IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

NO S190 OF 2017

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| **BETWEEN:** | **PETER ALLEY**<br>Plaintiff |
| **AND:** | **DAVID GILLESPIE MP**<br>Defendant |
| **AND:** | **ATTORNEY-GENERAL OF THE COMMONWEALTH**<br>Intervening |

# SUBMISSIONS OF THE ATTORNEY-GENERAL OF THE COMMONWEALTH (INTERVENING)

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Filed on behalf of the Attorney-General of the Commonwealth (Intervening) by:

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## PART I PUBLICATION

1. These submissions are in a form suitable for publication on the internet.

## PART II INTERVENTION

2. The Attorney-General of the Commonwealth (**the Commonwealth**) intervenes pursuant to s 78A of the *Judiciary Act 1903* (Cth) in support of the defendant.

## PART III LEGISLATIVE PROVISIONS

3. The Commonwealth relies on the legislative provisions identified in Annexure A.

## PART IV ARGUMENT

4. Two questions of law have been referred to the Full Court under s 18 of the *Judiciary Act 1903* (Cth) (QR**B[2]**).

5. The first question is: "Can and should the High Court decide whether the defendant was a person declared by the Constitution to be incapable of sitting as a Member of the House of Representatives for the purposes of s 3 of the *Common Informers (Parliamentary Disqualifications) Act 1975* (Cth) (**Common Informers Act**)?" The Commonwealth submits that that question should be answered as follows:

> The High Court cannot decide whether the defendant was a person declared by the Constitution to be incapable of sitting as a Member of the House of Representatives for the purposes of s 3 of the Common Informers Act 1975. The question of whether it "should not" so decide does not arise.

6. On that basis, the Commonwealth submits that it is unnecessary to answer the second question (concerning subpoenas).

7. In summary, the Commonwealth submits as follows:

   (a) The question of whether the High Court can determine whether a person is incapable of sitting as a member of the House of Representatives in a proceeding under the Common Informers Act depends on the construction of that Act. The text of the Common Informers Act, and the related extrinsic materials, reveal that that Act was intended to replicate the common informer proceeding provided for in s 46 of the Constitution, but to limit the availability and the quantum of the penalty in such a proceeding.

   (b) Section 46 of the Constitution provides that a penalty may be recovered by a person who sues for it in a court of competent jurisdiction where a person who is "declared by this Constitution" to be incapable of sitting has so sat.

   (c) The determination of any question as to whether a person is relevantly incapable of sitting for the purposes of s 46 can only take place in the manner prescribed by or otherwise provided for under s 47 of the Constitution. That section stipulates that, until Parliament otherwise provides, any question respecting the qualification of a senator or a member of the House of Representatives, or a

vacancy in either House, and any question of a disputed election to either House, shall be determined by the House in which the question arises.

(d) That understanding of the relationship between ss 46 and 47 is consistent with the text and structure of the Constitution; with the common law principle of exclusive cognisance (that the determination of the qualification of members of Parliament was historically a matter within the exclusive cognisance of the Parliament, which principle is adopted and embedded in the Constitution by s 47); and with concerns expressed in the Convention Debates. It also reduces the potential for inconsistent determinations between a House of Parliament and the High Court, or indeed between the Court of Disputed Returns and any other court that may determine a common informer action.

(e) The Common Informers Act is a law made under s 46 (read with s 51(xxxvi) and ss 76(i) and (ii) of the Constitution). It is not a law that "otherwise provides" for the purposes of s 47 of the Constitution, and it did not relevantly alter the existing, long-standing, institutional arrangements for the determination of questions of qualification that are prescribed by Pt XXII of the *Commonwealth Electoral Act 1918* (Cth) (**Electoral Act**) (which does otherwise provide for the purposes of s 47 of the Constitution).

(f) The High Court having no authority in a common informer proceeding to determine whether a person is incapable of sitting, the question of whether the High Court "should" exercise any such jurisdiction does not arise, and it is not necessary to answer Question 2.

8. If the above submissions are accepted, this proceeding should be stayed. The period within which an electoral petition could be brought under Div 1 of Pt XXII of the Electoral Act to challenge the defendant's election having expired, prior to the next election (after which the issue could be raised by an election petition) this proceeding can continue only if the House of Representatives determines that the defendant is disqualified, or if the House decides to refer the question of whether he is disqualified to the Court (sitting as the Court of Disputed Returns) pursuant to s 376 of the Electoral Act and the Court finds that he is disqualified.

**(a) The historical origins of the common informer's action**

9. Although once familiar to the law, the common informers action is now a *rara avis*. It is therefore of assistance to commence with some historical background as to the nature and character of the common informer's action. The purpose of so doing is not to suggest that matters of legal history are determinative of the result in this case. It is rather to dispel any such suggestion, to the extent it is made.

10. A common informer's action is an action "by a private person suing for his own benefit to recover a statutory penalty" and the term "common informer" is generally used to distinguish the plaintiff in such actions from a state or official informer.[1]

11. The origins of the common informer action lie not in parliamentary or electoral law, but in the difficulty of enforcing the law generally at a time when the state was weak.[2] In medieval times, the initiative of private citizens often had to be relied on to set the law in motion. It was therefore on occasion thought expedient to provide incentives for them to do so by enacting that the penalty for any infringement of the particular law in question, or a portion of that penalty, should be had by any person who successfully sued the wrongdoer for it.[3]

12. The heyday of the common informer action was the roughly three and a half centuries spanning Tudor times to the mid-19th century. In this period 'the common informer was expected to act as a policeman, and as a protector of the community against a vast mass of delinquency'.[4] English statutes gave common informers the right to bring actions to recover penalties for breaches of laws including, for example, the sale of unmarked silver wares; unlawful gaming; unlicensed disorderly houses; infringements of regulations governing weights and measures; depositing of rubbish on the streets; throwing of fireworks; removing plants growing on cultivated land; and many others.[5]

13. The statute "which forms the groundwork of the present law" upon the subject of parliamentary disqualification is the *Act of Succession 1707* 6 Anne, c 41.[6] That Act set out various circumstances which would disable a person from being elected to or, or sitting or voting in, parliament. Section 28 provided:

> ... and if any person disabled, or declared incapable by this act to be elected, shall after the dissolution or determination of this present parliament presume to sit or vote as a member of the house of commons in any parliament to be hereafter summoned, such person so sitting or voting shall forfeit the sum of five hundred pounds, to be recovered by such person as shall sue for the same in England ...

14. The Parliament at Westminster subsequently enacted further common informer legislation that added to the factors that would render a person incapable of being

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1 *Tranton v Astor* (1917) 33 TLR 383 at 385 (Low J).

2 Holdsworth, *A History of English Law* (3rd ed, 1923) vol 2 at 453. See also the historical account given in the second reading speech for the bill that became the *Common Informers Act 1951* (UK) (which largely abolished common informers actions in that country): United Kingdom, *Parliamentary Debates*, House of Commons, 9 February 1951, vol 483 col 2082–2085.

3 As Rowlatt J described it in *Bird v Samuel* (1914) 30 TLR 323 at 336, "[t]he Legislature had thought fit to appeal to the cupidity of individuals as a means of preventing ills which the action of the authorities could not be depended on to prevent".

4 Radzinowicz, *A History of English Criminal Law and its Administration from 1750* (1956) vol 2 at 147.

5 These examples are taken from Radzinowicz, *A History of English Criminal Law and Its Administration from 1750* (1956) vol 2 at 140–150.

6 Anson, *The Law and Custom of the Constitution* (4th ed reissue, 1911) vol 1 at 83.

elected to, or sitting and voting in Parliament.[7]

15. The common informer action was, however, "an expedient which was open to many obvious abuses" such as extortion and blackmail.[8] As Radzinowicz summarises the reputation of the common informer:[9]

> From time to time expression was given to the deep resentment which had always been felt against those who were willing to perform such an office. In 1589 a statute of Elizabeth deplored that common informers daily "unjustly taxed and disquieted" the Queen's subjects. Coke described them as "viperous vermin", who under the mantle of law "did vex and depauperize the subject ... for malice or private ends". In the nineteenth century they were called "unprincipled pettifoggers", whose office was a nuisance and "an instrument of individual extortion, caprice and tyranny".

16. During the course of the 19th century the state became more powerful and able to rely on its own agencies to enforce the law.[10] By about the same time the poor reputation of common informers had become such that even persons aggrieved by offences were refusing to bring actions as common informers.[11] In the second reading speech for the Common Informers Bill 1951 (UK), it was observed that, in the United Kingdom, '[t]here has been no new enactment of the common informer procedure in the last 100 years'.[12]

17. Nevertheless, the common informer action was transplanted to the Australian colonies with the British settlers, with the Constitution of each self-governing Australian colony containing a section providing for a common informer action to lie in the case of persons incapable of sitting or voting in the colony's parliament.[13]

18. Common informer provisions relating to parliamentarians were seldom invoked. In the leading texts, the earliest identified example of such an action in the United Kingdom is

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7 Eg *Crown Pensioners Disqualification Act 1715*, 1 Geo 1 Stat 2, c 56; *House of Commons Disqualification Act 1742*, 15 Geo 2, c 22; *House of Commons (Clergy Disqualification) Act 1801*, 41 Geo 3, c 63; *House of Commons Disqualification Act 1782*, 22 Geo 3, c 45, s 9; *House of Commons Disqualification Act 1801*, 41 Geo 3, c 52, s 6.

8 Holdsworth, *A History of English Law* (first published 1924, 2003 ed) vol 4 at 356.

9 Radzinowicz, *A History of English Criminal Law and Its Administration from 1750* (1956) vol 2 at 139 (references omitted).

10 In England the Metropolitan police force was created in 1829, the City of London force in 1839, and by 1857 each county had its own police force: Maitland, *The Constitutional History of England* (ed Fisher) (1963) at 487. Each of the Australian colonies (save Tasmania which waited until 1899) created centralised police forces by the mid 19th century: Kercher, *An Unruly Child: A History of Law in Australia* (1995) at 108; M Finnane *Police and Government: Histories of Policing in Australia* (1994) at 9, 11–16. See also *Tranton v Astor* [1917] 33 TLR 383 at 385 (Low J).

11 Radzinowicz, *A History of English Criminal Law and its Administration from 1750* (1956) vol 2 at 154.

12 United Kingdom, *Parliamentary Debates*, House of Commons, 9 February 1951, vol 483, col 2085.

13 *Tasmanian Constitution Act 1854* (Tas) 18 Vict No 17, s 28; *New South Wales Constitution Act 1855* (Imp) 18 & 19 Vict, c 54, Sch 1, s 29; *Victorian Constitution Act 1855* (Imp) 18 & 19 Vict, c 55, Sch 1, s 26; *Constitution Act 1856* (SA) 19 & 20 Vict No 2, s 18; *Queensland Constitution Act 1867* (Qld) 31 Vict No 38, s 7; *Western Australian Constitution Act 1899* (WA) 57 Vict No 4, s 32 and *Western Australian Constitution Act 1890* (Imp) 53 & 54 Vict, c 25, Sch 1, s 32.

the post-Federation case of *Forbes v Samuel*[14] (where the question of disqualification had already been considered in Parliament).[15] In the Australian colonies, it appears that there were only five instances of a common informer action being brought against a parliamentarian.[16] Those cases demonstrate that where the question arose as to whether a Court hearing such an action had jurisdiction to determine questions of qualification, that question was answered by reference to the text of the relevant statute. In *Miles v McIlwraith*,[17] the Supreme Court of Queensland determined, by reference to ss 6 and 7 of the *Queensland Constitution Act 1867* (Qld) 31 Vict No 38, that the voiding of a person's seat by the Legislative Assembly was not a condition precedent to the imposition of a common informer's penalty on that person. By contrast, in *Roe v Leake*[18], the Supreme Court of Western Australia determined, by reference to ss 29, 30 and 32 of the *Western Australian Constitution Act 1889* (WA) 57 Vict No 4, that any question relating to a vacancy in either House of Parliament was a question for the House in which the question arose.[19]

19. That brief historical conspectus is important for what it does not reveal. Here, as in *Attorney-General (NT) v Emmerson*,[20] it illustrates that there is no single precept drawn from historical examples of common informer's actions that could be said to inform the questions of construction in this matter. In particular, there is nothing inherent in the nature of a common informer's action against parliamentarians that requires that the court hearing such a matter have authority to determine questions relating to qualification. Whether the court has such authority is determined by the construction of the Constitution and the Common Informers Act.

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14 [1913] 3 KB 706 at 732, 739.

15 Fellowes (ed), *Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament* (16th ed, 1957); Williams (ed), *Rogers on Elections* (19th ed, 1918) at 33. The researches of the Commonwealth have, however, uncovered one pre-federation case in the United Kingdom: *Thompson v Pearce* (1819) 1 Brod & B 23; 129 ER 632. *Bradlaugh v Attorney-General* (1884) 14 QBD 667 did not concern disqualifications of parliamentarians but the taking of the parliamentary oath.

16 *Kenny v Chapman* (1861–1862) 1 WW (L) 93; *Miles v McIlwraith* (1880) 1 QLJ 27; *Proudfoot v Proctor* (1887) 8 LR (NSW) 459; *Roe v Leake* (reported in the *Daily News*, Tuesday 10 November 1891 at 3); *Baker v Traylen* (unreported, Supreme Court of Western Australia, *West Australian*, 23 Sept 1895 at 6).

17 (1880) 1 QLJ 27.

18 Reported in the *Daily News*, Tuesday 10 November 1891 at 3.

19 In *Proudfoot v Proctor* (1887) 8 LR (NSW) 459, which concerned relevantly identical provisions to *Miles*, the Court appears to have assumed jurisdiction to determine substantive questions of qualification without considering that question; *Kenny v Chapman* (1861–1862) 1 WW (L) 93 and *Baker v Traylen* (unreported, Supreme Court of Western Australia, *West Australian*, 23 Sept 1895, at 6) did not involve any determination of qualification.

20 (2014) 253 CLR 393 at 418 [19] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

**(b) *Construction of ss 46 and 47***

20. The extent of the authority conferred on the Court by the Common Informers Act is a question of statutory construction. That question falls to be considered in a particular constitutional context. That context reveals that both s 46 of the Constitution and the Common Informers Act proceed on the basis that the question of capacity to sit is determined in the way specified in s 47 of the Constitution (that is, by Parliament itself, or pursuant to a law that "otherwise provides" made under s 47 read with s 51(xxxvi)). The Common Informers Act is not such a law. Rather, that Act assumes the operation of the pre-existing institutional arrangements for the determination of questions of qualification prescribed by Pt XXII of the Electoral Act and by s 47 itself.[21]

*The text*

21. The following matters clearly emerge from the text of s 46 (in its operation until the Parliament otherwise provided). **First**, a person who sat in Parliament in the circumstances identified s 46 was liable to pay a penalty to "any person" who sued for it. **Secondly**, the penalty was 100 pounds per day for "every day" the person so sat. **Thirdly**, the penalty could be sued for in "any court of competent jurisdiction".

22. These consequences arose with respect to a person "declared by the Constitution to be incapable of sitting". That language raises two issues: **first,** what are the circumstances "declared by the Constitution" in which a person is incapable?; and **secondly**, what body is to determine whether those circumstances have come to pass in a particular case? It is necessary to look outside s 46 to answer both questions.

23. As to the **first issue**, although yet to be authoritatively determined, it appears that the notion of being "incapable of sitting" refers to any relevant absence of any qualification prescribed by or under the Constitution (not only to the provisions of ss 43 and 44).[22] Assuming that to be so, the notion arguably includes the absence of qualifications prescribed by ss 16 and 34 (or laws "otherwise providing" for the purpose of those provisions[23]), and non-compliance with rules about attendance in ss 20 and 38. It also arguably includes the matters giving rise to a vacancy identified in ss 45(ii) and (iii).[24]

24. That, in turn, points to the textual intersection between s 46 and the section that immediately follows it (s 47), which supplies the answer to the **second issue**.

25. Section 47 deals with three types of "question", including "any question" "respecting the qualification of a Senator or of a member of the House of Representatives" and any

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[21] The *Disputed Elections and Qualifications Act 1907* (Cth) inserted the reference procedure into the *Commonwealth Electoral Act 1902* (Cth).

[22] *Sue v Hill* (1999) 199 CLR 462 (***Sue***) at 479–480 [118] (Gaudron J) and at 554–555 [241] (McHugh J – in dissent in the result) dealing with the effect of the Common Informers Act.

[23] See ss 162 and 163 of the Electoral Act and note *Sue* (1999) 199 CLR 462 at 474-475 [10] (Gleeson CJ, Gummow and Hayne JJ).

[24] Noting the admonition of Gaudron J in *Sue* (1999) 199 CLR 462 at 507–508 [113]–[114] to the effect that the terms "vacancy" and "qualification" are not mutually exclusive as a matter of ordinary language. A parliamentarian whose seat becomes vacant is also no longer qualified to sit.

question "respecting a vacancy in either House". The breadth of s 47 in its operation on those subject matters is emphasised by the word "any" and by the twice appearing word "respecting".[25] Section 47 also deals with a third type of question ("a disputed election to either House"). Again, it applies to "any question" of that subject matter.

26. It was established in *Sue v Hill*[26] (***Sue***) that those three categories of question are not mutually exclusive.[27] A disputed election may involve a question of the qualification of a person to be chosen as a senator or member.[28] Equally, such a question may arise in a context other than that of a disputed election.[29] Similarly, while in some circumstances the question of a vacancy may arise in connection with a disputed election, in other circumstances it may arise independently of such an election (such as disputes concerning ss 19, 20, 37 or 38, or a vacancy arising by reason of s 45).

27. When regard is had to the breadth of the terms of s 47, and the overlapping nature of the subject matter specified therein, there can be no doubt that a "question" whether a person is "declared by the Constitution to be incapable of sitting" within the meaning of s 46 ("question" being a broad term that extends to any matter where qualification is a step in the reasoning process, and not just to proceedings where it constitutes the ultimate issue) will necessarily involve one or more of the three categories of question specified in s 47. As "any" question regarding any of those categories of question is to be determined in the manner prescribed by or otherwise provided for under s 47, it follows that the central issue of capacity to sit upon which the operation of s 46 turns must be determined in accordance with s 47 (ie either by the relevant House, or as otherwise provided by a law made under s 47 read with s 51(xxxvi)).[30]

28. Nothing in the text of s 46 suggests that whether a person was "declared by this Constitution to be incapable of sitting" could be determined by any court of competent jurisdiction entertaining an action under s 46. Instead, as elsewhere in the Constitution, the fact that s 47 required questions of incapacity to be determined in a particular way carried a "negative force" which forbade the doing of that same thing otherwise.[31]

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[25] Like the words "with respect to" in the chapeau of s 51, the term "respecting" indicates that a "question" concerning one of those subject matters will be caught by s 47 provided it has a sufficient relevance to or connection with them: *Plaintiff S156/2013 v Minister for Immigration and Border Protection* (2014) 254 CLR 28 at 42 [22] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ); *Grannall v Marrickville Margarine Pty Ltd* (1955) 93 CLR 55 at 77 (Dixon CJ, McTiernan, Webb and Kitto JJ).

[26] (1999) 199 CLR 462.

[27] (1999) 199 CLR 462 at 479–480 [24]–[25] (Gleeson CJ, Gummow and Hayne JJ), 507–508 [112]–[114] Gaudron J; *Sykes v Cleary [No 1]* (1992) 107 ALR 577 at 579 (Dawson J); *Re Wood* (1988) 167 CLR 145 at 160.

[28] As is illustrated by *Sykes v Cleary* (1992) 176 CLR 77.

[29] As is illustrated by *Re Canavan; Re Ludlam; Re Waters; Re Roberts [No 2]; Re Joyce; Re Nash; Re Xenophon* [2017] HCA 45 (***Re Canavan***).

[30] To the extent such a law involves the making of such determinations by a Court, it will involve the exercise of jurisdiction conferred on the court pursuant to ss 76(i), 76(ii) and/or 77: see *Sue* (1999) 199 CLR 462 at 472–473 [4] and 474 [8] (Gleeson CJ, Gummow and Hayne JJ), 506 [107] (Gaudron J).

[31] See eg *R v Kirby; Ex Parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 270; *Rizeq v*

29. Accordingly, under the arrangements that existed prior to the enactment of the Common Informers Act in 1975, the liability created by s 46 depended upon an anterior determination having been made as to capacity to sit either by the relevant House, or by a court exercising jurisdiction under Pt XXII of the Electoral Act (being a law supported by ss 47 and 51(xxxvi)).[32] Any such determination conclusively established whether a person was "declared by this Constitution to be incapable of sitting" for the purposes of a proceeding brought pursuant to s 46 of the Constitution.

30. That textual submission is supported by the common law principle that the determination of the qualifications of parliamentarians falls within the exclusive cognisance of the Parliament, except to the extent that Parliament itself decided to involve the courts in the determination of such questions, which principle has been adopted and embedded in the Constitution by s 47. It is also supported by the Convention Debates, which reveal a clear intention that questions concerning the qualifications of parliamentarians would be determined in that way.

*The principle of exclusive cognisance*

31. The exclusive power of Parliament to determine questions as to qualification to sit in Parliament is one aspect of the common law principle of "exclusive cognisance", which denotes that each House of Parliament has an "exclusive right ... to manage its own affairs without interference from the other or from outside Parliament".[33] As Blackstone put it, in a passage that immediately followed his description of qualifications and disqualifications of parliamentarians:[34]

> [T]he whole of the law and custom of parliament has its origins from this one maxim; 'that whatever matter arises concerning either house of parliament, ought to be examined, discussed, and adjudged in that house to which it relates, and not elsewhere'. Hence, for instance, the lords will not suffer the commons to interfere in settling a claim of peerage; the commons will not allow the lords to judge of the election of a burgess; nor will either house permit the courts of law to examine the merits of either case. But the maxims upon which they proceed, together with their method of proceeding, rest entirely in the breast of the parliament itself....

32. The House of Commons had long reserved to itself the power of determining disputed elections as well as questions concerning qualifications,[35] and the Constitution implemented a substantially similar arrangement (which is unsurprising given that the

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*Western Australia* (2017) 244 ALR 421 at 434 [59] (Bell, Gageler, Keane, Nettle and Gordon JJ).

[32] Cf the apparently contrary *obiter* views of Gaudron J in *Sue* (1999) 199 CLR 462 at 509–510 [117]–[119], discussed in footnote 38 below. For the reasons there given, the Court should not adopt those views.

[33] *R v Chaytor* [2011] 1 AC 684 at 712 [63] (Lord Phillips PSC).

[34] Blackstone, *Commentaries on the Laws of England* (first published 1765, 1979 reprint) vol 1, bk 1, ch 2 at 158–159. This principle is restated, nearly in Blackstone's words, in *Stockdale v Hansard* (1839) 9 Ad & E 1 at 114, 162, 209, 233.

[35] See *Sue* (1999) 199 CLR 462 at 508 [116] (Gaudron J).

historic role of the House of Commons in determining questions of qualification was well known to the framers[36]). It was framed in a way that reserved questions relating to the internal composition of the Parliament to the House in which such questions arose, subject to the courts being given part or all of that function in a law that "otherwise provided" for the purposes of s 47. It thereby proceeded on the basis that Parliament has exclusive power authoritatively to determine questions as to qualification to sit in Parliament, except to the extent it otherwise provides.[37] As Gleeson CJ, Gummow and Hayne JJ observed in *Sue*, "[a]ny question respecting Mrs Hill's qualification as a Senator, a vacancy in the Senate and any question of her disputed election to the Senate would, if the Parliament had not otherwise provided, have been for the determination of the Senate" (observing that that would have followed from the operation of s 47 of the Constitution).[38]

33. The aspects of the constitutional design just identified cohere with the position that applied (and still applies) at common law where a matter is within the exclusive cognisance of a House of Parliament. In such a case, the courts cannot determine that matter, even if their jurisdiction is regularly invoked. For example:

33.1. In *R v Richards; Ex parte Fitzpatrick*,[39] this Court refused applications for writs of habeas corpus on the basis that warrants issued by the Speaker of the Commonwealth House of Representatives pursuant to resolutions of that House were conclusive evidence of a breach of privilege, and that the Court would not go behind that warrant.

33.2. In *Egan v Willis* (***Egan***),[40] the Legislative Assembly of New South Wales had resolved to suspend a Minister, and forcibly to remove him from the House.

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[36] For the relevance of this to constitutional interpretation, see *Roach v Electoral Commissioner* (2007) 233 CLR 162 at 188–189 [53], 189–192 [55]–[63] (Gummow, Kirby and Crennan JJ); *Singh v Commonwealth* (2004) 222 CLR 322 at 331–332 [10] and 332–333 [12] (Gleeson CJ), 385 [159] (Gummow, Hayne and Heydon JJ).

[37] *In Re Wood* (1988) 167 CLR 145 at 157-8 (Mason CJ, Wilson, Brennan, Deane, Dawson, Toohey and Gaudron JJ); *Holmes v Angwin* (1906) 4 CLR 297 at 305 (Griffith CJ), 307–308 (Barton J); *Ellis v Atkinson* (1998) 3 VR 175 at 179–181; *Royal Commission on Australian Government Administration* (1976) Appendix 1.G at 205 [46(a)], 207 [53(a)]. Indeed, but for the "more specific" provision made for the determination of such questions in s 47, such matters may well have fallen within the "powers, privileges and immunities" referred to in s 49: *Sue* (1999) 199 CLR 462 at 483 [36] (Gleeson CJ, Gummow and Hayne JJ).

[38] (1999) 199 CLR 462 at 473 [5] and see also at 474 [8] (and see also McHugh J at 539 [204] and Kirby J at 560 [257], both in dissent in the result). Gaudron J may have taken a different view – see 510 [118], read with the last sentence of 508–509 [116]. To the extent Gaudron J's reasons are to be understood as suggesting that, until 1975, the various courts specified in s 46 had authority to determine questions of qualification, those reasons are at odds with those of the plurality (and McHugh and Kirby JJ), and fail to grapple with the emphatic language of s 47. It can also be noted that the authorities referred to by Gaudron J at footnote 175 involved the application of the *House of Commons (Disqualification) Act 1782* (22 Geo 3, c 45) which did not contain any provision akin to s 47.

[39] (1955) 92 CLR 157 at 162 (Dixon CJ, for the Court).

[40] (1998) 195 CLR 424 at 446 [27] (Gaudron, Gummow and Hayne JJ), 460 [66], 466–467 [78]–[79] (McHugh J), 491–492 [133(3)] (Kirby J), 509 [179] (Callinan J).

The Minister failed in proceedings claiming declarations that the resolution was invalid and that the removal constituted a trespass, this Court holding that a court may judge the existence of a privilege of a House of the Parliament, but not the manner of its exercise in any given case.

33.3. In *O'Sullivan v Andrews*,[41] the Supreme Court of Victoria decided that there was no justiciable controversy where the Legislative Assembly of Victoria had refused to hold a joint sitting of the two Houses of Parliament in order to allow a member representing the National Party of Australia – Victoria to fill the casual vacancy for which he had been duly nominated.

33.4. Finally, and most relevantly, in *Ellis v Atkinson*[42] the plaintiffs sought a declaration that the seat occupied by the defendant in the Legislative Council of Victoria had become vacant. Having examined the relevant history, the Supreme Court of Victoria reluctantly concluded that it did not have jurisdiction to determine questions concerning the qualifications of persons to sit and vote as members of the Legislative Council of the Parliament of Victoria, as that was within the exclusive cognisance of the Legislative Council.

34. Those examples illustrate a broader proposition, being that there is a category of questions which arise in litigation that the courts consider they are not free to decide for themselves because those questions are primarily committed to what was described in *Egan* as the "exclusive jurisdiction" of another organ of government.[43] In an Australian context, that proposition recognises the manner in which the Constitution assigns particular functions to each of the branches of government and is, at least in part, an element of the separation of powers.[44] The proposition is not confined to the position as between the Courts and the legislature — a similar demarcation doctrine applies to some questions that are to be determined "conclusively" or "primarily" by the executive (eg questions concerning the extent of the sovereign's territory, state of war or neutrality, the existence of a State[45] — although the precise scope and limits of such doctrine is not settled).[46] For the reasons given above, the demarcation of powers

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41 [2016] VSC 560.

42 (1998) 3 VR 175.

43 *Egan* (1998) 195 CLR 424 at 446 [27] (Gaudron, Gummow and Hayne JJ), referring to *New Brunswick Broadcasting Co v Nova Scotia* [1993] 1 SCR 319 at 384 (McLachlin J). See also McHugh J at 462 [69] (matters affecting the internal administration of the House of Commons are "outside the jurisdiction of the common law courts").

44 See *Brodie v Singleton Shire Council* (2001) 206 CLR 512 at 555 [92] (Gaudron, McHugh and Gummow JJ), explaining that the differences of opinion in *Sue* "respecting the exercise by this Court of jurisdiction as the Court of Disputed Returns exemplify the fundamental and difficult issues which are wrapped up in the term 'non-justiciable'". See also *Petrotimor Companhia de Petroleos SARL v Commonwealth* (2003) 128 FCR 507 at [68] (Black CJ and Hill J).

45 See eg Mann, *Foreign Affairs in English Courts* (1986) at 30–42.

46 See eg *Ffrost v Stevenson* (1937) 58 CLR 528 at 565–566 (Dixon J), 563 (Rich J), 612 (McTiernan J) and see also Latham CJ at 549 (noting his Honour's view that the Court could determine the matter, not having any conclusive statement before it); *The Fagernes* [1927] P 311

achieved by s 47 involved the conferral of such an "exclusive jurisdiction" on the Parliament in respect of matters which are to be regarded as "proper incidents of [its] legislative function",[47] and also provided the only means by which that arrangement could be altered. In contrast, s 46 conferred no authority to determine those matters – to conclude otherwise would be to "trump the exclusive jurisdiction of the legislative body"[48] in a manner that would be at odds with the constitutional scheme.

*The Convention Debates*

35. The Convention Debates concerning the clauses that became s 47 reveal a great deal about the intended institutional arrangements to determine matters of qualification, vacancies and disputed elections. They strongly support the conclusion that the framers intended that questions of qualification be within the exclusive cognisance of the Houses of Parliament. While at one point during the Conventions it appeared that electoral petitions would necessarily be determined by a court, ultimately even that issue was left to the determination of Parliament unless it otherwise provided.

36. As they appeared in the draft of 12 April 1897, the precursors to s 47[49] were substantively identical to the final form of that clause (albeit dealing with the position of the House and the Senate in separate clauses).[50] In the debate on cl 20 at the Adelaide Convention of 1897, Sir Edward Braddon and the Hon George Reid argued that "these questions, more especially the question of disputed returns, should be determined by the Supreme Court".[51] In contrast, Mr Barton, advocating the position ultimately adopted, expressed the view that the drafting increased the Parliament's "freedom of action",[52] and that "it is a matter for the Parliament of the Commonwealth to determine whether the Houses, after they are called together, shall determine this question, or whether the Judges should do it".[53] Nowhere did he, or any other participant during that or any other Convention, suggest that the issue of qualification could also be determined by any court of competent jurisdiction under s 46.

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at 319, 324; *Duff Development Co Ltd v Government of Kelantan* [1924] AC 797 (HL) at 805–806 (Viscount Cave), 813, 815 (Viscount Finlay), 820 (Lord Dunedin), 830 (Lord Carson).

47 *R v Richards; Ex parte Fitzpatrick* (1955) 92 CLR 157 at 167 (Dixon CJ, for the Court). See also *Sue* (1999) 199 CLR 462 at 516 [133] (Gaudron J).

48 See again *Egan* (1998) 195 CLR 424 at 446 [27] (Gaudron, Gummow and Hayne JJ).

49 Clauses 21 and 44 in the 1891 Draft, which became cll 20 and 42 in the 1897 Draft debated at the Adelaide Convention.

50 Williams, *The Australian Constitution: A Documentary History* (2005) at 504, 507. Clause 20 provided: "Until the Parliament otherwise provides, any question respecting the qualification of a member, or a vacancy in the States Assembly, or a disputed return, shall be determined by the States Assembly." Clause 42 provided: "Until the Parliament otherwise provides, any question respecting the qualification of a member or a vacancy in the House of Representatives, or a disputed return, shall be determined by the House."

51 *Official Record of the Convention Debates of the Australasian Federal Conventions* (**Convention Debates**), Adelaide, 15 April 1897 at 680 (Sir Edward Braddon), 681 (Mr Reid).

52 Convention Debates, Adelaide, 15 April 1897 at 681.

53 Convention Debates, Adelaide, 15 April 1897 at 681.

37. During the same debate, Mr Wise drew a distinction between questions of qualification and questions of disputed returns. He proposed that only the question of disputed returns ("a matter of altogether a different character") should be dealt with by the courts.[54] This distinction was accepted: the reference to disputed returns was removed from cll 20 and 42[55] and a new cl 48A dealing with disputed elections was inserted.[56] The result was that disputed elections were to be referred to a court[57] and questions of qualifications and vacancies were deliberately left to be determined by the Houses of Parliament unless they otherwise provided.[58]

38. At the Sydney Convention in 1897, a suggestion to omit the new cl 48A (by then cl 50) and restore "disputed elections" to the "qualifications and vacancies" clauses (by then cll 21 and 43) was considered.[59] It was pointed out that there might be difficulty as to the first election, before the Parliament could "otherwise provide" and the High Court could be established.[60] Mr Wise at first objected on the basis that the suggestion would confuse the distinction drawn in Adelaide — namely, that "[w]here the rights and privileges of members were affected, it was a matter for the house; but where any conflict arose as to the claims of any member to represent a particular constituency, the matter was one for the court."[61] Ultimately, however, he said that the matter was perhaps best left to the drafting committee,[62] a point repeated by Mr Barton in the subsequent debates on cll 21 and 50.[63] That course was adopted and the Drafting Committee (in amendments presented on the final day of the Sydney Convention), struck out all three clauses and substituted a new cl 50 which was in substantially the same form as s 47.[64] After that time, only very minor drafting changes were made[65] and no further debate occurred.

39. By contrast with the examination of the clause that became s 47, there was little discussion of the clause that became s 46.[66] Such discussion as did occur principally concerned whether that clause should be amended so that it imposed a "simple prohibition, so that the law of the commonwealth may provide a penalty afterwards".[67]

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54 Convention Debates, Adelaide, 15 April 1897 at 681.
55 Convention Debates, Adelaide, 15 April 1897 at 681, 736.
56 Convention Debates, Adelaide, 22 April 1897 at 1150. Clause 48A provided: "Until the Parliament otherwise provides all questions of disputed elections arising in the Senate or House of Representatives shall be determined by a Federal Court or a Court exercising federal jurisdiction."
57 Convention Debates, Adelaide, 22 April 1897 at 1150 (Mr Barton).
58 Convention Debates, Adelaide, 22 April 1897 at 1150 (Mr Barton).
59 Convention Debates, Sydney, 13 September 1897 at 464–466; Convention Debates, Sydney, 21 September 1897 at 991, 993.
60 Convention Debates, Sydney, 13 September 1897 at 464–465.
61 Convention Debates, Sydney, 13 September 1897 at 465.
62 Convention Debates, Sydney, 13 September 1897 at 465.
63 Convention Debates, Sydney, 21 September 1897 at 991, 1034.
64 See Williams, *The Australian Constitution: A Documentary History* (2005) at 771, 774, 776, 870.
65 See Williams, *The Australian Constitution: A Documentary History* (2005) at 1025, 1079.
66 See Williams, *The Australian Constitution: A Documentary History* (2005) at 259 for a discussion of the insertion of the precursor to s 46.
67 Convention Debates, Sydney, 21 September 1897 at 1034 (Mr Barton).

While Mr Barton undertook to make this change, it ultimately was not implemented by the drafting committee, because while the words "[u]ntil the Parliament otherwise provides" were inserted at the start of the provision, the words providing for the penalty were not omitted.[68] Thereafter the provision was only slightly revised at the 1898 Melbourne Convention,[69] where it escaped debate altogether.

40. Throughout the Convention process it was never doubted that it was the mechanism or mechanisms to be contained in what became s 47 that were to "determine" "any" question of vacancies, qualifications and disputed elections. To that end, the word "determined" and the phrases "any" or "all" questions were consistently used in each of the various precursor provisions to s 47. The issue debated at the Conventions went to how prescriptive the constitutional text should be as to the identity of the repository or repositories of power that was to make those "determinations" as to "any" or "all" such questions. But the common understanding throughout was that, whatever the final institutional arrangements settled upon, those arrangements were to be the only way in which those questions were determined. Thus, Quick and Garran correctly observed of s 47 that it provided that:[70]

> ... until legislation on the subject by the Federal Parliament establishing a different procedure, each chamber shall have exclusive jurisdiction to determine all questions which may arise respecting (1) the qualification of its members, (2) a vacancy which has arisen or which may be alleged to have arisen in its membership, and (3) a disputed election in which it is concerned. Such legislation may assume the form of transferring the jurisdiction to the Federal Courts or to the State Courts, to hear and determine all controversies of the kind.

*Structural considerations*

41. There is an obvious structural or systemic reason that explains why the text of s 47 is emphatic that "any" question referred to in that section should be determined in the manner prescribed by or provided for under that provision. That is, it reduces the risk of the kind identified by McHugh J in *Sue*,[71] referring to "potential and unseemly conflicts" between a court and Parliament. The capacity for unseemly conflicts between a court and Parliament is clearest when one considers that, until Parliament otherwise provided, the position under s 46 was that a suit in respect of the liability imposed by s 46 could be brought in "any court of competent jurisdiction" including, for example, the New South Wales District Courts, the Queensland District Courts, the Victorian County Court and South Australian Local Courts of Full Jurisdiction (subject to the

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[68] Williams, *The Australian Constitution: A Documentary History* (2005) at 744 (showing the draft Constitution with amendments made at the 1897 Sydney Session in 'mark up').
[69] Williams, *The Australian Constitution: A Documentary History* (2005) at 823.
[70] Quick and Garran, *The Annotated Constitution of the Australian Commonwealth* (1901) at 496 (emphasis added).
[71] (1999) 199 CLR 462 at 556 [243].

monetary limits on those courts' jurisdiction),[72] yet at the same time s 47 provided that "any question" of capacity to sit "shall be determined by the House in which the question [arose]".

42. If it was the case that the various courts in which claims could be instituted under s 46 could determine a question of qualification for themselves, irrespective of the determination of the relevant House, a parliamentarian may have found themselves in an invidious position. Even if the relevant House determined that the parliamentarian was qualified to sit in that House (pursuant to the procedure contemplated in s 47 of the Constitution), the parliamentarian would have had to confront the prospect that they would expose themselves to a substantial penalty for every day that they so sat (there being no certainty that the court in a common informer action would agree with the conclusion of the relevant House). Moreover, if they chose not to sit so as to avoid that penalty, their seat would become vacant under ss 20 or 38 of the Constitution.

43. The Commonwealth's submission reduces the potential for institutional conflicts, and is therefore to be preferred as supplying the greatest certainty of operation that is consistent with the language and purpose of ss 46 and 47. As was noted in *Re Day (No 2)*,[73] senators and members of the House of Representatives should know where they stand. They, and their electors, are entitled to expect tolerably clear and workable standards by which to gauge the constitutional propriety of their affairs. The opposite will be true if ss 46 and 47 are construed such that the authority to "determine" questions of qualification is conferred by both provisions.

44. Indeed, uncertainty as to questions of qualification to sit in Parliament has broader implications and may be seen to be inimical to the stability of the constitutionally prescribed system of government.[74] In that regard, a series of provisions points to the fact that the question of who is capable of sitting as a senator or member may be decisive in the exercise of the powers conferred upon the Parliament by Ch I.[75]

45. Similar observations apply as regards the Executive Government, by reason of the requirement in s 64 that Ministers sit in the Parliament. If qualification issues can be required to be determined at any time, by reason of a common informer action, that potentially creates uncertainty not just as to a person's capacity to sit in Parliament, but also to hold office as a Minister.

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[72] *District Courts Act 1901* (NSW); *District Courts Act 1891* (Qld) 55 Vict No 33; *County Court Act 1890* (Vic) 54 Vict No 1078; *Local Courts Act 1886* (SA) 49 & 50 Vict No 386. Section 46 was in that respect binding on the Courts of the States by virtue of covering cl 5 of the Constitution. The jurisdiction so conferred was withdrawn from State courts by s 39(1) of the *Judiciary Act 1903* (Cth), and was then restored as an invested federal jurisdiction by operation of s 39(2): see eg *Rizeq v Western Australia* (2017) 344 ALR 421 at 424 [6] (Kiefel CJ).

[73] *Re Day (No 2)* (2017) 91 ALJR 518 at 535 [97] (Gageler J).

[74] *Re Canavan* [2017] HCA 45 at [48] (the Court).

[75] See, eg, ss 23 and 40 (requiring questions in the Senate and the House to be determined by a majority of votes) and s 57 (joint sittings). The clear and authoritative determination of which persons are entitled to vote is obviously potentially of great significance.

*The purpose served by section 46*

46. Where then does s 46 fit within the constitutional scheme? That question is partly answered by reference to the observation that the Constitution entrenches a "great underlying principle ... that the rights of individuals are sufficiently secured by ensuring, as far as possible, to each a share, and an equal share, in political power".[76] In such a system, electoral choice represents the "principal constraint on the constitutional exercise by the Parliament of the legislative power of the Commonwealth, and on the lawful exercise by Ministers and officers within their departments of the executive power of the Commonwealth".[77] It likewise represents the principal constraint upon elected representatives or parliamentary majorities who are (or are perceived to be) "unduly protective of [their own] members".[78]

47. Viewed in that context, s 46 had two primary functions. **First**, and most obviously, it provided a penalty, and thus a deterrent, for disqualified members. However, unless the absence of qualification had been determined in the manner prescribed by or under s 47, a "court of competent jurisdiction" could not proceed to impose such a penalty, because such a court had no authority to decide one of the two critical questions upon which liability to that penalty depended (the other being the period, if any, during which the person in fact sat while disqualified). **Second**, s 46 is also to be understood as having served a (possibly more important) systemic function: it supplied a mechanism by which any member of the public could draw attention to a possible infirmity in the qualifications of a member or senator. By so doing, that matter was brought to the attention of both the relevant House and the member, and also to the attention of the persons who make the choices required by ss 7 and 24 of the Constitution.

48. If a common informer action is commenced at a time when there has been no prior determination of the qualification issue that is raised,[79] it is for the relevant House to address that issue, if it considers that it is appropriate to do so, either by a reference under s 376 of the Electoral Act, or by determining that question for itself pursuant to its residual powers under s 47 of the Constitution. It should be presumed that, where such a matter is brought to the Parliament's attention, the relevant House will act responsibly in addressing that matter.[80] The manner in which Parliament has dealt with qualification

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[76] Moore, *The Constitution of the Commonwealth of Australia* (1902) at 329.

[77] *McCloy v New South Wales* (2015) 257 CLR 178 at 226 [111] (Gageler J).

[78] Gareth Evans 'Pecuniary Interests of Members of Parliament under the Australian Constitution" (1975) 49 *Australian Law Journal* 464 at 473.

[79] As occurred in relation to Mr Culleton, whose position was referred to the Court of Disputed Returns after a question was raised as to his qualification in a common informer action: see *Bell v Culleton* (HCA No P44 of 2016), commenced on 7 September 2016 and dismissed on 24 October 2017 (*Bell v Culleton* [2017] HCATrans 217); *Re Culleton (No 2)* (2017) 91 ALJR 311.

[80] *Singh v Commonwealth* (2004) 222 CLR 322 at 418 [267]–[269] (Kirby J); *Shaw v Minister for Immigration and Multicultural Affairs* (2003) 218 CLR 28 at 43 [32] (Gleeson CJ, Gummow and Hayne JJ); *Sue* (1999) 199 CLR 462 at 480 [26] (Gleeson, Gummow and Hayne JJ), *Kartinyeri v Commonwealth* (1998) 195 CLR 337 at 380–381 [87]–[88] (Gummow and Hayne JJ); *Egan* (1998) 195 CLR 424 at 505 [160] (Kirby J). See also *Bradlaugh v Gosset* (1884) 12 QBD 271 at 280 (Stephen J).

questions that have arisen in relation to nine parliamentarians since the last election reveals Parliament doing exactly that.[81] That role for the Parliament is entirely consistent with the framers having considered, consistently with longstanding historical practice, that the determination of issues concerning qualifications could properly be left to the Parliament (which could then involve the courts to the extent it sought fit by "otherwise providing" under s 47). If Parliament chooses to take no action, the issue may be raised by election petition under the Electoral Act following the next election.

49. None of that gives rise to any imperative that might lead the Court to strain to imply into s 46 authority to decide that which is exclusively dealt with in s 47. Instead, it locates s 46 in the modest position envisaged by the framers; no longer directed to the archaic object of common informer actions identified above (being enforcement of the law at a time when the state was weak); but rather taking its proper place in a constitutionally prescribed system whose ordinary working will be through the political process.[82]

### (c) *Conferral of jurisdiction on the High Court under the Electoral Act*

50. The submissions above have focused on the interaction of ss 46 and 47 of the Constitution. Plainly, however, Parliament can "otherwise provide" for the purposes of either or both sections, and has done so.

51. As to s 47, Parliament first "otherwise provided" in 1902, with the passage of the *Commonwealth Electoral Act 1902* (Cth), in which it provided for petitions disputing elections or returns to be addressed to the Court of Disputed Returns, in effect legislating the arrangement advocated for by Sir Edward Braddon and Mr Reid at the Adelaide Convention. The reference procedure was added in 1907,[83] to allow a House of Parliament to refer cases involving questions of law to the Court of Disputed Returns.[84] However the Parliament reserved a discretion to determine questions of qualification (to be exercised particularly where those questions would depend on facts easily ascertained).[85]

52. The provisions that "otherwise provide" for the purposes of s 47 of the Constitution are now found in Pt XXII of the Electoral Act, which relevantly provides that:

    (a) the validity of any election or return may be disputed by petition addressed to the Court of Disputed Returns and not otherwise (s 353(1)). Such a petition must be commenced within strictly limited time periods;

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[81] *Re Culleton (No 2)* (2017) 91 ALJR 311; *Re Day (No 2)* (2017) 91 ALJR 518; *Re Canavan* [2017] HCA 45.

[82] Stephen Gageler, 'Beyond the Text: A Vision of the Structure and Function of the Constitution' (2009) 32 *Australian Bar Review* 138 at 152.

[83] Pursuant to amendments to the *Commonwealth Electoral Act 1902* (Cth) made by the *Disputed Elections and Qualifications Act 1907* (Cth).

[84] Commonwealth, *Parliamentary Debates*, Senate, 1 November 1907 at 5461–5472.

[85] Commonwealth, *Parliamentary Debates*, Senate, 1 November 1907 at 5461; *Royal Commission on Australian Government Administration* (1976) Appendix 1.G at 205 [46], [47].

(b) the High Court shall be the Court of Disputed Returns, and shall have jurisdiction either to try the petition or to refer it for trial to the Federal Court of Australia (s 354(1)); and

(c) any question respecting the qualifications of a Senator or of a Member of the House of Representatives or respecting a vacancy in either House of the Parliament may be referred by resolution to the Court of Disputed Returns by the House in which the question arises, and the Court of Disputed Returns shall thereupon have jurisdiction to hear and determine the question (s 376).

53. Part XXII prescribes matters such as the content of the originating documents, the persons who may be parties to the proceeding, the powers of the Court of Disputed Returns, the finality and conclusiveness of decisions of the Court, whether persons may be represented, whether costs may be awarded against an unsuccessful party, the effect of the Court's decision, and the power of the Court to make rules in relation to the jurisdiction conferred.[86] These provisions demonstrate a careful regulation of the jurisdiction conferred on the Court.

**(d) *Contrast with Common Informers Act***

54. In 1975, the Common Informers Act, which was the first law to "otherwise provide" for the purpose of s 46 of the Constitution, was passed. The contrast with Pt XXII of the Electoral Act is immediately apparent. The Common Informers Act is a short Act of five sections, of which only three have substantive content. It hewed to, and did not substantively alter, the existing institutional arrangements concerning the determination of questions of the qualifications of parliamentarians (which had been in place, in essentially the same substantive form, since 1907). The Bill that became that Act was prepared hastily, in the circumstances explained by McHugh J in *Sue*.[87]

55. Section 4 makes it clear that the Common Informers Act is intended to "otherwise provide" for the purposes of s 46 of the Constitution. It states that on and after the date of commencement of this Act, a person is not liable to pay any sum under s 46 of the Constitution and no suit shall be instituted, continued, heard or determined in pursuance of that section. In this respect, it may also be noted that the long title of the Common Informers Act is "An Act to make other Provision with respect to the Matter in respect of which Provision is made by s 46 of the Constitution".[88]

56. Section 5 limits the courts with jurisdiction to hear a proceeding under the Common Informers Act to the High Court of Australia (thereby excluding the other courts of competent jurisdiction that could have entertained suits under s 46).

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[86] Electoral Act ss 355, 357–361, 368, 370–371, 375, 376–381.

[87] *Sue* (1999) 199 CLR 462 at 556 [244].

[88] As to the use of the long title, see *Clunies-Ross v Commonwealth* (1984) 155 CLR 193 at 199 (Gibbs CJ, Mason, Wilson, Brennan, Deane and Dawson JJ); *Re Bolton; Ex parte Beane* (1987) 162 CLR 514 at 530 (Deane J); *Amatek Ltd v Googoorewon Pty Ltd* (1993) 176 CLR 471 at 477 (Mason CJ, Brennan, Dawson, Gaudron and McHugh JJ).

57. Section 3 is the central provision of the Common Informers Act. Section 3(1) creates the penalty. It makes a senator or member of the House of Representatives who has sat "while he or she was a person declared by the Constitution to be incapable of so sitting [to] be liable to pay [a penalty] to any person who sues for it in the High Court". The penalty is limited to $200 for the period before the originating process is served, and $200 for every subsequent day on which he or she is proved to have so sat. Sections 3(2) and 3(3) confine the circumstances in which the penalty can be imposed. Section 3(2) provides that a suit under the section shall not relate to any sitting at a time earlier than 12 months before the day on which the suit is instituted. Section 3(3) provides that a person cannot be penalised more than once in respect of any period or day of sitting as a senator or member of the House of Representatives.

58. In his second reading speech, the Attorney-General stated that:[89]

(a) "The purpose of this Bill is to modify the provision at present made by s 46 of the Constitution";

(b) "It seems to the Government that the penalty provided by s 46 is archaic and out of proportion";

(c) "the total penalty that could be incurred by a member of senator could amount to enormous sums where the infringement does not become apparent until years after it has occurred";

(d) "the Bill will ... preserve the common informer procedure provided for by the Constitution, while modifying its application in a way that will be more in keeping with modern time and justice";

(e) "the Government does not intend to repeal it [the common informer action] in its entirety but to modify it".

59. Those comments suggest that the intended purpose of the Common Informers Act was to limit the size of penalties that may be imposed and the sittings to which a proceeding under the Act could apply; and to provide a form of double jeopardy protection.

60. It is true, as McHugh J observed in *Sue*,[90] that aspects of the Second Reading Speeches in the Senate and the House of Representatives appeared to assume this Court could decide questions of constitutional disqualification in a suit under s 3 even if the matter was not referred to the Court of Disputed Returns under the Electoral Act. But that was on the basis that the Common Informers Act "preserved an independent right to challenge a person's right to sit in this House" (emphasis added),[91] referring to what was apparently thought to be the pre-existing position that applied under s 46. When regard is had to the matters identified above, it is apparent that those views proceeded upon an erroneous understanding of the earlier state of the law (which is

[89] Commonwealth, *Parliamentary Debates*, House of Representatives, 22 April 1975 at 1978–1979.
[90] *Sue* (1999) 199 CLR 462 at 556 [244].
[91] Commonwealth, *Parliamentary Debates*, House of Representatives, 22 April 1975 at 1985.

unsurprising, noting McHugh J's observations about the circumstances in which the Bill was drafted and debated). A subjective misunderstanding of the law cannot control the meaning of the statutory text,[92] or be relied upon to change the law, particularly when a fair reading of the extrinsic materials as a whole suggests that Parliament did not intend to alter the existing detailed arrangements regarding the determination of questions concerning the qualifications of parliamentarians. Notably, in that regard, there is (and was at the time of the enactment of the Common Informers Act) a stark contrast with the Electoral Act, where such matters were dealt with comprehensively and with some particularity (including by reference to strict time limits, to the extent that issues of qualification are to be raised outside of the Parliament).

61. In addition, and for essentially the same reasons identified above in respect of s 46, a construction of the Common Informers Act so as not to permit questions of qualification to be litigated is to be preferred as a means of avoiding conflicts between the Court and a House of Parliament over the qualifications of a member of that House.[93] Certainty being an important value within our system of representative and responsible government, a construction that promotes certainty is to be preferred unless the opposite result is required by clear and unambiguous words.[94]

62. For those reasons, the Common Informers Act should not be interpreted as otherwise providing for the purposes of s 47 of the Constitution. Instead, it should be understood as continuing the position that applied under s 46, allowing a penalty to be awarded only after any question of the qualifications of a parliamentarian is determined in accordance with, or pursuant to laws made under, s 47 of the Constitution.

**(e) *No question of discretion***

63. Question 1 asks both whether the High Court can and should decide whether the defendant was a person declared by the Constitution to be incapable of sitting as a Member of the House of Representatives for the purposes of s 3 of the Common Informers Act. These submissions have answered that question on the basis that the Court cannot answer that question. Accordingly, it is not necessary to address whether the Court should decide the relevant question.

**(f) *Question 2***

64. The Common Informers Act does not confer authority to determine questions relating to qualifications of senators or members of the House of Representatives. That being the case, it is not necessary to answer Question 2.

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92 *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252 at 265 (French CJ, Gummow, Hayne, Crennan and Kiefel JJ); *Nominal Defendant v GLG Australia Pty Ltd* (2006) 228 CLR 529 at 538 [22] (Gleeson CJ, Gummow, Hayne and Heydon JJ), 555–556 [82]–[84] (Kirby J); *Re Bolton; Ex Parte Beane* (1987) 162 CLR 514 at 518; Oliver Jones (ed), *Bennion on Statutory Interpretation* (6th ed, 2013) at 659.

93 See, explaining that potential for conflict, *Sue* (1999) 199 CLR 462 at 556 [243] (McHugh J).

94 Eg *Re Canavan* [2017] HCA 45 at [19], [48] (the Court).

## PART V LENGTH OF ORAL ARGUMENT

65. Approximately 1.5 hours will be required for the presentation of oral argument.

Dated: 10 November 2017


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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY NO S190 OF 2017

| | | |
|---|---|---|
| BETWEEN: | PETER ALLEY<br>Plaintiff |
| AND: | DAVID GILLESPIE MP<br>Defendant |
| AND: | ATTORNEY-GENERAL OF THE COMMONWEALTH<br>Intervening |

# ANNEXURE A TO THE SUBMISSIONS OF THE ATTORNEY-GENERAL OF THE COMMONWEALTH (INTERVENING)

**47 Disputed elections**

Until the Parliament otherwise provides, any question respecting the qualification of a senator or of a member of the House of Representatives, or respecting a vacancy in either House of the Parliament, and any question of a disputed election to either House, shall be determined by the House in which the question arises.

## *Common Informers (Parliamentary Disqualification) Act 1975* (Cth)

**1 Short title [see Note 1]**

This Act may be cited as the *Common Informers (Parliamentary Disqualifications) Act 1975*.

**2 Commencement [see Note 1]**

This Act shall come into operation on the day on which it receives the Royal Assent.

**3 Penalty for sitting when disqualified**

(1) Any person who, whether before or after the commencement of this Act, has sat as a senator or as a member of the House of Representatives while he or she was a person declared by the Constitution to be incapable of so sitting shall be liable to pay to any person who sues for it in the High Court a sum equal to the total of:

(a) $200 in respect of his or her having so sat on or before the day on which the originating process in the suit is served on him or her; and

(b) $200 for every day, subsequent to that day, on which he or she is proved in the suit to have so sat.

(2) A suit under this section shall not relate to any sitting of a person as a senator or as a member of the House of Representatives at a time earlier than 12 months before the day on which the suit is instituted.

(3) The High Court shall refuse to make an order in a suit under this Act that would, in the opinion of the Court, cause the person against whom it was made to be penalized more than once in respect of any period or day of sitting as a senator or as a member of the House of Representatives.

**4 Suits not to be brought under section 46 of the Constitution**

On and after the date of commencement of this Act, a person is not liable to pay any sum under section 46 of the Constitution and no suit shall be instituted, continued, heard or determined in pursuance of that section.

**5 Jurisdiction**

Original jurisdiction is conferred on the High Court in suits under this Act and no other court has jurisdiction in such a suit.

that choice or appointment were an election within the meaning of this Division.

**354 The Court of Disputed Returns**

(1) The High Court shall be the Court of Disputed Returns, and shall have jurisdiction either to try the petition or to refer it for trial to the Federal Court of Australia (the ***Federal Court***).

(2) When a petition has been so referred for trial, the Federal Court shall have jurisdiction to try the petition, and shall in respect of the petition be and have all the powers and functions of the Court of Disputed Returns.

(3) The High Court may refer to the Federal Court part of a petition in respect of an election or return, being a part that consists of a question or questions of fact.

(4) Subject to any directions by the High Court, if the High Court refers part of a petition to the Federal Court under subsection (3):

(a) the Federal Court has jurisdiction to deal with the part of the petition that has been referred; and

(b) the Federal Court has, in respect of the petition, the powers and functions of the Court of Disputed Returns, other than the powers referred to in paragraphs 360(1)(v), (vi), (vii) and (viii) and in section 379; and

(c) subject to any directions by the High Court, further proceedings in relation to the part of the petition are as directed by the Federal Court.

(5) The High Court may have regard to the findings of the Federal Court in dealing with the petition and may in its discretion receive further evidence on questions of fact.

(6) The jurisdiction conferred by this section may be exercised by a single Justice or Judge.

**355 Requisites of petition**

Subject to section 357, every petition disputing an election or return in this Part called the petition shall:

(a) set out the facts relied on to invalidate the election or return;

(aa) subject to subsection 358(2), set out those facts with sufficient particularity to identify the specific matter or matters on which the petitioner relies as justifying the grant of relief;

(b) contain a prayer asking for the relief the petitioner claims to be entitled to;

(c) be signed by a candidate at the election in dispute or by a person who was qualified to vote thereat, or, in the case of the choice or the appointment of a person to hold the place of a Senator under section 15 of the Constitution or section 44 of this Act, by a person qualified to vote at Senate elections in the relevant State or Territory at the date of the choice or appointment;

**359 Right of Electoral Commissioner to be represented**

The Electoral Commission shall be entitled by leave of the Court of Disputed Returns to enter an appearance in any proceedings in which the validity of any election or return is disputed, and to be represented and heard thereon, and in such case shall be deemed to be a party respondent to the petition.

**360 Powers of Court**

(1) The Court of Disputed Returns shall sit as an open Court and its powers shall include the following:

(i) To adjourn;

(ii) To compel the attendance of witnesses and the production of documents;

(iii) To grant to any party to a petition leave to inspect in the presence of a prescribed officer the rolls and other documents (except ballot papers) used at or in connexion with any election and to take, in the presence of the prescribed officer, extracts from those rolls and documents;

(iv) To examine witnesses on oath;

(v) To declare that any person who was returned as elected was not duly elected;

(vi) To declare any candidate duly elected who was not returned as elected;

(vii) To declare any election absolutely void;

(viii) To dismiss or uphold the petition in whole or in part;

(ix) To award costs;

(x) To punish any contempt of its authority by fine or imprisonment.

(2) The Court may exercise all or any of its powers under this section on such grounds as the Court in its discretion thinks just and sufficient.

(3) Without limiting the powers conferred by this section, it is hereby declared that the power of the Court to declare that any person who was returned as elected was not duly elected, or to declare an election absolutely void, may be exercised on the ground that illegal practices were committed in connexion with the election.

(4) The power of the Court of Disputed Returns under paragraph (1)(ix) to award costs includes the power to order costs to be paid by the Commonwealth where the Court considers it appropriate to do so.

**361 Inquiries by Court**

(1) The Court shall inquire whether or not the petition is duly signed, and so far as Rolls and voting are concerned may inquire into the identity of persons, and whether their votes were improperly admitted or rejected, assuming the Roll to be correct, but the Court shall not inquire into the correctness of any Roll.

(2) Where the Court makes inquiries in relation to ballot papers marked in Antarctica pursuant to the provisions of Part XVII, a statement of the

(b) have regard to any declaration vote ballot papers (including postal ballot papers) rejected at the preliminary scrutiny if the Court is of the opinion that the ballot papers should not have been rejected.

**365 Immaterial errors not to vitiate election**

No election shall be avoided on account of any delay in the declaration of nominations, the provision of certified lists of voters to candidates, the polling, or the return of the writ, or on account of the absence or error of or omission by any officer which did not affect the result of the election:

Provided that where any elector was, on account of the absence or error of, or omission by, any officer, prevented from voting in any election, the Court shall not, for the purpose of determining whether the absence or error of, or omission by, the officer did or did not affect the result of the election, admit any evidence of the way in which the elector intended to vote in the election.

**365A Election not affected by failure of delivery arrangement**

(1) This section applies if a DRO or Assistant Returning Officer, under section 188, arranges for delivery of a certificate and ballot paper instead of posting them.

(2) The Court of Disputed Returns must not:

(a) declare that a person returned as elected was not duly elected; or

(b) declare an election void;

on the ground of a failure of the arrangement for delivery.

(3) This section is not intended to imply anything about the effect of a failed delivery by post.

**366 Errors relating to printing of party affiliations**

The Court of Disputed Returns is not to declare that a person returned as elected was not duly elected, or declare an election void, by reason only that:

(a) there was or was not printed on one or more ballot papers used in the election:

(i) the name; or

(ii) an abbreviation of the name; or

(iii) a logo of a political party;

adjacent to the name of a candidate or group of candidates; or

(b) the name or an abbreviation of the name of a political party printed on one or more ballot papers used in the election was misspelt; or

(c) the name, an abbreviation of the name or a logo of a political party printed on one or more ballot papers used in the election was inaccurate or incorrect; or

A party to the petition may appear in person or be represented by counsel or solicitor.

**371 Costs**

The Court may award costs against an unsuccessful party to the petition.

**372 Deposit applicable for costs**

If costs are awarded to any party against the petitioner, the deposit shall be applicable in payment of the sum ordered, but otherwise the deposit shall be repaid to the petitioner.

**373 Other costs**

All other costs awarded by the Court, including any balance above the deposit payable by the petitioner, shall be recoverable as if the order of the Court were a judgment of the High Court of Australia, and such order, certified by the Court, may be entered as a judgment of the High Court of Australia, and enforced accordingly.

**374 Effect of decision**

Effect shall be given to any decision of the Court as follows:

(i) If any person returned is declared not to have been duly elected, the person shall cease to be a Senator or Member of the House of Representatives;

(ii) If any person not returned is declared to have been duly elected, the person may take his or her seat accordingly;

(iii) If any election is declared absolutely void a new election shall be held.

**375 Power to make Rules of Court**

The Justices of the High Court or a majority of them may make Rules of Court not inconsistent with this Act for carrying this Part of this Act into effect and in particular for regulating the practice and procedure of the Court the forms to be used and the fees to be paid by parties.

Note: Section 86 of the *Judiciary Act 1903* provides that certain provisions of the *Legislation Act 2003* apply, with modifications, to rules of court made by the Court. Section 88 of the *Judiciary Act 1903* provides that regulations may be made modifying and adapting certain provisions of the *Legislation Act 2003* in their application to the Court.

**375A Right of Electoral Commission to have access to documents**

Unless the Court orders otherwise, the filing of a petition does not deprive the Electoral Commission of any right to have access to a document for the purposes of the performance of its functions.

The provisions of sections 364, 368, 370, 371, 373, 374 and 375 shall apply so far as applicable to proceedings on a reference to the Court of Disputed Returns under this Part.