PECUNIARY INTEREST OF PARLIAMENTARIANS: A COMMENT ON THE *WEBSTER CASE*

On 25th June 1975, the Chief Justice of the High Court of Australia, Sir Garfield Barwick, handed down his judgment in the case of "*Re Senator Webster*".[1]

The case was the first litigation arising out of the "pecuniary interest disqualification" section of the Australian Constitution.[2] Given the Australian public's general suspicion of politicians' financial integrity, the decision might have provided the legal framework within which such activities could be controlled—at least at the federal parliamentary level.

Regrettably, however, the somewhat narrow view of s. 44(v) as adopted by Barwick C.J. appears to rob the section of most of its efficacy. His Honour saw the section as a safeguard against the "sapping of the freedom and independence of Parliament [from the Crown]", rather than "protecting the public against fraudulent members of the House".[3]

It is solely with this aspect of the judgment that this article is concerned.[4] For, in His Honour's own words, "It is fundamental to the decision [of this case] to bear in mind the purpose which s. 44(v) of the Constitution seeks to achieve".[5] In the respectful opinion of the writer, Barwick C.J. trod an unnecessarily narrow path to reach his conclusion as to purpose.

Background to the Case

On 15th April 1975, Senator the Honourable J. O'Byrne, President of the Senate, read to the Senate a letter he had received from Mr J. M. Riordan M.H.R., the Chairman of the "Joint Committee on Pecuniary Interests of Members of Parliament".[6] The letter informed the Senate that certain witnesses who had appeared before the Committee had alleged that a member of the Joint Committee itself, Senator James J. Webster, "probably unwittingly, had broken Section 44 (v) of the Constitution by contracts with the Crown".

As a result of this letter, and following a great deal of press publicity, the Senate resolved to refer the matter to the High Court of Australia

[9] If A.C.T.U.-Solo had sought to enjoin the Royal Commission, the High Court would have had jurisdiction at least under s. 75(v) on the ground that one of the remedies referred to in that provision was being sought against a Commonwealth officer, the Royal Commissioner. Furthermore, it would also have had jurisdiction to grant both injunction and declaration against the Commission under s. 75(iii) if it held that the Commission was an agent of the Commonwealth. See the Judiciary Act, 1903-1973 (Cth), s. 64.

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1 (1975) 6 A.L.R. 65.

2 *Commonwealth of Australia Constitution Act* 1900 (Eng.), s. 44(v).

3 (1975) 6 A.L.R. 65, 70.

4 For an analysis of the other aspects of this case, see G. Evans, "Pecuniary Interests of Members of Parliament under the Australian Constitution" (1975) 49 A.L.J. 464.

5 (1975) 6 A.L.R. 65, 69.

6 The Committee was appointed "to inquire into and report on arrangements to be made relative to the declaration of the interests of the Members of Parliament and the registration thereof". Commonwealth, *Parliamentary Debates*, House of Representatives, 1 August 1974 950.

(sitting as the Court of Disputed Returns) to determine the following questions:

(a) Whether Senator Webster was incapable of being chosen or of sitting as a Senator; and

(b) Whether Senator Webster has become incapable of sitting as a Senator.[7]

Barwick C.J. answered both questions in the negative.

Despite the constitutional importance of this case (it was the first time that s. 44(v) had been litigated), Barwick C.J. decided to hear it alone,[8] even though at one stage during the preliminary hearing he had thought that it "would be better [to have] more than one view about it".[9]

The Facts

Section 44(v) of the Commonwealth Constitution provides that any person who has any direct or indirect pecuniary interest in any agreement with the Public Service of the Commonwealth otherwise than as a member and in common with the other members of an incorporated company consisting of more than 25 persons shall be incapable of being chosen or of sitting as a Senator or a member of the House of Representatives.

Senator James J. Webster was a shareholder in J.J. Webster Pty. Ltd. (the company)—a company founded by his grandfather. The company carried on business in Victoria as a timber, hardware and plumbing merchant.

At various relevant times the company publicly tendered for, and subsequently supplied, material for the use of the Postmaster-General's Department, and the Department of Housing and Construction.

At all material times Senator Webster was a shareholder in the company, and in addition, was the managing director, secretary and the manager. He was not entitled to, nor had he received, any fee, remuneration or reward as managing director, nor as a director. He received a fixed salary as manager of the company, plus the use of a company car. The salary was unrelated to the turnover or the profits of the company. Senator Webster received no remuneration of any kind in relation to the negotiation or management of business for the company. The company had nine shareholders.

The Purpose of s. 44(v)

On its face, s. 44(v) makes no mention of the mischief it seeks to remedy. The Constitution does not tell us whether the section was designed to

[7] Commonwealth, *Parliamentary Debates*, Senate, 15 April 1975 980-985; 16 April 1975 1020, 1026-1029; 21 April 1975 1138-1142; 22 April 1975 1196-1223; House of Representatives 16 April 1975 1661. The Court of Disputed Returns was constituted under the *Commonwealth Electoral Act* (1918-1973) s. 184, which in turn was authorized by the Commonwealth Constitution ss. 47 and 51. The matter was referred to the Court by the Senate pursuant to the *Commonwealth Electoral Act* (1918-1973) s. 203.

[8] "[The case] might involve some consideration of general law but not any constitutional questions of great moment really. I think the most convenient course is for me to decide it, and that I will do."—*Transcript of Proceedings* Sydney 2/6/75 p. 53.

[9] *Transcript of Proceedings* Sydney 19/5/75 pp. 6-7.

protect the independence of Parliament from the Crown, the public purse from predatory parliamentarians, or both. Consequently, what reasoning did the Court follow to arrive at the conclusion that the section was not designed to protect the public against fraudulent parliamentarians,[10] but rather was exclusively designed to prevent the Crown from influencing parliamentarians in relation to their parliamentary affairs?[11] Barwick C.J. reached this conclusion by simply asserting that because s. 44(v) can be traced back to an English Act of Parliament—the *House of Commons (Disqualification) Act* 1782[12]—it therefore serves the same purpose as did the English Act (*vis-à-vis* the House of Commons).[13]

There is no doubt that some vestiges of the English Act can be discerned in s. 44(v), and further, the sole purpose of the English Act was to protect Parliament from the Crown.[14] However, how valid is the Court's conclusion that the *sole* purpose of s. 44(v) is therefore identical with that of the English Act? Is it not possible that the framers of the Constitution had more than one purpose in mind when they drafted s. 44(v)?

The conclusion reached by Barwick C.J. is even more suspect when one realizes that well before he had received any submissions from counsel as to the purpose of the section, and *before he had compared the English Act with s. 44(v)*, he held fairly strong views as to the purpose of the section. For, on 19th May 1975, during the preliminary hearing, he said of s. 44(v), "If you look at the reason for this provision historically, it is a provision to protect the parliament; it is not like a local government disqualification for instance. But that may need some consideration in relation to the facts when I see them".[15] Yet some two weeks later, on 3rd June 1975, His Honour, whilst receiving submissions from Mr Deane Q.C. (counsel for Senator Webster) confessed, "I have not checked the 1782 and 1800 legislation. Is it in identical terms with s. 44(v)—these words 'pecuniary interest'?"[16]

A Comparison of the Wording of the Two Pieces of Legislation

The *House of Commons (Disqualification) Act* 1782 s. II, provides

> "any person who shall directly or indirectly, himself or by any person whatsoever in trust for him, or for his use or benefit, or on his account undertake, execute, hold, or enjoy, in the whole or in part, any contract, agreement, or commission, made or entered into with [the Crown] for or on account of public service . . . shall be incapable of being elected, or of sitting or voting as a member of the house of commons, during the time that he shall execute, hold or enjoy, any such contract, agreement or commission, or any part or share thereof, or any benefit or emolument arising from the same. . . ."

10 ". . . the parliamentary disqualification was neither initially devised nor inserted into the Constitution in order to protect the public against fraudulent members of the House . . ." per Barwick C.J. (1975) 6 A.L.R. 65, 70.
11 Ibid. p. 71.
12 22 Geo. III c. 45, s. 1.
13 (1975) 6 A.L.R. 65, pp. 69-70.
14 See the Preamble, and also *Re Stuart Samuel* [1913] A.C. 514, 524.
15 *Transcript of Proceedings*, Sydney 19/5/75 pp. 6-7.
16 *Transcript of Proceedings*, Sydney 3/6/75 p. 115.

Whereas s. 44(v) of the Australian Constitution provides

> "any person who has any direct or indirect pecuniary interest in any agreement with the Public Service of the Commonwealth otherwise than as a member and in common with the other members of an incorporated company consisting of more than twenty five persons, shall be incapable of being chosen or sitting as a senator or a member of the House of Representatives."

Even the most cursory examination of both pieces of legislation reveals substantial differences—the most striking of which is the inclusion in s. 44(v), of the words "pecuniary interest". So far as the writer has been able to discover (at least up to the year 1900) the words "pecuniary interest" had only been used in local government-type legislation. For example

> "No councillor shall vote upon or take part in the discussion of any matter in or before the council in which such councillor has directly or indirectly by himself or his partners any pecuniary interest. . . ."[17]

The purpose of such wording in that type of legislation was to remove from those who govern, "the manifest possibility of a conflict between interest and duty".[18]

Notwithstanding this similarity of wording between s. 44(v) and local government-type legislation, Barwick C.J. discounted completely any possibility that s. 44(v) could have been designed to prevent a possible conflict between the interest and duty of a member of Parliament.[19] He gave no reason for this conclusion, apart from simply asserting that members of Parliament are in a "significantly different situation" to that of councillors.[20]

However, in the respectful opinion of the writer, it is the inclusion of the words "pecuniary interest" which permit of a far broader interpretation of s. 44(v) than Barwick C.J. was prepared to give.

A Comparison of the "Purpose" of the Two Pieces of Legislation

(1) *House of Commons (Disqualification) Act* 1782

The purpose of this English Act is well known and was certainly well settled at the time of the drafting of the Commonwealth Constitution.[21]

[17] *Local Government Act* 1890 (Vic.) No. 1112, s. 173; see also *Local Government Act* 1863 (Vic.) No. 176, s. XXXV; *An Act for the Government of New South Wales and Van Dieman's Land* 1842 (Eng.) s. XLI(3); *Municipal Corporations Act* 1842 (Eng.) s. 11.

[18] *Attorney-General* v. *Emerald Hill* (1873) Vic. Sup. Court 4 A.J.R. 135-136.

[19] "The purpose of s. 44(v) has no real analogy in the purpose sought to be achieved by disqualification provisions under local government and comparable legislation. In the case of . . . councillors . . . the object of the disqualification is to prevent a possible conflict of interest and duty . . . the obligations of a member of Parliament cannot be compared to the duties of local government . . . officials." Per Barwick C.J. (1975) 6 A.L.R. 65, 70.

[20] Ibid. See also at p. 72.

[21] See the Preamble and *Thompson* v. *Pearce* (1819) 29 E.R. 632; *Dartmouth Borough Election Petition* (1845) 1 Bar and Arm 455; *City of Londonderry Election Petition* (1860) Wolf and B. 206; *Royse* v. *Birley* (1869) L.R. 69 C.P. 297; see generally Repl. Vol. 36 *English and Empire Digest* [1954] pp. 379-380.

As it is the wont of parliamentary draftsmen to faithfully repeat words of a previously well settled statute when seeking to obtain a similar legislative effect, it is not surprising to find that very similar phraseology to the English Act had already been incorporated into the Constitution Acts of, New South Wales, Victoria, South Australia, Queensland, New Zealand and Canada.[22] This situation can be contrasted with the phraseology of s. 44(v) which, when adopted in 1900, was markedly different from the phraseology of any of the existing Constitution Acts. This could give rise to a presumption that s. 44(v) was not intended to be treated precisely in the same way as its "cousin clause" in other Constitution Acts. I say "cousin clause" because, as will be shown later, it would appear that s. 44(v) did originate from the English Act. However, it underwent substantial change as it proceeded through the Convention Debates, from draft to draft, to final form.

(2) Evolution of s. 44(v)

Barwick C.J. revealed during the hearing that he had consulted the Convention Debates.[23] Although the High Court has said that the Convention Debates should not be referred to,[24] this does not apply to successive draft bills. In 1904, the High Court held that they could be referred to, and Barton J., speaking of an argument which relied on the earlier drafts said

> "The successive alterations of the drafts seems rather to point to the view, not that the final provisions are to be interpreted in the same sense as those struck out of the draft, but that the first intentions were given up, and that entirely different intentions, to be gathered from the language of the Constitution, are those by which we are to abide."[25]

It is respectfully submitted that the successive drafts support a conclusion different to that reached by the Court.

(a) First Draft of s. 44(v)—1891 Sydney Convention

The first draft (then numbered "clause 48" and comprising three paragraphs) was clearly drawn from the *House of Commons (Disqualification) Act* 1782 and the subsequent colonies' Constitution Acts. Thus it can reasonably be assumed that it was designed to effect the same purpose. No debate of any consequence took place, and it was adopted with only slight amendment.[26]

(b) Second Draft of s. 44(v)—1897 Adelaide Convention

This draft (re-numbered as "clause 46" and still comprising three paragraphs) was basically the same as that adopted by the previous Convention, although the wording had been tightened up slightly.

[22] N.S.W. (1855) 18 and 19 Vict. c. 54, s. 28; Vic. (1855) 17 Vict. s. 25; S.A. (1869-1870) s. 1; Qld. (1867) 31 Vict. c. 38, s. 6; N.Z. (1870) 33 and 34 Vict. c. 16, s. 9; Can. (1878) 41 Vict. c. 5 (Dom.) s. 2.

[23] "One ought not to do it, but I did it; I went and looked at the original debates" per Barwick C.J.—*Transcript of Proceedings*, Sydney 2/6/75 p. 95; see also (1975) 6 A.L.R. 65, 70, 71.

[24] See, for example *The Municipal Council of Sydney* v. *The Commonwealth* (1904) 1 C.L.R. 208, 213.

[25] *Tasmania* v. *The Commonwealth and State of Victoria* (1904) 1 C.L.R. 329, 351.

[26] *Convention Debates* 1891 Sydney pp. 659-660; p. 951 Cl. 48.

At this Convention however, a fairly spirited debate took place. The clause, as it then stood, excluded "contractors" from serving in Parliament, but it was not seen to exclude "professional" persons (especially barristers) from accepting fees for services rendered to the Government. Some speakers thought that this loophole might enable the government-of-the-day to win the support of such members, by dangling a brief or other commission in front of them. As a result of this concern, an additional paragraph was added to the clause—the effect of which was to disqualify any member who accepted a fee or honorarium for services rendered to the Government. This step was to protect further the independence of Parliament.

The amended clause was adopted by the Convention. It was re-numbered "clause 47", and now comprised four paragraphs.[27]

Despite the amendment, the clause was still recognizable as emanating from the English Act. However, it is interesting to note that some important variations were starting to emerge.

First, the prohibition now embraced a far wider class of persons than those initially contemplated by the English Act.

Secondly, even though the speakers in the 1897 Adelaide Convention Debates made no mention of the fact, a lighter penalty was imposed upon a "professional" (as distinct from a "contractor") for ostensibly the same breach of the Constitution.[28] It is difficult to know whether this discriminatory treatment was deliberate, or simply a draftsman's oversight.

Either way, the effect was to treat "professionals" (who, according to the Debates to date were definitely subject to the risk of subornation by the Crown) less severely than "contractors". If one believed that this was deliberate policy, rather than an oversight, it would lend support to the view that the Convention was beginning to view the "contractors" provision of the clause as having a far broader effect than its antecedents would suggest. This broader effect could thus catch parliamentarians who engaged

[27] See the speeches of Sir Joseph Abbott, and especially Isaac Isaacs (later to become Sir Isaac Isaacs, Chief Justice of the High Court of Australia 1906-1930).—*Convention Debates* 1897 Adelaide p. xi, Cl. 46; pp. 736-738; 1034-1044; 1228-1229 Cl. 49.

[28] Clause 47, Paragraph 1 states that "any person who [is a 'contractor'] shall be incapable of being chosen or sitting as a member of the Senate, or of the House of Representatives". Thus if any person who, whilst enjoying a relevant contract with the Crown, is elected, he is nevertheless not chosen within the meaning of the Constitution, and therefore cannot take his place. On the other hand, no such restriction is imposed upon a "professional" who is say, holding a brief on behalf of the Crown at the time of election. If elected, he can take his seat. (Nevertheless, under clause 47, paras. 2 and 4, if a Member subsequently enjoys a contract, or alternatively, accepts a fee or honorarium while still a Member, he shall "thereupon vacate his place". In this regard, the "contractor" and the "professional" are treated alike.) Furthermore, another discrimination applies when we look at clause 49. Here, if "any person by this Constitution declared to be incapable of sitting [in either House] sits as a Member of either House, he shall, for every day on which he sits . . . be liable to pay the sum of one hundred pounds. . . ." Whereas a "contractor" (under clause 47 para. 2) together with certain other classes of persons (specified in clauses 32, 45 and 48) is expressly declared to be "incapable of sitting", a "professional" (under clause 47 para. 4) is not so described. Thus a "professional" who continues to sit whilst ineligible to do so, incurs no additional penalty, yet a "contractor" can be liable to a heavy fine under clause 49.

in fraudulent conduct against the public, as well as protecting the freedom and independence of the Parliament from the Crown.[29]

(c) Third Draft of s. 44(v)—1897 Sydney Convention

Clause 47 surfaced again at this Convention. Here a different debate ensued. The speakers did not discuss the "professional" paragraph four, but concentrated their attention on paragraphs two and three—the "contractor" provisions. The tone of their speeches lends weight to the view that they now saw the "contractor" provisions as having a far broader effect than simply protecting the Parliament from the Crown. The whole thrust of this debate was concerned with ways of preventing parliamentarians from using their elected office for personal gain.[30] Not one word was said about the risk of the Crown suborning members by letting out contracts to them, in the manner that the speakers at the 1897 Adelaide Convention thought that barrister-parliamentarians might be tempted.

Support for the proposition that their view was broadening can be found quite readily. Contrast the speech made by Isaac Isaacs at the 1897 Adelaide Convention, on the "professional" paragraph four, with his speech at this Convention on the "contractor" paragraphs two and three.[31]

He was the *only* speaker to speak at any length on *both* the "professional" and "contractor" paragraphs, and his speeches certainly reflected the view that the clause could have the dual effect previously mentioned.

Given the thrust of the debate, it is interesting to note that the clause was adopted virtually unamended.[32] This seems to suggest that the clause, *even as it then read*, was seen to cover a broader area than its progenitor, the English Act.

(d) Fourth Draft of s. 44(v)—1898 Melbourne Convention

At this Convention the delegates were presented with what was to become the final draft of s. 44(v). But what a radical change from the clause adopted at the previous Convention!

[29] The penalty distinction between the "contractor" and the "professional" was retained in subsequent drafts, and is now enshrined in the Constitution (ss. 44, 45 and 46). This could add weight to the argument that it was not simply a draftsman's oversight at the 1897 Adelaide Convention, but rather an indication that the Convention (and evidently subsequent Conventions) saw that there was a two-fold mischief to be remedied by the section.

[30] For example, "The object of [clause 47] is to prevent individuals making personal profit out of their public positions . . ." per Isaac Isaacs, *Convention Debates* 1897 Sydney p. 1023; "I think it inexpedient to allow members to have any contractual relations which might suggest to any one that their position might be impure", per Sir John Downer, ibid. at p. 1025.

[31] *Convention Debates* 1897 Adelaide p. 1037-1038; *Convention Debates* 1897 Sydney pp. 1023 ff.

[32] The clause as presented to the 1897 Sydney Convention provided "Clause 47. Any person, being a member of the senate or of the house of representatives, who, in the manner or to the extent forbidden in this section, undertakes, executes, holds, enjoys, or continues to hold, or enjoy, any such agreement [from any part or share of it, or any benefit or emolument arising from it] shall thereupon vacate his place. But this section does not extend to any agreement made, entered into, or accepted by, an incorporated company consisting of more than [twenty-five] persons, if the agreement is made, entered into, or accepted, for the general benefit of the company."
The Convention amended the clause by inserting the words shown in brackets, and then adopted it in its amended form—*Convention Debates* 1897 Sydney p. xi.

Omitted was all the phraseology which had clearly identified it with the earlier English Act. This was despite, or perhaps because of, the broader meaning ascribed to it by the previous debates. Substituted was totally different wording, and for the first time the term "pecuniary interest" was used in an Australian constitutional document.[33] As mentioned above, prior to this time the phrase had only been used in local government-type legislation, where the Parliament had sought to proscribe certain undesirable activities of local councillors.[34]

Needless to say, there had not been the need at the local government level to protect the Council Chamber from the influence of the Crown: thus the only purpose for such wording was to prevent elected representatives from using their office for personal gain—the very point that had concerned the speakers in the 1897 Sydney Convention Debate.

Despite the assertion of Barwick C.J. that "the obligations of a member of Parliament cannot be compared to the duties of local government . . . officials",[35] this certainly was not the view held by parliamentarians at that time. They could foresee the possibility of a conflict between a parliamentarian's private interest and his public duty. This possibility is evidenced by the adoption of various Standing Orders in the respective Legislatures of the Australian Colonies expressly prohibiting a Member from voting "upon any question in which he has a direct pecuniary interest".[36] The English progenitor of this Standing Order pre-dated the *House of Commons (Disqualification) Act* 1782 by at least 170 years,[37] so it is most unlikely that the Order was brought in to protect the Parliament from the Crown. Clearly it had another purpose, and this purpose was extensively discussed in the "*U.K. Report of the Select Committee on Members of Parliament (Personal Interest)* 1896". This Committee was set up in 1896, indicating that the possible conflict between a Member's private interest and his public

[33] As well as including this term, the clause had been reworded and renumbered. Clauses 46, 47 and 48, as adopted by the 1897 Convention in Sydney, had been redrafted into Clauses 45(i)-(v) and 46(i)-(iii). The "contractor" was now dealt with under Clauses 45(v) and 46(i)—the "professional" under Clause 46(iii). Clause 45(v) read as follows

"Any person who . . . has any direct or indirect pecuniary interest in any agreement with the public service of the Commonwealth otherwise than as a member and in common with the other members of an incorporated company consisting of more than twenty-five persons, shall be incapable of being chosen or of sitting as a senator or a member of the House of Representatives."—*Convention Debates* 1898 Melbourne pp. 1931-1932. No debate or amendments relevant to this article took place, and the Clauses were adopted by the Convention. In so doing, the Clauses were re-numbered yet again—the "contractor" clauses became Clauses 44(v) and 45(i)—the "professional" clause became 45(iii)—ibid. pp. 2529-2530.

Ultimately, the clauses were enacted as Sections 44(v), 45(i) and 45(iii) of the *Commonwealth of Australia Constitution Act* 1900 63 and 64 Vict. c. 12.

[34] *Attorney-General* v. *Emerald Hill* (1873) Vic. Sup. Ct. 4 A.J.R. 135-136.

[35] (1975) 6 A.L.R. 65, 70.

[36] For example, Legislative Assembly Standing Orders: S.A. (1887) No. 201; Vic. (1888) No. 121; N.S.W. (1894) No. 204. This rule was a codification of the U.K. House of Commons unwritten rule "that no Member who has a direct pecuniary interest in a question shall be allowed to vote on it".

[37] The basic U.K. ruling was that of Mr Speaker Abbott on 17th July 1811. He alluded to the unwritten rule as "established two hundred years before, and then spoken of as ancient practice"—*Parliamentary Debates* 20 c.c. 1001-1012.

duty, was very much a live issue at the time of the 1898 re-drafting of s. 44(v).[38] If the Report itself was available in Melbourne at the time,[39] and if in fact the draftsmen referred to it, they would have noticed that the Report highlighted the distinction between the mischief intended to be remedied by the *House of Commons (Disqualification) Act* 1782, and the mischief the Select Committee was enquiring into. The Committee saw that these were separate, but clearly related issues.[40] Given the thrust of the previous Convention Debates, the Report would have been extremely helpful to a draftsman working on s. 44(v).

It seems then, that the Australian legislators were well aware of the possibility of a conflict between an elected representative's private interest, and his public duty. Furthermore, they were very familiar with the terminology used to proscribe such behaviour. It is therefore submitted that the inclusion of the term "pecuniary interest", coupled with the radical change in wording, indicated a deliberate attempt by the 1897 draftsmen to broaden the scope of the section beyond that contemplated by the English Act.

One final point should be made regarding the 1897 draft of s. 44(v). When it was presented to the 1898 Convention in its radically altered form, the change did not provoke one word of debate! This is all the more curious, given the close attention that Isaac Isaacs had paid to this clause in the previous debates. A pedant at the best of times,[41] he could be expected to meticulously examine every word drafted by the men who had defeated him for a position on the 1897 Drafting Committee,[42] and who were therefore responsible for the "new" s. 44(v). The absence of any public comment by him,[43] the writer respectfully submits, supports the

[38] The Committee was to "inquire into and report on the most effective way of defining and disallowing the vote of any Member who had a direct pecuniary interest in any question before the House"—U.K., *Parliamentary Debates* 4th Series, Vol. 39, 14 April 1896 pp. 866, 869, 877, 878. Copies of these debates, which resulted in the setting up of the Select Committee, were received by the Melbourne Public Library on 29 October 1896.

[39] In view of the binding and dating system used by the Melbourne Public Library, it is a probability, amounting to almost a certainty, that the Report itself was available in the Library at the time of the 1897 re-drafting of s. 44(v). In addition, the *Victorian Parliamentary Catalogue May 1886-August 1898* lists the *House of Commons Sessional Papers 1884-1885 to 1896* (which included the Report) as being on the shelves of the Parliamentary library—see the *Supplementary Alphabetical and Classified Catalogue of the Parliament Library from May 1886-August 1898* (Melbourne) 1899.

[40] See especially Lloyd-George questioning W. C. Gully *U.K. (Personal Interest) Report* op. cit. p. 11, para. 140.

[41] Deakin spoke of him as "dogmatic by disposition, full of legal subtlety, and the precise literalness and littleness of the rabbinical mind" quoted in Z. Cowen, *Isaac Isaacs* (Melbourne, Oxford University Press 1967) p. 59.

[42] "[Isaacs'] defeat was occasioned purely by personal motives and from personal dislike, and was brought about by a plot discreditable to all engaged in it"—Deakin quoted in M. Gordon, *Sir Isaac Isaacs—A Life of Service* (London, Heinemann 1963) p. 83. The 1897 Drafting Committee comprised Barton, Downer and O'Connor.

[43] "[Isaacs'] crushing humiliation . . . ensured that [he], the most acute legal critic in the Convention, would now be forced to make his frequently technical criticisms in public." J. A. La Nauze, *The Making of the Australian Constitution* (Melbourne University Press 1972) pp. 129-130.

proposition that the new phraseology (which incorporated the technical term "pecuniary interest") encompassed not only the traditional protection of Parliament from the Crown, but also spelt out more clearly the sentiments expressed by Isaac Isaacs and others, at the 1897 Sydney Convention.

Conclusion

As stated above, Barwick C.J. concluded that s. 44(v) is solely designed to preserve the freedom and independence of Parliament from the Crown. He reached that conclusion by simply asserting that its purpose was identical to that of the *House of Commons (Disqualification) Act* 1782. He did this, notwithstanding the obvious differences in wording between the two pieces of legislation. Unfortunately, he offered no explanation as to why he thought the constitutional drafstmen would abandon phraseology which had been used for over 100 years in British constitutional legislation, if they simply wanted the section to have the same legislative effect as the well-settled English Act.

It is submitted that the difference in wording was deliberate. In such a case, it is possible for the section to perform a two-fold purpose. First, it would still proscribe the sort of behaviour the English Act sought to affect. Secondly, it would go further, and require of Federal parliamentarians no lower standard of probity than was expected of their local government brethren.

If this interpretation were accepted,[44] it would mean that the injection of the words "pecuniary interest" transformed the section from a rather puny direct descendant of the *House of Commons (Disqualification) Act* 1782, to a vigorous cousin of the same Act. Under such circumstances, the section would still have relevance to present-day conditions. However, the decision in *Webster's* case has rendered it almost useless as a check upon would-be fraudulent politicians.[45]

J. D. HAMMOND*

[44] An interpretation which would appear to be more in tune with the climate of the late nineteenth century, rather than the interpretation of the Court, which, even according to Barwick C.J. is more in keeping with the thinking of the eighteenth century—see (1975) 6 A.L.R. 65, 71.

[45] This is not to say, even with the broader interpretation being urged, that Senator Webster contravened the section. The result of his case may well have been the same, by virtue of the nature of the transactions—see (1975) 6 A.L.R. 65, 77.

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