



THE LAW REFORM COMMISSION  
OF WESTERN AUSTRALIA

Project No 14

**Disqualification for Membership  
of Parliament:  
Offices of Profit under the Crown  
and Government Contracts**

**REPORT**

**MARCH 1971**



To: THE HON. R.E.. BERTRAM, M. L. A.  
ATTORNEY GENERAL

## **TERMS OF REFERENCE**

1 By the terms of reference for Project No. 14 of its first programme, the Committee was asked -

“to consider whether any alteration is desirable in the law relating to persons holding offices of profit under, or having contracts with, the Crown in relation to their right to be members of Parliament.

## **THE LAW IN WESTERN AUSTRALIA**

2. The law is contained in the *Constitution Act 1889-1963* and in the *Constitution Acts Amendment Act 1899-1969*.

Appendix I to this report sets out the text of the relevant provisions. Paragraphs 3 to 8 of this report summarise their main features.

### **Offices of Profit:**

3. Subject to the exceptions and qualifications listed in the next paragraph -
- (a) the holder of any office of profit under the Crown is *not* disqualified from becoming a member of Parliament but, if elected, he is deemed to have vacated the office by taking the oath as member;
  - (b) a member of Parliament who accepts an office of profit from the Crown after his election vacates his seat.
4. The following are the exceptions and qualifications referred to in paragraph 3 above.

- (a) Judges of the Supreme Court and the Sheriff of Western Australia are disqualified from becoming members of Parliament.
- (b) A Minister of the Crown does not vacate his office as Minister by taking the oath as member of Parliament, nor does he vacate his seat upon appointment as Minister or on changing his portfolio.
- (c) An officer of Her Majesty's sea or land forces (but not air force) on "full, half or retired pay" does not vacate his office on election to Parliament nor does he vacate his seat if appointed to the office after election.
- (d) A member of Parliament does not vacate his seat if appointed Administrator of the Government.
- (e) A member of Parliament does not vacate his seat by reason only of accepting payment of prescribed expenses, if appointed -
  - (i) a member of a Royal Commission;
  - (ii) a member of a select committee of either House or of a joint select committee;
  - (iii) a member of the Executive Council with the designation of "Honorary Minister";
  - (iv) a representative of either House or of the Commonwealth Parliamentary Association.
- (f) The following are deemed by statute not to hold offices of profit from or under the Crown and may therefore be members of Parliament -

- (i) chemists and doctors approved by the Commonwealth Director-General of Health under what is now the *National Health Act 1953* (Commonwealth); and
- (ii) members of the Cancer Council (*Cancer Council of Western Australia Act, 1958-1964* (s.6 (17))).

Legislation was also passed to save from disqualification the holders of office connected with the prosecution of the 1939-1945 war, and to exempt membership of the Lotteries Commission up to the end of 1934. These provisions are unlikely to be of any significance now.

### **Government Contracts**

5 Subject to the exceptions and qualifications listed in the next paragraph, a person is disqualified from becoming a member of Parliament during the time he -

- (a) is interested in the execution or enjoyment of a contract with the Western Australian Government; or
- (b) “knowingly provides, pursuant to such a contract, money to be remitted abroad or goods to be used in the service of the public” - (this provision is copied from the United Kingdom *House of Commons (Disqualification) Act 1782*); or
- (c) is a member of or office holder in a company formed for the construction of a public work, the payment for which or interest on the cost of which has been guaranteed by the Western Australian Government.

6. The exceptions and qualifications referred to in the previous paragraph are -

- (a) a contract entered into by an incorporated company of more than twenty members for the general benefit of the company;
- (b) a contract relating to the sale or occupation of Crown lands

- (c) a contract which devolves on a person by succession until twelve months after he has been in possession or on a personal representative until three years after he has been in possession;
- (d) a subscription to a loan raised by the State of Western Australia or the holding of bonds issued for such a loan;
- (e) a contract (other than for the construction of a public work) for the rendering of any service for the Crown;
- (f) a contract (other than for the construction of a public work) at the usual rates and conditions for the supply of goods, the rendering of any service or the making of any secured loan by the Crown to the person contracting;
- (g) any casual sale of goods or performance of work (except for the construction of a public work) in the ordinary course of business, provided that -
  - (i) there is no other person carrying on the same sort of business in the area;
  - (ii) it is necessary to obtain the goods or perform the work in the area; and
  - (iii) the goods are not sold or the work performed pursuant to a written agreement which has a continuing operation.

7. A member of Parliament who undertakes a disqualifying contract vacates his seat.

**Penalty:**

8. Any person who sits or votes while disqualified is liable to forfeit the sum of \$400 which may be recovered by any person who sues for it in the Supreme Court. This is the equivalent of the “common informer procedure”, now abolished in the United Kingdom.

## **AIMS OF LEGISLATION**

### **Offices of Profit:**

9. The historical development of the law dealing with office-holding as a disqualification is summarised in *Erskine May's Parliamentary Practice*, 16th ed. pp.200-202 (see Appendix II of this report).

10. Traditionally the considerations to which regard has been had in deciding whether an office should disqualify are broadly as follows -

- (a) The need to limit the control or influence of the Executive over Parliament which could otherwise exist if an undue proportion of members of Parliament were office holders;
- (b) The incompatibility of certain officers with membership of Parliament. This covers not only the physical impossibility of fulfilling both the duties of the office and the duties of a member of Parliament (including the member's duties to his constituents) but also the need to prevent certain offices, such as judicial offices and offices held by senior public servants, being held by persons who are, as members of Parliament, engaged in political controversy;
- (c) The need to maintain the principle of Ministerial responsibility by preventing office holders whose duties involve the making of decisions on matters of public policy and for whose decisions a Minister is ultimately responsible to Parliament, being themselves members of Parliament;
- (d) The necessity for certain office holders, namely Ministers of the Crown, to sit in Parliament, so as to ensure control of the Executive by Parliament.

### **Government Contracts:**

11. Traditionally the consideration to which regard has been had in deciding that persons interested in Government contracts should be disqualified, is the need to limit the influence of the Executive over Parliament by awarding of lucrative contracts to members.

### **INADEQUACIES OF PRESENT LAW**

12. The Committee is of the opinion that qualification for membership of Parliament should be on as wide a basis as possible and that any restriction in membership should be contained in legislation which is easily interpreted by those who may be affected.

13. Measured against these criteria the present legislation is defective, being in parts obscure and in parts too rigid.

### **Offices of Profit:**

14. The more important obscurities in relation to offices of profit are as follows -

- (a) It is not clear whether there is any difference between an office of profit **under** the Crown (the *Constitution Acts Amendment Act*, s.37) and an office of profit **from** the Crown (ibid, s.38(6)).

In the United Kingdom before the basis for the distinction was swept away by the *House of Commons Disqualification Act 1957* (see paragraphs 20-23 below), an office of profit **from** the Crown was one to which appointment was made directly by the Sovereign, and was limited to major Ministerial and Household offices; an office of profit **under** the Crown included all non-political executive offices and minor Ministerial offices (Report of the Select Committee on Offices of Profit, H.C. 120 (1940-41) p12).

In *Clydesdale v Hughes* (1934) 36 W.A.L.R. 73, a decision of the Supreme Court of Western Australia, Dwyer J. seemed to suggest a reverse

interpretation: he said he was disposed to think that “an office from the Crown” was wider in meaning than “an office under the Crown”.

The adoption of Dwyer J’s interpretation would create an anomaly: a person could be the holder of an office “from” the Crown without holding an office “under” the Crown. He would thus not be deemed to have vacated his office on taking the oath after election (since only offices under the Crown are so vacated) and could thus continue as office-holder and as member of Parliament.

- (b) It is not clear whether the legislation relates only to offices from or under the Crown in right of the State or whether they apply as well to the Crown in other capacities: e.g. the Crown in right of the Commonwealth or other States.

The express exemption of approved chemists and doctors (see paragraph 4(f) (i) above) and of officers of the army and navy (see paragraph 4(c) above) points to the inclusion at least of the Crown in right of the Commonwealth. On the other hand such an interpretation would involve State legislation purporting to vacate the office of a person appointed by another Government.

- (c) It is not clear whether the legislation applies only to appointments made by or on behalf of the Crown or whether it covers all offices “connected with the public service”, irrespective of who makes the appointment.

Thus employees of an independent statutory authority, appointed by the authority itself, may be included. The fact that payment is made from non-Government funds is apparently irrelevant (*Clydesdale v Hughes*). There is also the question of whether offices **not** connected with the public service are excluded, even though appointment is made by or on behalf of the Crown. The Attorney General in a memorandum given to the United Kingdom Select Committee on Offices of Profit (H.C. 120 (1940-41) p. 136) suggested that such offices were excluded. The question admittedly is not likely to arise as far as Western Australia is concerned, since the example given by the Attorney

General - Regius Professors of the Universities of Oxford and Cambridge - has no counterpart here.

- (d) It is not clear whether the mere receipt of travelling allowances and necessary expenses, not amounting to a reward, transforms an office into one of profit.

In *The Warrego Election Petition* (1899) 9 Q.L.J. 272, a decision of the Queensland Elections Tribunal, Real J. assumed that it did not. However, the position still appears to be sufficiently doubtful for the Crown Solicitor in Western Australia to have suggested an amendment to the *Constitution Acts Amendment Act* as a means of clarifying the position (C.L.D. 964/70 - a memorandum of 7 July 1970). It is well established that a person cannot place himself outside the ambit of the disqualification by refusing payment (see the cases listed in the report of the Select Committee on Offices of Profit, H.C. 120 (1940-41) pp. 152-154).

15. Regarding the rigidity of the present legislation it appears to place too great an emphasis on the consideration set out in paragraph 10(a) above, and not enough on the other considerations listed in that paragraph.

16. There may be statutory bodies similar to the Cancer Council (see paragraph 4(f) (ii) above) membership of which should not disqualify, even though the membership may nominally involve an office of profit. On the other hand, there may be offices which should disqualify even though technically they are **not** offices of profit.

### **Government Contracts:**

17. In relation to Government contracts -

- (a) it is doubtful whether the phrase “a contract made . . . with any person . . . for or on account of the Government of the State” (*Constitution Acts Amendment Act*, s.32) can be defined with sufficient precision. It is possible that the disqualifying provisions do not extend to contracts where there is no protracted

execution, holding or enjoyment, or to contracts which are not “mercantile” (themselves very vague tests);

- (b) it is also doubtful whether the proper exemptions have been made in the legislation. Contracts of insurance with the State Government Insurance Office, contracts for the sale of land to the Government or for the settlement of claims against the Government should be but have not been exempted. On the other hand, contracts with corporate bodies of more than twenty members have been exempted without reference to how large the member’s shareholding may be.

## **LEGISLATION ELSEWHERE**

### **Other Australian States and the Commonwealth:**

18. The law in the other Australian States and the Commonwealth is broadly similar to that of Western Australia. Queensland appears to permit the holder of any office of profit to stand for Parliament, but in New South Wales, Victoria and Tasmania, this privilege is given only to “State employees”. South Australia and the Commonwealth appear to bar holders of offices of profit from standing for Parliament unless they are Ministers of the Crown and, in the case of the Commonwealth, unless they are members of the army and navy.

### **New Zealand:**

19. In New Zealand too, the position is broadly similar to that in Western Australia. With certain exceptions any person employed in the service of the Crown may stand for election; if elected he vacates his office. Members of statutory boards who receive only travelling expenses are not disqualified but those who receive other payments are.

Contracts under which not more than \$400 of public money is payable annually to the contractor do not disqualify.

### **United Kingdom:**

20. The law in the United Kingdom has been greatly simplified by the *House of Commons Disqualification Act 1957*, which is based on the recommendations of the 1956 Select Committee (H. C. 349 (1955-56)). This Committee was impressed by the report of the Select Committee of 1941 which had recommended that the legislation be as clear as possible (H.C. 120 (1940-41)).

21. The Act lists all disqualifying offices by name so that a person can know with certainty whether or not an office can be accepted without disqualification. The election of a person holding a disqualified office is void and if a member is appointed to a disqualifying office his seat is vacated.

22. The Act also abolishes the former disqualification based on contracting with the Crown.

23. Other significant provisions in the Act are -

- (a) sitting or voting while disqualified no longer attracts a monetary penalty;
- (b) the House of Commons is expressly empowered to declare that a particular disqualification be disregarded;
- (c) any person may seek a declaration from the Privy Council that a person purporting to be a member of the House is disqualified but no such declaration may be made if the House has resolved that the disqualification is to be disregarded.

### **RECOMMENDATIONS**

#### **Offices of Profit:**

24. In the Committee's view it is not possible to set out general criteria with sufficient precision.

25. The Committee is of opinion that Western Australia should follow the United Kingdom by listing the disqualifying offices by name. If a newly created office should carry disqualification it could be added to this list by amending the Statute. So that the guiding principles (see paragraph 10 above) are not departed from in the future, the Committee considers that they should be set out in a Preamble to the legislation.

26. Such an approach would solve the problems both of obscurity and of rigidity.

27. In Appendix III the Committee has set out in three parts, offices the acceptances of which by a member of Parliament would probably cause his seat to become vacant under the present law.

28. The Committee suggests that the offices listed in Appendix III should continue to carry disqualification. The list in Part III is not exhaustive and should be reconsidered as part of a complete review of all offices.

29. The Committee is, however, of the view that the Western Australian approach to vacation of office upon taking the oath after election (see paragraph 3(a) above) is preferable to that contained in the United Kingdom Act (see paragraph 21 above). Subject to certain limited exceptions (holders of judicial office) it seems desirable that holders of offices of profit should be able to stand for Parliament if their duties permit it without being compelled to resign in order to do so.

30. To safeguard the rights of third parties it could be enacted that any decision of the holder of an office made in his capacity as such after he had taken his oath as member was nevertheless valid. In any case, the listing of the offices by name makes the chance of a mistake occurring negligible.

#### **Holders of Office in other Jurisdictions:**

31. The Committee is also of opinion that persons holding offices from or under the Crown in right of any other State or of the Commonwealth should be disqualified in the same way as persons holding similar offices from or under the Crown in right of Western Australia.

32. The Committee is of this view because -

- (a) the duties of such persons would prevent them giving proper attention to their duties as members of Parliament; and
- (b) they could have a conflict of interests.

33. It would be quite impracticable to attempt to list all the offices in these jurisdictions which should carry disqualification. The Committee is of the view that, having regard to the considerations expressed in the previous paragraph, it would probably be sufficient to enact the following clause which would avoid some of the obscurities of the traditional formula.

“(1) Subject to subsection (2) hereof, a member of Parliament vacates his seat if, after election, he -

- (a) accepts employment in the service of the Crown; or
  - (b) becomes a member of any Commission, Council, Board, Committee, or other body, and, as such member, was -
    - (i) appointed by the Crown, or the Government, or any department or agency of the Government, or
    - (ii) was entitled to be paid a fee, salary or allowance out of public money.
- (2) Subsection (1) of this section shall not apply to a member of Parliament if the only money he is entitled to be paid as a condition of his employment or membership of the body is reasonable travelling allowances and out-of-pocket expenses.

(3) Subsection (1) of this section shall not apply to a member of Parliament who becomes a member of the armed forces of the Commonwealth other than the Permanent Forces.

(4) In this section -

“Crown” means Crown in right of the Commonwealth or of any State of Australia other than Western Australia;

“Government” means the Government of the Commonwealth or of any State of Australia other than Western Australia;

“Public money” means revenue, loan, trust or other money whatsoever received for or on account of the Commonwealth or of any State of Australia other than Western Australia.’

34. Traditionally officers of the Army and Navy are not disqualified (see paragraph 4(c) above - the omission of the Air Force is simply because the legislation was enacted before the existence of such a force). The Committee recommends that membership of the Citizen Forces should not disqualify, but that membership of the Permanent or Regular Forces should. This is the position in the United Kingdom and seems to accord with present day realities. The draft clause in the previous paragraph has been drawn so as to include this recommendation.

35. There would seem to be no reason why a person holding office in another jurisdiction should not stand for election if the conditions of his office permit. However, since Western Australia cannot enact that the office shall be deemed vacant on election, the office holder should be given a limited time after election to terminate the holding of the office. If he fails to do so his seat could be declared vacant.

36. Disqualification based on considerations similar to those set out in paragraph 32 above, should apply to membership of the Parliament of any other State or of the Commonwealth (ss.16 and 17 of the *Constitution Act* already provide that a member of the Commonwealth Parliament cannot hold a seat in the Western Australian Parliament).

### **Penalties and Procedures:**

37. The Committee is of the view that s.39 of the *Constitution Acts Amendment Act* (which is the equivalent of the English “common informer” procedure - see paragraph 8 above) should be repealed. Sitting or voting while disqualified could be made a simple offence, but in the Committee’s view this would be unnecessary. Parliament’s ordinary disciplinary powers, together with the recommendations expressed in the next paragraph, would suffice.

38. The Committee recommends that the law empower any person to apply to the Full Court for a declaration as to whether or not a member of Parliament is disqualified. To discourage needless harassment, the applicant could be required to give security for costs.

39. It would seem undesirable to give either House power (as the United Kingdom Act gives to the House of Commons) to over-ride any disqualification. Both Houses would have an interest in the question of the qualification of members of Parliament. If it was considered necessary in extraordinary circumstances to permit a member of Parliament to sit even though he had accepted a disqualifying office this could be done by special legislation.

### **Government Contracts:**

40. The Committee is also of the opinion that the disqualifying provisions relating to Government contracts should be repealed, as has been done in the United Kingdom. The 1956 Select Committee of the House of Commons pointed out the extreme difficulty of drafting satisfactory provisions to cover all the possible contractual arrangements in which a member may theoretically become subject to the influence of the Government. The Select Committee pointed out that the House had inherent power to regulate the behaviour of its members, and any member who abused the position could be dealt with by the House itself by way of contempt proceedings. The *Parliamentary Privileges Act 1891* of this State gives both Houses equally wide power. An additional safeguard exists in ss.60 and 61 of the *Criminal Code* relating to the bribing of members of Parliament. Also relevant is Standing Order No. 195 of the Legislative Assembly which prohibits a member from voting on a Question in which he has a pecuniary interest (the Legislative Council, however, has no similar Standing Order).

### **Miscellaneous Matters:**

41. The following matters are not strictly within the Committee's terms of reference but have arisen incidentally. The Committee therefore offers its views on them.

42. Section 38 of the *Constitution Acts Amendment Act* provides that if a member of Parliament accepts a pension during pleasure or for a term of years his seat becomes vacant. All existing pensions fall outside this provision since they are granted as of right and not at the discretion of the Crown (see Solicitor General's opinion of 15 November 1963 in C.L.D. 832/63). The existing provision could perhaps remain as a possible deterrent.

43. The Committee also believes that the time has come for a reconsideration of the qualification for membership of Parliament generally. For example, it is difficult to understand why a clergyman or a minister of religion should be disqualified from membership (*Constitution Acts Amendment Act*, s.31(4)). The former Premier is reported to have stated that he has no objection to lifting this disqualification (*The Independent*, Nov. 8, 1970, p.7). A similar disqualification was recently abolished in Victoria (*The Constitution Act Amendment Act 1970* (Vic.)).

Also the provisions disqualifying on account of convictions under the criminal law seem to be unnecessarily wide, anomalous and without adequate flexibility (see s .31(6) of the *Constitution Acts Amendment Act*, and s.20 of the same Act as it relates to s.18 of the *Electoral Act*).

### **SUMMARY OF RECOMMENDATIONS**

44. The Committee recommends the following -

- (1) The disqualifying offices of profit should be listed by name in a Statute which should also contain a statement of the general principles in a Preamble (para. 20 & App. III).

- (2) With limited exceptions any office holder should be eligible to stand as a candidate for Parliament. On election he should be deemed to vacate his office (this is the existing law) (para. 29).
- (3) Office holders in other jurisdictions in Australia should also be disqualified (paras. 31-36).
- (4) Contracting with the Government should no longer be a disqualification (para. 40).
- (5) The “common informer” procedure should be abolished, and in its place a provision should be enacted empowering any person to apply to the Full Court for a declaration as to a member’s qualification (paras. 37 & 38).
- (6) The disqualifying provision for membership generally should be reviewed (para. 43).

**Select Committee of Parliament:**

45. The United Kingdom *House of Commons Disqualification Act 1957* was enacted only after the matters had been investigated by two Select Committees (1941 and 1956). The Committee has not issued a working paper. It would suggest that this report be considered as a working paper and that it be referred to a Select Committee of Parliament for consideration.

CHAIRMAN

MEMBER

MEMBER

9<sup>th</sup> March, 1971

# APPENDIX I

## STATUTORY PROVISIONS

relating to Offices of Profit and Government Contracts

### IN WESTERN AUSTRALIA

#### *Constitution Act, 1889-1963*

6 . . . . .

Appointment of members of Council. No member of the Legislative Council shall hold any office of profit under the Crown other than such as is liable to be vacated on political grounds, or than that of an officer of Her Majesty's sea or land forces on full, half or retired pay.

. . . . .

#### *Constitution Acts Amendment Act, 1899-1969*

Disqualification for membership of either House. 31. No person shall be qualified to be a member of the Legislative Council or Legislative Assembly, if he –

.....

- (2) Be a Judge of the Supreme Court; or
- (3) Be the Sheriff of Western Australia;

.....

Persons holding contracts for the public service shall be incapable of being elected or sitting. 32. Any person who shall directly or indirectly, himself, or by any person whomsoever 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, under, or from any person whomsoever, for or on account of the Government of the State;

Or shall knowingly furnish or provide in pursuance of any such contract, agreement, or commission any money to be remitted abroad, or any goods whatsoever to be used or employed in the service of the public; And any member of any company, and any person holding any office or position in any company formed for the construction of any railway or other public work, the payment for which, or the interest on the cost of which has been promised or guaranteed by the Government of the State;

shall be disqualified from being a member of the Legislative Council or Legislative Assembly during the time, he shall execute, hold, or enjoy any such contract, agreement, or commission, or office or position, or any part or share thereof, or any benefit or emolument arising from the same.

If member not qualified election to be void.

33. If any person not qualified to be a member of the Legislative Council or Legislative Assembly shall, nevertheless, be elected and returned as a Member to serve in the said Council or Assembly, such election and return shall be void.

Any member accepting a contract or continuing to hold any contract after the commencement of the next session, his seat shall be void.

34. If any person, being a member of the Legislative Council or Legislative Assembly, shall directly or indirectly, himself, or by any person whomsoever in trust for him, or for his use or benefit, or on his account, enter into, accept, or agree for, undertake or execute, in the whole or in part, any such contract, agreement, or commission as aforesaid, or if any person being a member of the said Council or Assembly, and having already entered into any such contract, agreement, or commission, or any part or share of any such contract, agreement, or commission, by himself, or by any other person whomsoever in trust for him or for his use or benefit, or upon his account, shall, after the commencement of the next Session of the Legislature, continue to hold, execute, or enjoy the same, or any part thereof, the seat of every such member shall be void: Provided that nothing in this or the last preceding section shall extend to persons contributing towards any loan for public purposes heretofore or hereafter raised by the State, or to the holders of any bonds issued for the purpose of any such loan.

Not to extend to incorporated trading companies.

35. The foregoing provisions shall not extend to any contract, agreement, or commission made, entered into or accepted by any incorporated company where such company consists of more than twenty persons and where such contract, agreement, or commission is made, entered into, or accepted for the general benefit of such company, nor to any contract or agreement in respect of any lease, licence, or agreement in respect to the sale or occupation of Crown lands, nor to any contract or agreement (not being a contract or agreement for the construction of any public work within the meaning of the *Public Works Act, 1902-1933*) made or entered into by any person with the Crown for the rendering of any service by such person for the Crown, or for the supply of any goods, wares or merchandise or the rendering of any service to such person or for the making of any loan to such person upon the security of a mortgage, bill of sale, lien or other security at prices or rates or upon and subject to conditions which are similar to those charged or imposed by the Crown in its transactions of a like nature with other persons in the ordinary course of business of supplying goods, wares or merchandise or

rendering the service or making loans as aforesaid, and which the said first mentioned person under the said contract or agreement is legally bound to pay or observe and comply with; nor to any sale of goods or to any performance of work by any person to or for the Crown in the usual and ordinary course of a commercial business as already established and being carried on by such person in a town or portion of the State where there is no other person carrying on the same kind of business and -

- (i) it is necessary, in order to avoid delay, expense, or other inconvenience, that the Crown shall obtain such goods or the performance of such work in such town or portion of the State;
- (ii) the goods are not sold or the work is not performed in pursuance of a written agreement which by virtue of its provisions has a continuing operation; and
- (iii) the goods or work are not required for or in connection with the construction of a public work within the meaning of the *Public Works Act, 1902-1933*.

For the purposes of this section, the term “the Crown” includes the Crown, a Minister of the Crown in his ministerial capacity, any State Government officer acting in his official capacity, any State Government department, any State trading concern, State instrumentality, State public utility, and any other person or body, whether corporate or non-corporate who or which under the authority of an Act of Parliament administers or carries on for the benefit of the State any public social service or public utility.

Not to extend to contracts by descent.

36. The foregoing provisions shall not extend to any person on whom, after the commencement of this Act, the completion of any contract, agreement, or commission shall devolve by descent, or limitation, or by marriage, or as devisee, or legatee, until twelve months after he shall have been in possession of the same, or to any executor or administrator until three years after he shall have been in possession of the same.

Office-holder taking the oath as member thereby to vacate his office.

37. Subject to the second proviso to section thirty-eight of this Act, if any person while holding an office of profit under the Crown, other than that of an officer of Her Majesty’s sea or land forces on full, half, or retired pay, be elected a member of the Legislative Council or of the Legislative Assembly, he shall, if he takes the oath or makes the affirmation herein-before prescribed, be held by so doing to vacate his said office.

Chief executive offices exempted.

Provided that this section shall not apply to the twelve principal executive offices of the Government liable, in accordance with this Act, to be vacated on political grounds.

Seats in Parliament vacated in certain cases.

38. If any member of the Legislative Council or Legislative Assembly, after his election -

- (1) Ceases to be qualified or becomes disqualified as aforesaid; or
- (2) Takes the benefit, whether by assignment, composition, or otherwise, of any law relating to bankrupt or insolvent debtors; or
- (3) Becomes of unsound mind; or
- (4) Takes any oath or makes any declaration or acknowledgment of allegiance, obedience, or adherence to any foreign Prince or Power, or does, concurs in, or adopts any act whereby he may become a subject or citizen of any foreign State or Power, or whereby he may become entitled to the rights, privileges, or immunities of a subject or citizen of any foreign State or Power; or
- (5) Fails to give his attendance in the Legislative Council or in the Legislative Assembly, as the case may be, for two consecutive months of any session thereof without the permission of the said Council or Assembly, as the case may be, entered upon its journals; or
- (6) Accepts any pension during pleasure or for term of years other than an allowance under section seventy-one of the *Constitution Act, 1889*, or any office of profit from the Crown, other than that of an officer of Her Majesty's sea or land forces on full, half, or retired pay;

his seat shall thereupon become vacant;

Provided that notwithstanding anything in this or any other Act, a member of the Legislative Assembly shall not vacate his seat by reason only of his acceptance of an office of profit from or under the Crown if that office be one which the holder is liable to vacate on political grounds and which is referred to in sections six and seventy-four of the *Constitution Act, 1889* (52 Vict. No. 23), and in sections thirty-seven, forty-two, forty-three and forty-four of this Act.

Provided further that, on and after the twelfth day of June, one thousand nine hundred and forty-seven, for the purposes of this and the last preceding section, the holding or acceptance of the offices following, or either of them, shall not of itself constitute the holding of an office of profit under the Crown or the acceptance of an office of profit from the Crown -

- (a) The office of an approved pharmaceutical chemist under and for the purposes of the *Pharmaceutical Benefits Act, 1947*, of the Commonwealth.
- (b) The office of a medical practitioner approved under section eleven of the said *Pharmaceutical Benefits Act, 1947*.

Election of disqualified persons void.

39. If any person under any of the disqualifications mentioned in this Act, shall presume to sit or vote as a member of the said Council or Assembly, such person shall forfeit the sum of four hundred dollars, to be recovered, subject as hereinafter provided, by any person who shall sue for the same in the Supreme Court.

Member may accept office of Administrator without vacating his seat.

41. No member of the Legislative Council or Legislative Assembly shall vacate his seat by reason of his accepting the office of Administrator of the Government of the State and any Member of either House duly appointed thereto may hold the said office.

Protection of members in certain cases.

41A. Notwithstanding anything to the contrary contained elsewhere in this Act or in any other Act a member of the Legislative Council or of the Legislative Assembly who is appointed as a member of a Select Committee (whether a Select Committee of either House or a Joint Select Committee) or as a member of any Royal Commission, or as a member of the Executive Council with the designation "Honorary Minister", or who is approved by the Governor as a representative of either House of Parliament, or of the Commonwealth Parliamentary Association shall not vacate his seat or incur disqualification under this Act by reason of accepting, for and in respect of expenses which may necessarily or reasonably be incurred by him in connection with or incidentally to the discharge by him of his duties as such member of such Select Committee or Royal Commission or such Executive Council or as such representative (as the case may be), payment from the Crown of an expenses allowance as prescribed by regulation which the Governor shall be and is hereby authorised to make under and for the purposes of this section.

Responsible Minister changing his office not to vacate seat.

42. When a person has been elected a member of the Legislative Council or Legislative Assembly after his acceptance of one of the offices liable to be vacated on political grounds, the subsequent acceptance by him from the Crown of another of such offices, whether both offices are held together, or the one office is accepted in lieu of and in immediate succession to the other, shall not vacate his seat.

## APPENDIX 11

### HISTORICAL DEVELOPMENT REGARDING OFFICE-HOLDERS

[Extract from *Erskine May's Parliamentary Practice*,  
16th ed. pp. 200-202]

The compatibility of office-holding, especially office-holding under the Crown, with membership of the House of Commons, is a subject of great constitutional importance, involving in particular the question of the relations between the Commons and the Crown. The matter is one which has been an important parliamentary issue throughout the past four hundred years; the attitude of the House of Commons to this problem has passed through every kind of variation in response to successive stages in its relation to the executive government. Three of the principal phases in the development may be distinguished.

(1) **The “Privilege” Phase before 1640:-** The attitude of the sixteenth century House of Commons to the question of the holding by its Members of Offices under the Crown first appears in a jealous insistence on its own prior claim to their services. This was but one aspect of the continuous effort to gain recognition for the Privileges of the House. In consequence, the criterion which was applied to an office was not the extent to which the Crown could exert its influence, but compatibility with the physical attendance of the holder on the service of the House. This phase of the Commons’ attitude to paid office left a permanent mark on the law in the shape of the common law disqualification of judges and clergy; it also affected the position of sheriffs and ambassadors.

(2) **The “Corruption” Phase from 1660:-** The events leading up to the Civil War had established the Privileges of the Commons and had demonstrated that they had become too powerful to be ruled by repressive methods. With the Restoration the arts of management were tried in their turn; and at the beginning of the administration of Danby a comprehensive system was instituted of winning over individual Members to the King’s interest by the distribution of offices and places of profit under the Crown. The reaction of the House was to seek to make the holding of paid crown office incompatible with membership of the House of Commons.

There was, however, a realisation of the difficulties which might arise through a complete severance of the executive and the legislature, and the first tentative steps were taken towards the modern conception of the constitutional balance between an independent legislature and an independent executive. Two alternative expedients of complete exclusion of office-holders and vacation of seats on appointment to office without bar to re-election were canvassed by the House of Commons in a series of bills during the last decade of the seventeenth century. Eventually, the expedient of complete exclusion was given statutory effect in the *Act of Settlement, 1701*. But before this Act came into operation the House altered its mind and embodied both expedients in the *Succession to the Crown Act, 1705*, re-enacted after the Union with Scotland in 1707 (commonly known as the ‘Statute of Anne’)

The drafting of the two relevant sections of this latter Act has caused great and continuing difficulty in the interpretation of their effect. Section 24 provides that no person holding an office or place of profit **under** the Crown created since 25th October, 1705 should be able to sit in the House of Commons. A similar absolute disqualification is applied to certain named offices and also to persons holding any pension under the Crown. Section 25, however, states that if any person, being a Member, accepts any office of profit **from** the Crown, his election is avoided and a new writ is to issue; but he is capable of being elected again. The apparent conflict between the two sections has been resolved by applying section 25 to old offices, i.e. those created before 1705, although it is not expressly so stated. But many other anomalies have arisen in great part as the result of an attempt to draw a distinction between the alternative use of the words “under” and “from” the Crown in sections 24 and 25.

### (3) **The “Ministerial Responsibility” Phase after 1705:-**

Although the division into “old” and “new” offices continued to pose many problems in determining the category into which any particular office fell, its force in fostering any nascent theory of separation of powers was soon spent. Neither of the two sections indeed expressed any constitutional distinction between Ministerial and other office, yet section 24 by its veto on the capacity of holders of newly created office to sit in the House could have produced a government the majority of whose members were outside the House.

In fact a reverse process took place.

The government was ceasing to be something entirely external to the House of Commons. A movement had begun which was destined to bring the government on the floor of the House of Commons; and to change the House from being a body united, or almost united, in opposition to the Crown into a body which only the minority are opponents, while the majority are supporters, of a ministry whose chief Members are necessarily also Members of the House of Commons. The machinery by which this took place was a series of statutes exempting the holders of newly created office from the disqualification rising from section 24, and placing them in the position of the old office-holders under section 25, i.e. their election was avoided without prejudice to re-election.

[**Note:** The requirement of re-election was completely abolished in 1926. The extract from *Erskine May* above was written before the passing of the *House of Commons Disqualification Act 1957* which replaced the large number of previous statutory and common law disqualifications by a simple code - see paragraphs 20 to 22 of this report].

## **APPENDIX III**

### **OFFICES WHICH CANNOT BE HELD BY MEMBERS OF PARLIAMENT**

#### **PART I**

##### **Judicial Offices**

Chairman or member of the Third Party Claims Tribunal (*Motor Vehicle (Third Party Insurance) Act 1943-1970*, s.16).

Chairman or member of the Western Australian Coal Industry Tribunal (*Mining Act 1904-1970*, s.314).

Chairman or member of the Workers' Compensation Board (*Workers Compensation Act 1912-1970*, s.25).

Chief Industrial Commissioner or other Commissioner (*Industrial Arbitration Act 1912-1968*, s.44).

Industrial Magistrate (*Industrial Arbitration Act 1912-1968*, s.103).

Judge of the District Court (*District Court of Western Australia Act 1969-1970*, s.10).

Judge of the Supreme Court (*Supreme Court of Western Australia Act 1935-1969*, s.7).

Chairman or member of the Licensing Court of Western Australia (*Liquor Act 1970*, s 10).

Stipendiary Magistrate (*Stipendiary Magistrates Act 1957-1965*, s.4).

Special Magistrate appointed under the *Child Welfare Act* (*Child Welfare Act 1947-1970*, s.19).

## PART II

### The Public Service

The Agent General (*Agent General Act 1895-1969*, s.1).

The Auditor General (*Audit Act 1904-1966*, s.5).

An employee of that part of the State Services as includes departments and sub-departments (cf. *Public Service Act 1904-1970*).

A member of the Police Force appointed under the *Police Act 1892-1970*.

A member of the teaching staff appointed under the *Education Act 1928-1970*.

Any officer or person appointed under the *Government Railways Act 1904-1970*.

## PART III

### Commissions, Boards and other Bodies of which all members are disqualified

Agriculture Protection Board of Western Australia:	<i>Agriculture Protection Board Act 1950-1970</i> . S.5.
Albany Port Authority:	<i>Albany Port Authority Act, 1926-1967</i> . 5.3,
Banana Industry Compensation Committee:	<i>Banana Industry Compensation Trust Fund Act, 1961-1969</i> . S.5.
Betting Control Board:	<i>Betting Control Act, 1954-1970</i> . S.6.
Bunbury Port Authority:	<i>Bunbury Port Authority Act, 1909-1967</i> . S.3.
Bush Fires Board	<i>Bush Fires Act, 1954-1970</i> . S 8.
Coal Committee:	<i>Mining Act, 1904-1970</i> . S.329.
Coal Mines Advisory Board:	<i>Mining Act, 1904-1970</i> . S.9B.
Commissioners of the Rural & Industries Bank of Western Australia:	<i>Rural &amp; Industries Bank Act, 1944-1969</i> . S9.

Dairy Products Marketing Board:	<i>Dairy Products Marketing Regulation Act, 1934-1937. S.8.</i>
Dried Fruits Board:	<i>Dried Fruits Act, 1947-1968. S.4.</i>
Eastern Goldfields Transport Board:	<i>Eastern Goldfields Transport Board Act, 1946-1970. S.6.</i>
Esperance Port Authority:	<i>Esperance Port Authority Act, 1968. S.6.</i>
Factory Welfare Board & Retail Trade Advisory & Control Committee:	<i>Factories and Shops Act, 1963-1965. Ss.45 &amp; 82.</i>
(Filled Milk) Advisory Committee:	<i>Filled Milk Act, 1959. S.5.</i>
Fire Brigades Board:	<i>Fire Brigades Act, 1942-1966. S.6.</i>
Fremantle Port Authority:	<i>Fremantle Port Authority Act, 1902-1969. S.3.</i>
Fruit Growing Industry Trust Fund Committee:	<i>Fruit Growing Industry (Trust Fund) Act, 1941-1956. S.5.</i>
Geraldton Port Authority:	<i>Geraldton Port Authority Act, 1968. S.6.</i>
Lotteries Commission:	<i>Lotteries (Control) Act, 1954-1970. S.5.</i>
Metropolitan Market Trust:	<i>Metropolitan Market Act, 1926-1969. S.3.</i>
Metropolitan (Perth) Passenger Transport Trust:	<i>Metropolitan (Perth) Passenger Transport Trust Act, 1957-1966. S.6.</i>
Metropolitan Region Planning Authority:	<i>Metropolitan Region Town Planning Scheme Act, 1959-1970. S.7.</i>
Metropolitan Water Supply, Sewerage & Drainage Board:	<i>Metropolitan Water Supply, Sewerage and Drainage Act, 1909-1970 S.6.</i>
Midland Junction Abattoir Board:	<i>Abattoirs Act, 1909-1970. S.4.</i>
Milk Board of Western Australia:	<i>Milk Act, 1946-1970. S.10.</i>
Motor Vehicle Insurance Trust:	<i>Motor Vehicle (Third Party Insurance) Act, 1943-1970. S3A</i>
Port Hedland Port Authority:	<i>Port Hedland Port Authority Act, 1970. S5.</i>
Poultry Industry Trust Fund Committee	<i>Poultry Industry (Trust Fund) Act, 1948-1969. S5.</i>

Sales Advisory Committee: (Agricultural Products)	<i>Agricultural Products Act, 1929-1968. Ss.3A &amp; 3B.</i>
Soil Conservation Advisory Committee:	<i>Soil Conservation Act, 1945-1967.S9.</i>
State Electricity Commission:	<i>State Electricity Commission Act, 1945-1966. S.8.</i>
State Housing Commission:	<i>State Housing Act, 1946-1969. S. 8.</i>
Superannuation Board:	<i>Superannuation and Family Benefits Act, 1938-1970. S.9.</i>
Taxi Control Board:	<i>Taxi Cars (Co-ordination &amp; Control) Act, 1963-1970. S.5.</i>
Totalisator Agency Board:	<i>Totalisator Agency Board Betting Act, 1960-1970. S.5.</i>
Town Planning Board & Town Planning Appeal Commission	<i>Town Planning and Development Act, 1928-1970. Ss.4 &amp; 40.</i>
Transport Advisory Council:	<i>State Transport Co-ordination Act, 1966. S.10.</i>
Western Australian Barley Marketing Board:	<i>Marketing of Barley Act, 1946-1955. S.6.</i>
Western Australian Coastal Shipping Commission:	<i>Western Australian Coastal Shipping Commission Act, 1965. S.5.</i>
Western Australian Egg Marketing Board:	<i>Marketing of Eggs Act, 1945-1969. S.7.</i>
Western Australian Linseed Board:	<i>Marketing of Linseed Act, 1969. S.7.</i>
Western Australian Onion Marketing Board:	<i>Marketing of Onions Act, 1938-1965. S.3.</i>
Western Australian Potato Marketing Board:	<i>Marketing of Potatoes Act, 1946-1966 S.7.</i>
Western Australian Wheat Board:	<i>Wheat Industry Stabilisation Act, 1968-1969. S.8.</i>
Western Australian Wheat Marketing Board:	<i>Wheat Marketing Act, 1947-1956. S.7.</i>
Wheat Quotas Committee:	<i>Wheat Delivery Quotas Act, 1969. S.7.</i>