the Committee believes that a system of registration of interests for public servants should have the following features:

- (a) registers should be established within each department, covering all First and Second Division officers and those in the Third and Fourth Divisions who have been designated by the Permanent Head to be occupying 'sensitive' posts or discharging 'sensitive' duties;
- (b) decisions on the extent of coverage of departmental registers should be made in consultation with the Public Service Board;
- (c) imposition of the duty to register, or discharge from the duty, should be conveyed in writing to the officer concerned;

- (d) when a particular officer is required to register because of 'sensitive' duties, a reasonable period should be defined within which the obligation would continue;
- (e) the public should not have access to any registers of public servants' interests;
- (f) each departmental register should be formally in the custody of the Permanent Head, who should have authority to designate a senior officer of the department to maintain the register on his behalf, and to grant access on a 'need to know' basis for particular entries to senior officers responsible for the allocation of duties within the department, provided that State branches may need to keep copies of relevant portions of the departmental register in their offices in the State capitals;
- (g) the appropriate authorities should develop their own rules to deal with the situations of staff involved in security and intelligence operations;
- (h) in each department, in the event of allegations of conflict of interest, the Minister should have access to the register so as to satisfy himself as to the facts, confidentiality being protected by designating one senior member of the Minister's staff to receive any papers in connection with such a matter;
- (i) the disclosures supplied by Permanent Heads should be lodged with the Chairman of the Public Service Board, with access being available to both the Permanent Head's Minister and the Prime Minister;
- (j) the Chairman of the Public Service Board should lodge his disclosure with the Secretary of the Department of the Prime Minister and Cabinet;
- (k) in the case of Acting Permanent Heads, a disclosure of interests should be lodged at the time an officer is first appointed as Acting Permanent Head, and be updated each time he is reappointed Acting Permanent Head.

**21.** With regard to the selection of classes of officers to be subject to registration requirements, the Committee notes that officers in the First and Second Divisions are more likely to be in positions of real or apparent conflict of interest, because of the breadth and importance of their duties. An unknown number of Third and, in certain cases, Fourth Division officers discharge responsibilities in 'sensitive' areas such as purchasing, so that their inclusion in any system applied to First and Second Division officers would be appropriate.

**22.** While it might be possible to identify a minority of Second Division officers who could be exempted from registration requirements on the ground that their duties could not in any foreseeable circumstances lead to a significant conflict of interest situation, the Committee thinks, on balance, that inclusion of all officers of the First and Second Divisions is appropriate, in recognition of universality of the obligation to avoid and resolve conflicts of interest. Similarly, the Committee prefers the designation of certain officers in the Third and Fourth Divisions because they occupy 'sensitive' posts or discharge 'sensitive' duties to taking an automatic cut-off point within the Third Division, such as the Clerk Class 8 level or equivalent, with a power to exempt officers. It should be necessary for departments to show that a Third or Fourth Division office need be included within the registration system.

**23.** The aim of providing for designation for reasonable periods is to ensure that registrable information is disclosed for the entire period during which 'sensitive' duties are discharged, and that the duty to register ceases after such an officer's duties are no longer 'sensitive'. Consultation with the Public Service Board would be necessary

to ensure the maximum possible uniformity of practice across the Australian Public Service. Communicating the imposition of the duty to register in writing should avoid any chance of misunderstanding as to an officer's obligations.

**24.** The maintenance of registered disclosures on a confidential basis within departments should mitigate the intrusion upon privacy to which exception is taken. The Committee can see no justification for public access to registers of public servants' interests at the present time. It was not persuaded by the fact that, as a consequence of recent legislation, the Ethics in Government Act of 1978, senior public servants in the American Federal Government have been required to disclose a wide range of personal and family pecuniary interests in a public access register. This, the Committee believes, is a consequence of a crisis in public confidence in governmental institutions which has not been paralleled in Australia. It also noted a reported proposal that access to registers of public servants' interests be given to Members of Parliament, both Government and Opposition, in an Australian State. The Committee has grave doubts whether confidentiality could be preserved under such a system.

**25.** The ingredients of the register system outlined in this appendix would generally be suitable for public servants. Those items, such as company directorships, income earned from outside employment, or gifts, the holding or receipt of which is substantially regulated within the Public Service should still be required to be regulated where permitted. Up to the present time, it appears that departmental disclosure practices, where they exist, have tended to concentrate on interests which have a direct connection with the department's functions.

**26.** Whilst it would be possible to continue such an approach with only interests in the area of a department's responsibilities being registrable, the Committee believes that, because of the circulation of information and personnel between various functional areas, it would be preferable to require a wider disclosure. It would still be possible for officers of a particular department to be brought under more stringent requirements in respect of interests which are sensitive for their own department, and be liable to prohibition or divestment rules.

**27.** The Committee considered, and rejected, the possibility that all public servants' registration disclosures should be assembled in a single register maintained by a special agency or some existing body such as the Public Service Board. The Committee believes that responsibility for dealing with conflicts of interest in the Australian Public Service should rest primarily at the departmental level, and with the Permanent Head for each department.

**28.** Departmental registers would be needed in any case, if a register was to be made use of in the allocation of tasks in the light of information about possible conflicts of interest. The choice is really between a system of decentralised registers held at the departmental level and one which adds a central register duplicating all the departmental registers.

#### *Statutory officeholders*

**29.** The following points should be taken into account in any registration system for statutory officeholders:

- the member of a single-member statutory authority should lodge his disclosure by way of registration with the responsible Minister;
- the members of a multi-member statutory authority should lodge their register disclosures with the Secretary of that body;

- ordinarily all members of a multi-member statutory authority should have access to all disclosures held, including the chairman's, but there may be exceptional circumstances where for reasons of commercial confidentiality this general rule might have to be modified by the responsible Minister;
- the Minister should have access to the registers of all statutory authorities within his area of responsibility; and
- there should be no right of public access to such a register.

30. Registration practices similar to those outlined for public servants could be applied to the staff of statutory authorities, with any necessary adaption to the circumstances of the authority.

### Parliamentary candidates

31. In Chapter 7 of the Report, the Committee recommended that any requirement for the registration of interests not be extended to parliamentary candidates. The Committee has been informed by the Australian Electoral Office that should, however, a decision to be taken to extend any registration system to parliamentary candidates, and legislation to this effect passed, it is unlikely there would be any substantial administrative problems created.

32. Certain practical considerations arising out of existing electoral legislation may impinge upon the feasibility of any pecuniary interest registration requirement as a condition for candidature.

33. Firstly, it would seem appropriate that such registration forms as are required be lodged in the first instance with the Divisional Returning Officer (for elections to the House of Representatives) or the Australian Electoral Officer for the State (for Senate elections) at the time a candidate gives his formal consent to be nominated (*Commonwealth Electoral Act 1918*, ss. 73 and 74).

34. Existing legislation provides that this consent may be withdrawn at any time prior to 12 o'clock noon on the day of nomination (s. 80). It would be inappropriate, therefore, for any officer of the Australian Electoral Office to disclose information pertaining to any nomination prior to the actual declaration of nominations.

35. Consequently, the earliest appropriate date for the details of candidates' pecuniary interests to be forwarded to the Registrar of Members' Interests would be the date of nomination fixed by the writ for election (ss. 59 and 62).

36. Existing legislation provides that the date of the poll may be seven to thirty days after the date of nomination (s. 63). In the event that an election were held as early as seven days from the date of nomination, it is likely that there would be insufficient time available for the publication of details of candidates' pecuniary interests in many, especially remote, electoral Divisions prior to polling day. This possible difficulty gives rise to questions whether:

- (a) details of the pecuniary interests of some candidates might be published (those whose proximity to the Registrar's office would make publication feasible) and not those of others (candidates too remote);
- (b) in Senate elections, a situation could be contemplated in which urban electors might have access to the published statements of candidates' pecuniary interests while remote electors might not;

- (c) it should be possible for postal voters, even in close proximity to the office of the Registrar of Members' Interests, to vote prior to the publication of details of candidates' pecuniary interests (as would be permitted under existing legislation which provides that postal voting may take place at any time between the declaration of nominations and the close of the poll—Part XII of the Commonwealth Electoral Act).

Clearly, any decision to introduce compulsory registration of candidates' interests would give rise to a need to review provisions touching on these issues.

37. Further matters which would need consideration would include whether failure to comply with the registrative requirements would disqualify a candidate from election and the consequences of misstatements in the details submitted by candidates for registration.

1. Great Britain, House of Commons, *Report from the Select Committee on Members' Interests (Declaration)* (F. Willey, Chairman), 1974–75 H.C. 102, HMSO, London, 1974; Australia, Parliament, *Declaration of Interests: Report of the Joint Committee on Pecuniary Interests of Members of Parliament* (J. M. Riordan, Chairman), AGPS, Canberra, 1975.
2. Willey, *Report*, pp. vii–viii.
3. Riordan, *Report*, p. 47.
4. Chapter 7, para. 7.13.
5. The term 'qualified blind trust' is explained at length in section 102 of Title 1 of Ethics in Government Act of 1978, and includes any trust in which a reporting individual, his spouse or any of his dependants has a beneficial interest in the principal or income, which meets certain requirements in respect of the trustee of the trusts, transfer of assets, and has the approval of the reporting individual's supervising ethics office.





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