IN THE HIGH COURT OF AUSTRALIA
SITTING AS THE COURT OF DISPUTED RETURNS
CANBERRA REGISTRY **NO C15 OF 2016**

RE SENATOR RODNEY NORMAN CULLETON
Reference under s 376 *Commonwealth Electoral Act 1918* (Cth)

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

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PART I PUBLICATION

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

PARTS II AND III BASIS OF INTERVENTION AND LEAVE

2. The Attorney-General of the Commonwealth (**Commonwealth**) intervenes pursuant to s 78A of the *Judiciary Act 1903* (Cth) and is also a party by virtue of orders made by French CJ on 21 November 2016 pursuant to s 378 of the *Commonwealth Electoral Act 1918* (Cth) (**Electoral Act**).

PART IV APPLICABLE CONSTITUTIONAL AND LEGISLATIVE PROVISIONS

3. The applicable constitutional and legislative provisions, in their form on applicable dates, which is relevantly the same as their current form, are set out in Annexure A to these submissions.

PART V ARGUMENT

4. Section 44(ii) of the Constitution operates to disqualify individuals who are, in fact, under sentence or subject to be sentenced for a relevant offence, whether or not their conviction for that relevant offence is subsequently annulled under s 8 of the *Crimes (Appeal and Review) Act 2001* (NSW) (**NSW Appeal and Review Act**). That construction promotes certainty in the ascertainment of disqualified persons throughout the process of the people choosing their senators and members of the House of Representatives: from the issue of writs, to the nominations, to the polling day and the return of the writs. It also promotes certainty in relation to the ongoing membership of the Senate and House of Representatives.

5. That level of certainty is demanded by the scheme of Ch I and, in particular, the requirement for regular elections, the results of which are to be ascertained promptly, and which reflect a genuine choice by the people between known alternatives. That level of certainty is also reflected in the text of s 44(ii) itself. If s 44(ii) were engaged only by being under sentence or being subject to be sentenced in respect of a conviction that was *not subsequently annulled*, then the possibilities of protracted legal process would introduce into the scheme of Ch I and s 44 more particularly an intolerable element of uncertainty.

6. Even if the annulment of Senator Culleton's conviction means that it is to be treated as never having existed for the purposes of New South Wales criminal law (which the Commonwealth disputes), that is of no consequence for the operation of s 44(ii). The NSW Appeal and Review Act cannot, of course, control the operation of s 44(ii) of the Constitution; and s 44(ii) is engaged in Senator Culleton's case by the historical fact of his being "subject to be sentenced" at all material times in the process of the 2016 Western Australian Senate election.

7. There is therefore a vacancy in the representation of Western Australia in the

Senate for the place for which Senator Culleton was returned. In accordance with settled principles, that vacancy should be filled by a special count of the ballot papers.

Facts

8. The offence of larceny in NSW is punishable under s 117 of the *Crimes Act 1900* (NSW) (**Crimes Act**) by imprisonment for five years. Where the value of the property in respect of which larceny is charged does not exceed $5000, the maximum penalty for the offence is affected by s 268 of the *Criminal Procedure Act 1986* (NSW).[1] In those circumstances, the maximum term of imprisonment that the Local Court may impose for larceny is two years: s 268(1A). The maximum fine is 50 penalty units or, where the value of the property is less than $2000, 20 penalty units: s 268(2)(b)(ii). A fine may be imposed in addition to or instead of a term of imprisonment: s 268(2AA).

9. On 2 March 2016 in the Local Court of New South Wales at Armidale, Senator Culleton was convicted (in his absence) of an offence against s 117 of the Crimes Act in relation to property with value less than $2000.[2] Accordingly, the offence of which he was convicted was an offence punishable under the law of New South Wales by imprisonment for two years or a fine of 20 penalty units, or both.

10. Certain punishments, including imprisonment but not including a fine, may not be imposed on an "absent offender": s 25(1) of the *Crimes (Sentencing Procedure) Act* 1999 (NSW) (**CSP Act**). Section 25(2) of that Act empowers the Local Court to issue a warrant for the arrest of an absent offender for the purpose, relevantly, of having the offender brought before the Local Court for sentencing. On 2 March 2016, the Local Court issued such a warrant for Senator Culleton's arrest.[3]

11. On 16 May 2016, the Governor of Western Australia issued a writ for the election of Senators for Western Australia. The writ specified, among other things, that nominations of candidates for the Senate election would close on 9 June 2016.[4] On 7 June 2016, the Australian Electoral Officer for Western Australia received a group nomination for Pauline Hanson's One Nation party which included a nomination by Senator Culleton as a Senate candidate.[5] The polling day for the election was 2 July 2016. On 2 August 2016, the poll for the Senate in the Commonwealth Parliament for the State of Western Australia was declared and the writ returned. Senator Culleton was certified as duly elected as the eleventh out of twelve senators for Western Australia.

12. On 8 August 2016, the Local Court of New South Wales at Armidale granted

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1 See s 268 and item 3 of Pt 2 of Table 2 in Sched 1.

2 Certificate of a Registrar of Local Court of New South Wales, dated 15 November 2016, in respect of orders made on 2 March 2016.

3 Local Court of New South Wales bench warrant dated 2 March 2016.

4 Exhibit TJC-2 to Affidavit of Timothy John Courtney affirmed 25 November 2016.

5 Exhibit TJC-3 to Affidavit of Timothy John Courtney affirmed 25 November 2016.

an annulment of Senator Culleton's conviction pursuant to s 8 of the NSW Appeal and Review Act.[6] On 25 October 2016, the Local Court accepted Senator Culleton's plea of guilty to an offence against s 117 of the Crimes Act and, without proceeding to conviction, dismissed the matter pursuant to s 10(1)(a) of the CSP Act and ordered Senator Culleton to pay compensation.[7]

13. On 7 November 2016, the Senate resolved that certain questions respecting a vacancy in the representation of Western Australia in the Senate for the place for which Senator Rodney Norman Culleton was returned should be referred to the Court of Disputed Returns. On 8 November 2016, the President of the Senate transmitted to the High Court of Australia, in its jurisdiction as the Court of Disputed Returns, a statement of the questions upon which the determination of the Court is desired.

Effect of the annulment of conviction

14. Part 2 of the NSW Appeal and Review Act provides for a procedure by which the Local Court of New South Wales can review certain of its own decisions (using the statutory label "annulment"). Section 4(1) provides for the making of an "application for annulment" of a conviction or sentence made or imposed by the Local Court. Such application to the Court is to be made within 2 years of the conviction or sentence being made or imposed: s 4(2)(a). Section 9 deals with various matters of procedure to be followed by the Local Court after a decision on such an application is made. Section 10(1) deals with the "effect" of annulment on the earlier conviction or sentence (and provides for enforcement action to be reversed – see also s10(3)). Properly construed, that scheme does not operate retrospectively so as to produce the result that, in law, there was never a conviction in the case of a successful application. Its operation is relevantly prospective.

15. Section 10(1) provides that "On being annulled, a conviction ... ceases to have effect...". The fact that s 10(1) commences with the words "[o]n being annulled" (a condition to be satisfied at a particular point in time, necessarily after the time of conviction or sentence) suggests that it operates prospectively. So too do the words "*ceases* to have effect" (emphasis added).

16. That is confirmed by regard to the statutory context. In particular, s 9(3) provides that, following an annulment of conviction, the Local Court "is to deal with the original matter as if no conviction ... had been previously made" (emphasis added). That is a familiar deeming device, creating a statutory fiction.[8] Such a device would, of course, be unnecessary if s 10(1) had a

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6 Certificate of a Registrar of Local Court of New South Wales, dated 15 November 2016, in respect of orders made on 8 August 2016.

7 Certificate of a Registrar of Local Court of New South Wales, dated 15 November 2016, in respect of orders made on 25 October 2016.

8 See *Re Macks; Ex Parte Saint* (2000) 204 CLR 158, 203 [115], where McHugh J observed the use of the phrase "as...if" always introduces a "fiction or hypothetical contrast" and "deems something to be what it is not".

retrospective operation. A prospective operation is therefore to be preferred as one which accords with the principle that "no clause, sentence or word shall prove superfluous void or insignificant if by *any* other construction they may all be made useful and pertinent".[9] Of course, the use of such a device does not, of its own force, give to s 10(1) some form of retrospective operation: deeming devices are to be construed strictly and only for the purpose for which they are resorted to (here, limited to the *procedure* to be followed by the Local Court after the making of an annulment order). It is "improper" to "extend by implication the express application of such a statutory fiction",[10] particularly when it is directed to matters of procedure.

17. If that is accepted, then Senator Culleton is to be treated as standing convicted, both as a matter of historical fact and in law, from 2 March 2016 until 8 August 2016 (and therefore at all relevant times during the election process) and question (a) is to be answered in the manner indicated at paragraph 56 below.

18. If, however, s 10 of the NSW Appeal and Review Act does have a retrospective operation, then it is necessary to decide whether s 44(ii) of the Constitution is engaged only by a conviction and subjection to sentence that has not been annulled, or also by a conviction and subjection to sentence as a matter of historical fact. That is addressed in paragraphs 19-53 below. Before doing so, it should be said that, even if construed as having a retrospective operation, ss 9 and 10 of the NSW Appeal and Review Act do *not* purport to alter or affect the historical fact of a conviction — that is, that the conviction, although annulled, "in fact existed"[11] or was "a thing in fact".[12] At all relevant times during the election process (the nomination date, the date of polling and the date of the declaration of the writ) Senator Culleton was, as a matter of fact, "convicted" and "subject to be sentenced".

Construction of s 44(ii)

19. The word "conviction", although "part of the vocabulary of English law for centuries", takes its meaning and effect in a text such as the Constitution from "the context in which [it] there appear[s], and on the policy and purpose of the [Constitution] as made manifest by its language".[13] Section 44(ii) should be construed as referring to the circumstance of a person's having "been convicted" and being "subject to be sentenced" as a thing in fact and

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9 *Plaintiff M47/2012 v Director-General of Security* (2012) 251 CLR 1, 76-7 [172] (Hayne J) (referring to *Project Blue Sky v Australian Broadcasting Authority* (1998) 194 CLR 355, 382 [71] (McHugh, Gummow, Kirby and Hayne JJ)), emphasis in the original.

10 *East Finchley Pty Limited v Commissioner of Taxation* (1989) 90 ALR 457, 478 (Hill J), referring to *Commissioner of Taxation v Comber* (1986) 10 FCR 88, 96 (Fisher J). See also *Muller v Dalgety & Co Ltd* (1909) 9 CLR 693, 696 (Griffith CJ).

11 See *University of Wollongong v Metwally* (1984) 158 CLR 447 (***Metwally***), 458 (Gibbs CJ). See also 475 (Brennan J) and 478-9 (Deane J).

12 *New South Wales v Kable* (2013) 252 CLR 118 (***Kable (No 2)***), 138-9 [52] (Gageler J).

13 *Cobiac v Liddy* (1969) 119 CLR 257, 270 (Windeyer J) (in the context of general principles of statutory construction).

attributing legal consequences to that thing, even if the conviction did not have the legal operation it purported to have. This is a species of the genus identified by Gageler J in *State of New South Wales v Kable*[14] (*Kable No 2*). A person will have been convicted and subject to sentence within the meaning of s 44(ii), irrespective of the position as it ultimately appears correctly at law. In *Cobiac v Liddy*, Windeyer J explained that when a court quashes a conviction it is "because the court holds that the accused was not lawfully convicted and that the conviction ought not to stand, not that there never was in fact a conviction".[15]

20. The competing constructions presented by Senator Culleton's circumstances involve, on the one hand, disqualification of a wider but more certain class of individuals and, on the other hand, disqualification of a narrower but less certain class of individuals. The wider class would encompass individuals who are, as a matter of historical fact, convicted and under sentence or subject to be sentenced, even though the conviction is subsequently annulled or otherwise cancelled with retrospective effect (if, contrary to the Commonwealth's submissions above, the NSW Appeal and Review Act so operates) or, indeed (although not arising for decision on present facts) held to have been legally erroneous or invalid. The narrower class would be limited to individuals who are, at law, convicted and under sentence or subject to be sentenced; and the additional requirement of legal correctness or validity introduces an additional element of uncertainty to the membership of the disqualified class.

21. The text, purpose, and history of the Constitution favour construing s 44(ii) so as to prioritise certainty by disqualification of the wider class. Certainty about who "shall be incapable of being chosen or of sitting as a senator or a member of the House of Representatives" within the meaning of s 44 is central to the scheme for the election of Senators and members of the House of Representatives prescribed by Ch I of the Constitution.

Scheme of Chapter I

22. Section 44 appears in Ch I of the Constitution. Chapter I vests the legislative power of the Commonwealth in the Parliament of the Commonwealth, provides for the composition of that Parliament, and delineates its powers. It is concerned with systemic features of representative and responsible government and not with individual rights and protections.[16]

23. More particularly, the scheme of Ch I requires that there be regular elections: ss 7, 24, and 28. It requires that, upon dissolution of the Senate or House of

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14 (2013) 252 CLR 118, 138-9 [52].

15 (1969) 119 CLR 257, 272.

16 See, eg, *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 559-60 (The Court); *Unions NSW v New South Wales* (2013) 252 CLR 530, 554 [36] (French CJ, Hayne, Crennan, Kiefel and Bell JJ), 570-1 [101]-[104] (Keane J); *Tajjour v New South Wales* (2014) 254 CLR 508, 569 [104] (Crennan, Kiefel and Bell JJ), 593-4 [198] (Keane J); *Monis v The Queen* (2013) 249 CLR 92, 129 [62] (French CJ), 189 [266], 192 [273], 206-7 [324] (Crennan, Kiefel and Bell JJ).

Representatives, writs for those elections issue promptly: ss 12, 32. After any general election the Parliament must be summoned to meet "not later than thirty days after the day appointed for the return of the writs": s 5. Inherent in those foundational precepts of the prescribed system of representative government is a value of certainty and speed in the ascertainment of the result of an election. That constitutional value is carried into effect by the Electoral Act, especially by the statutory constraints placed upon the period of time over which the process of the election — from the issue to the return of the writs — may run: ss 155-159.

24. Furthermore, elections give effect to the constitutionally mandated direct choice of the people: ss 7 and 24. That choice must be a true choice with "an opportunity to gain an appreciation of the available alternatives".[17] Inherent in that basic precept of the prescribed system of representative government is a value of certainty in the ascertainment and "appreciation" of those "available alternatives" in relation to whom the people exercise their constitutional choice. That constitutional value too is carried into effect by the Electoral Act, especially s 170(1)(b)(i), by which a requisite for nomination is that the nominating person "declare" that he or she is "qualified under the Constitution".

25. Related to that, certainty about who is "incapable of being chosen" is constitutionally significant *throughout* the electoral process, and not merely at the declaration of the poll. The words, "incapable of being chosen" refer to the process of being chosen.[18] An election is not a single-day "event", but rather a process commenced by the issuance of writs and concluded by their return: see ss 12, 32 and 33 of the Constitution. That "process" extends from the time of nomination and includes the polling and the date when the poll is declared.[19] Section 44 therefore contemplates that it will be possible to identify who is "incapable of being chosen" not only at a single point in time such as the declaration of the poll, but throughout the process of an election, including at the time of nomination.

26. That is reinforced by section 45(i), which provides for the automatic vacation of the place of a senator or member of the House of Representatives who becomes subject to any of the disabilities mentioned in s 44 (their place shall "thereupon" become vacant). That provision would not sit well with a construction of s 44 that tolerated uncertainty about the circumstances in which the mentioned disabilities are engaged. Indeed, it would involve a

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17 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 560 (The Court), quoting *Australian Capital Television v Commonwealth* (1992) 177 CLR 106, 187 (Dawson J).

18 *Sykes v Cleary* (1992) 176 CLR 77, 100 (Mason CJ, Toohey and McHugh JJ); Brennan J agreeing at 108; Dawson J agreeing at 130; Gaudron J agreeing at 132.

19 Ibid.

strained reading of the word "thereupon", which would ordinarily connote a measure of immediacy.[20]

27. Other aspects of Chapters I and II further illustrate the importance of certainty and speed in the ascertainment of the status of disqualified persons, to promote the orderly composition and functioning of the legislative and executive branches of government.

28. **Decisive Parliamentary voting**: 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. Questions in the Senate and in the House of Representatives are required, by ss 23 and 40 respectively, to be determined by a majority of votes, with no senator or member having more than one vote. Section 53 provides that the Senate has equal power with the House of Representatives in respect of all proposed laws, with certain specified exceptions. Disagreements between the Senate and the House of Representatives about any proposed law may engage the mechanism for dissolution of both houses in s 57 and, if disagreement persists after such a dissolution, by holding a joint sitting of the Senate and the House of Representatives, in which the proposed law is taken to be duly passed if affirmed by an "absolute majority of the total number of senators and members". In each of those instances, the question of who is (and who is not) capable of sitting in each house is potentially of great significance under the constitutionally mandated scheme.

29. **Who can be a Minister of State?** Similar observations apply as regards the Executive Government by reason of the requirement in s 64 that Ministers of State sit in the Parliament. In turn, attention to those matters highlights the importance of certainty in the ascertainment of the "available alternatives" from amongst whom the people make their choices. For it is those electoral choices that act as a constraint upon the "extravagant" exercise of Commonwealth legislative and executive power.[21]

30. **First business to choose President and Speaker**: ss 17 and 35 require that the first matter to be determined by both houses after an election (prior to the despatch of any other business) will be the choice of a President or Speaker. It is inconsistent with the priority accorded by the text to that choice that it could be affected (perhaps decisively) by the vote of a person whose capacity to sit cannot be finally determined at that time.

31. **Conflict between requirement to be present and penalty for sitting**: if s 44(ii) were to be construed as disqualifying the narrower but less certain class of individuals, then an acute (and unlikely) conundrum in the form of a

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20 The observations made by Deane J in *Metwally* (1984) 158 CLR 447 at 478 regarding the language of s 109 ("is" and "shall be") are equally apposite to s 45(i). See also further below as to s 44.

21 See *McCloy v New South Wales* (2015) 325 ALR 15, 43 [112] (Gageler J) referring to *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129, 151 (Knox CJ, Isaacs, Rich and Starke JJ).

conflict between a requirement to be present and a penalty for sitting would arise from the combined operation of ss 20, 38 and 46. Section 46 created a financial liability or penalty for persons "declared by this Constitution to be incapable of sitting" on each day that they sit.[22] At the same time, ss 20 and 38 provided for vacancy by absence, without permission. If s 44(ii) includes the additional requirement of legal correctness or validity of the conviction, then persons in the position of Senator Culleton are placed in an invidious position: if resolution of those issues takes some time (as it notoriously does), then they may be required to sit to avoid the operation of ss 20 or 38 (subject only to the possibility that the chamber grants permission to be absent), and yet be exposed to a penalty for doing so (formerly by direct operation of the Constitution and now under statute contemplated by that provision). The Commonwealth's proposed construction of s 44(ii) avoids imputing this conflict to the scheme of Ch I.[23]

32. **Intrusion of State legislative powers**: If s 44(ii) were to be construed as concerned with convictions and sentences as matters of law rather than matters of fact, it would expose the composition of a Parliament, during its life or during the electoral process for its selection, to the legislative power of the States retrospectively to alter the sentences attaching to certain offences, or the legal effect of annulment or other review process, or the grounds on which annulment or other review may be available. That would, having regard to the federal structure, be a surprising result which does not arise if s 44(ii) is construed to be engaged by the historical fact of a conviction and sentence or subjection to sentence.

Text of s 44(ii)

33. Section 44(ii) does not expressly provide (as it might have provided) that the legal consequences that it attaches to a conviction and sentence are not to be attached to a conviction that is subject to appeal, or that has been quashed, or annulled.[24]

34. "It is not conviction of an offence per se of which s 44(ii) speaks".[25] Disqualification is visited only upon a person who also "is under sentence, or subject to be sentenced". That casts light on the purposes served by s 44(ii). Disqualification is not visited on an individual merely because of any moral opprobrium attaching to conviction for serious offences (that is, offences punishable by imprisonment for one year or longer). It is visited because the person "is" *in fact* under sentence or subject to be sentenced. That is, the words "is" (under sentence or subject to be sentenced) and "shall" (be

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22 See now the *Common Informers (Parliamentary Disqualification) Act 1975* (Cth).

23 Note, in that regard, that Quick and Garran describe the "duty" to serve in Parliament (reflected in ss 20 and 38) as "a duty which might be cast on every person not expressly disqualified": Quick and Garran, *Annotated Constitution of the Australian Commonwealth* (1901), 481.

24 Cf *Licensing Act 1932* (Tas), s 104; *Local Government Act 1999* (SA), s 62(6); *Crimes (Superannuation Benefits) Act 1989* (Cth), s 20; *Fisheries Management Act 1991* (Cth), s 106HA; *Vehicle and Traffic Act 1999* (Tas), s 23; *Crimes Sentencing Act 2005* (ACT), s 134.

25 *Nile v Wood* (1988) 167 CLR 133, 139 (Brennan, Deane and Toohey JJ).

disqualified) in s 44 have a similar operation to that which they have in the context of s 109:[26] it is "immediate and automatic".

35. In part, that is to demarcate a definite period of disqualification: "it is apparent that it was the intention of the framers of the Constitution that the disqualification ... should operate only while the person was under sentence".[27] That definite period would end, in the case of imprisonment, upon the end of the term of imprisonment or of any period of "be[ing] at large under ... a licence or parole".[28]

36. In part, it is also to reflect the practical concern to ensure that individuals who are in gaol or liable to go to gaol would be "incapable of being chosen or of sitting". That practical concern is supported in the drafting history of s 44(ii). The words "under sentence, or subject to be sentenced" were added to a version of s 44(ii) proposed by Sir Samuel Griffith.[29] The addition was made by the drafting Committee led by Mr Barton.[30] The drafting history indicates that that change (like the reduction of the requisite punishable sentence from three years to one year) was made with the object of avoiding the possibility that a "person in gaol might be elected to the Federal Parliament".[31]

37. This practical purpose of s 44(ii) supports the construction on which it is engaged by the *fact* of a person being under sentence or being subject to be sentenced, whether or not the conviction is subsequently annulled.

38. Indeed, the words "subject to be sentenced" can be seen to be addressed to remedying what would otherwise be a position of uncertainty: that a person is potentially liable to be "under sentence" at a time in the future. In that situation, the nature and length of any such sentence is unknown. But the approach adopted by the framers was to pay no heed to the potential variety of ultimate outcomes. Instead they imposed a blanket rule requiring disqualification in all such cases (again, reflecting a desire to avoid the consequence identified by Mr Barton in the passage extracted above).

39. The disqualification of persons merely "subject to be sentenced" further highlights the priority of certainty in the scheme of s 44 and the subservience of other potential considerations such as fairness to individual candidates. A person merely "subject to be sentenced" may ultimately receive no sentence at all and nevertheless still be disqualified at the relevant time. If that same

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26 See again *Metwally* (1984) 158 CLR 447, 478 (Deane J).

27 *Nile v Wood* (1988) 167 CLR 133, 139 (Brennan, Deane and Toohey JJ), citing Quick and Garran, *Annotated Constitution of the Australian Commonwealth* (1901) 490, 492; *Official Report of the National Australasian Convention Debates*, Sydney (1891) 655-9. See also the definite period demarcated in s 44(iii) by the word "undischarged".

28 See *Roach v Electoral Commissioner* (2007) 233 CLR 162, 188 [51] (Gummow, Kirby and Crennan JJ). See also Gerard Carney, *Members of Parliament: Law and Ethics* (2000) 40.

29 John Williams, *The Australian Constitution: A Documentary History* (2005) 633; Senate Standing Committee on Constitutional and Legal Affairs, *The Constitutional Qualifications of Members of Parliament* (1981) [3.13].

30 *Official Report of the National Australasian Convention Debates*, Sydney (1898) 2443.

31 *Official Report of the National Australasian Convention Debates*, Sydney (1898) 2445.

person had been dealt with immediately by the criminal court, any period of disqualification may well have been at an end at the time it arises for consideration or (if no sentence is imposed) never come to pass. Equally, a conviction may ultimately be annulled or set aside and be treated as never having been made in law. But the text of s 44(ii) manifests the view that those contingencies (and any resulting matters of fairness to candidates) are to be subservient to the interests of certainty in the electoral choices required by ss 7 and 24 and in the ascertainment of the outcome of those choices in the scheme of Ch I. The constitutional concern is with the protection of the systemic features identified above; not with the rights of individual candidates or members.

Coherence with s 44(iv)

40. The Commonwealth's preferred construction is also supported by analogies derived from this Court's approach to s 44(iv).

41. *Sykes v Cleary* (***Sykes***)[32] concerned a candidate for the House of Representatives who, being a public servant, held an office of profit under the Crown such as to the attract the disqualification in s 44(iv). The candidate resigned his position before the declaration of the poll, but after polling day (and, indeed, after his nomination). The Court held that he was disqualified, notwithstanding his resignation before the declaration of the poll. In reaching their conclusion, Mason CJ, Toohey and McHugh JJ (with whose reasons Dawson and Gaudron JJ relevantly agreed) reasoned that the contrary construction would permit a public servant to stand for election and obtain "an option to resign and be declared elected or not to resign and be disqualified". That was said to have two "adverse consequences". ***First***, the inclusion in the list of candidates on polling day of a candidate who may opt for disqualification may well constitute an additional and unnecessary complication in the making by the electors of their choice. ***Secondly***, their Honours observed that "it is hardly conducive to certainty and speed in the ascertainment of the result of the election that it should depend upon a decision to be made by a candidate on or after polling day".

42. Section 44(ii) should be construed coherently with s 44(iv). The "adverse consequences" to which the Court referred in *Sykes* apply with even greater force to s 44(ii).

43. As to the first "adverse consequence", a similar "complication" for the choices to be made by electors would arise if the term "has been convicted" did not simply mean convicted as a matter of historical fact, but meant convicted with legal efficacy. Indeed, that applies *a fortiori* in the case of s 44(ii), given that the disqualifying condition in s 44(ii) (unlike the holding of an office for profit under the Crown) cannot be avoided or "cured" by the unilateral action of the candidate. Electors would be left to guess at the prospect that a potentially disqualified candidate may, at some later time, succeed in showing that his

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[32] (1992) 176 CLR 77.

or her conviction did not have the legal consequences that it purported to have — whether by annulment under the NSW Appeal and Review Act or like legislation, or whether by appeal. The need for certainty on the date of nomination indicates an inquiry into the *factual* position as at that date: is the putative candidate, as a matter of fact, "under sentence or subject to be sentenced"; not: is the conviction on which the putative candidate is under sentence or subject to be sentenced beyond legal correction?

44. As to the second "adverse consequence", s 44(ii) should not be construed to place in doubt the result of an election pending the conclusion of an appeal process in relation to a candidate's criminal conviction. A practical consequence of the narrow construction of s 44(ii) might be that any election petition would need to be deferred until a challenge to the conviction is finally determined. The NSW Appeal and Review Act contemplates that an application for annulment might be brought at any time within 2 years of conviction or sentence: s 4(2)(a). A (potentially lengthy) period of uncertainty about a candidate's qualifications is not readily compatible with the scheme of Ch I and it is inherently unlikely that such uncertainty was intended or contemplated by the framers of the Constitution.

45. Writing of the position under cognate provisions in the UK and New South Wales constitutions concerning the disqualification of sitting members upon conviction, and with reference to *Attorney-General v Jones*,[33] Professor Twomey opined that it was "unsatisfactory" for a Member, unseated by his conviction, to be able to resume that seat upon having the conviction set aside because of the happenstance that the vacated seat had not in the meantime been filled: "loss of a Member's seat will depend upon arbitrary factors such as the speed of appeal courts or the timing of the issue of a new writ".[34] The proposed construction of s 44(ii) avoids similar unsatisfactory or arbitrary consequences of a member or senator's entitlement to sit remaining uncertain while appeal and other review processes take their course, because what matters is the *fact* of a person being under sentence or being subject to be sentenced, and not the ultimate legal correctness of the underpinning conviction.

Nomination

46. A further related point arises from the observations made in *Sykes* to the effect that nomination is part of the process of being chosen to which the disqualifying characteristics set out in s 44 apply. Not only was nomination said to be an "essential part" of that process, the Court also observed (without deciding) that it was possible that if a candidate was not qualified on nomination day, she or he may be incapable of being chosen.[35] Brennan CJ later treated *Sykes* as having gone somewhat further: observing that the time of nomination was the "relevant time for determining whether a person is

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33 [2000] QB 66.

34 Anne Twomey, *The Constitution of New South Wales* (2004) 429-30.

35 *Sykes v Cleary* (1992) 176 CLR 77, 100-1 (Mason CJ, Toohey and McHugh JJ).

incapable of being chosen on any of the grounds specified in s44 of the Constitution": see *Free v Kelly*.[36]

47. It is unnecessary for the Court to resolve that question because Senator Culleton was, at least as a matter of fact, convicted and subject to be sentenced at all relevant times during the electoral process). But the significance attributed by the Court in *Sykes* and *Free v Kelly* to the position at the time of nomination is presently important for two reasons.

48. **Election before polling day***:* as the Court observed in *Sykes*, at the time of Federation special provision was made in imperial and colonial legislation for cases in which only one candidate was nominated. In such a case, the Divisional officer (or equivalent) was required to declare that candidate duly elected, and that declaration may be made in advance of polling day.[37] That position continued to apply after the enactment of the Electoral Act,[38] and remains the case today: s 179(2) of the Electoral Act.

49. **Choice involved in nomination:** nomination is not only the process by which candidates submit themselves to the constitutionally mandated choices to be made by the people; it may also be seen to involve an anterior "choice" (albeit by a smaller subset of nominating electors). Again, that understanding applied at the time of Federation: colonial and imperial legislation required a person to be nominated by a specified number of electors.[39] A similar position applied in the Commonwealth at the enactment of the Electoral Act and continues today (although an alternative path is now available to registered political parties).[40]

50. It is true, as was noted in *Sykes*[41] in respect of the first matter, that both those features of past and present electoral law are purely statutory and that neither is required by the terms of the Constitution. But the grounds of disqualification necessarily operate in the milieu of laws made under ss 9, 10, 31 and 51(xxxvi).[42] And the framers may be presumed to be well aware of those aspects of the colonial and imperial legislative schemes for electoral matters.

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36 (1996) 185 CLR 296, 301 (Brennan CJ), referring to *Sykes v Cleary* (1992) 176 CLR 77, 99-101 (Mason CJ, Toohey and McHugh JJ).

37 See *Sykes v Cleary* (1992) 176 CLR 77, 101, footnote 48 referring to: *Parliamentary Electorates and Elections Act 1893* (56 Vict No 38) (NSW), s 66; *Elections Act 1885* (49 Vict No. 13) (Qld), s 52; *Electoral Code 1896* (59 & 60 Vict No 667) (SA), s 97; *Electoral Act 1896* (60 Vict No 49) (Tas), s 91; *Constitution Act Amendment Act 1890* (54 Vict No 1075) (Vic), s 224 (re-enacting *Electoral Act 1865* (29 Vict No 279) (Vic) s 86); *Electoral Act 1899* (63 Vict No 20) (WA), s 83.

38 *Commonwealth Electoral Act 1902* (Cth), s 106.

39 See *Parliamentary Electorates and Elections Act 1893* (NSW), s 65(II); *Electoral Code 1896* (59 & 60 Vict No 667) (SA), s 95, *Electoral Act 1896* (60 Vict No 49) (Tas), s 89; *Constitution Act Amendment Act 1890* (54 Vict No 1075) (Vic), s 220 (re-enacting *Electoral Act 1865* (29 Vict No 279) (Vic) s 83); *Electoral Act 1899* (63 Vict No 20) (WA), s 81.

40 See *Commonwealth Electoral Act 1902* (Cth), s 99, as first enacted and see now Electoral Act, s 166(1)(b)(i) and (ii).

41 (1992) 176 CLR 77, 100-1 (Mason CJ, Toohey and McHugh JJ).

42 Note *Sue v Hill* (1999) 199 CLR 462, 496 [78] (Gleeson CJ, Gummow and Hayne JJ).

51. That, in turn, suggests that s 44(ii) is concerned with a hard-edged criterion of fact – one that is capable of being ascertained, one way or the other, by potential candidates and those electors who are considering nominating a potential candidate at the time of nomination.

Other suggested constructions of s 44(ii) and the reasons they are wrong or not relevant here

52. The Commonwealth's submissions above proceed upon the assumption that s 44(ii) is engaged when a person is "under sentence, or subject to be sentenced" regardless of what the actual sentence is, provided that the offence for which he or she is under sentence or subject to be sentenced is an offence referred to in s 44(ii). The offences referred to in s 44(ii) are offences "punishable ... by imprisonment for one year or longer". The Commonwealth submits that this refers to offences for which the *maximum* penalty is one year imprisonment or more.

53. This construction accords with the drafting practice, observed in several Australian colonies around the time of Federation, of prescribing a penalty for an offence which was, in effect, a maximum penalty because of other provisions permitting courts to moderate the penalty in the individual case.[43] Mandatory imprisonment for a minimum period was not common around the time of Federation[44] and s 44(ii) would have had virtually no work to do, at least in several States, if it referred only to offences for which there was a mandatory minimum sentence of imprisonment for one year or longer. The contrary construction would also be inconsistent with *Chanter v Blackwood*.[45] The construction is also appropriate in the contemporary context in which, it may be said, there are very few offences having mandatory minimum terms of imprisonment.

54. It is, however, appropriate to draw to attention the observation in Quick and Garran to the effect that s 44(ii) applies where a person convicted "is undergoing sentence of imprisonment for the term of one year or more".[46] With respect to the learned authors, that statement is incomplete. It fails to give effect to the disqualification of persons "subject to be sentenced". There would be an incongruity if s 44(ii) were attracted in the case of persons subject to be sentenced (whatever the actual sentence turned out to be) but, in the case of persons actually under sentence, only if the actual sentence were imprisonment for one year or more. Alternatively, it is unnecessary in

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43 See eg *Criminal Code 1899* (Qld), s 19 and *Crimes Act 1900* (NSW), s 442. See also *Crimes Act 1890* (Vic), which generally adopted a drafting practice of prescribing punishment "not exceeding" a maximum.

44 See, eg, as to the position in New South Wales: GD Woods, *A History of Criminal Law in New South Wales* (2002) Ch 24; see also *Magaming v R* (2013) 252 CLR 381 at 396 [49].

45 (1904) 1 CLR 39, 57 (Griffith CJ), 76 (O'Connor J) - it was there held that s 44(ii) would be engaged by conviction for an offence of bribery or undue influence under the Electoral Act that was then "punishable ... by penalty not exceeding two hundred pounds, or by imprisonment not exceeding one year".

46 Quick and Garran, *Annotated Constitution of the Australian Commonwealth* (1901) 492.

this case to decide whether s 44(ii) applies to persons under sentence only if the sentence is one of imprisonment for one year or more. That is because s 44(ii) was attracted in Senator Culleton's case only by his being subject to being sentenced.

Answer to Question (a)

55. Senator Culleton was, in fact, convicted of an offence punishable under the law of a State by imprisonment for one year or longer and subject to be sentenced as at the date of nomination, polling day, and the declaration of the poll. Section 44(ii) was attracted, notwithstanding that the conviction was annulled after the declaration of the poll.

56. Question (a) should be answered as follows: By reason of s 44(ii) of the Constitution, there is a vacancy in the representation of Western Australia in the Senate for the place for which Senator Rodney Norman Culleton was returned.

Question (b): By what means and manner vacancy to be filled

Principles to be applied

57. The applicable principles were established in *In re Wood*[47] and followed in *Sue v Hill*.[48] The Court, on the hearing of a reference under Pt XXII of the Electoral Act, has the powers conferred by s 360 so far as they are applicable: s 379. That includes the power to "declare any candidate duly elected who was not returned as elected": s 360(vi). That power carries with it an incidental power to order a special count.[49]

58. A special count permits a vacancy occasioned by the return of a candidate who was subject to disqualification under s 44 of the Constitution to be filled by giving effect to "the true result of the polling – that is to say, the true legal intent of the voters so far as it is consistent with the Constitution and the [Electoral] Act".[50] By analogy with s 273(27) of the Electoral Act, which deals with votes indicated for a deceased candidate, votes indicated for the disqualified candidate should be counted to the candidate next in the order of the voter's preference and the numbers indicating subsequent preferences should be treated as altered accordingly.[51]

59. A special count would not be ordered if the special count would "result in a distortion of the voters' real intentions", as (it has been held) can happen under the different scrutiny rules for the House of Representatives.[52] If a special count would occasion such a distortion, then the court would declare

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47 (1988) 167 CLR 145.

48 (1999) 199 CLR 462; see also *Sue v Hill* [1999] HCATrans 225 (2 July 1999) (Gleeson CJ).

49 *In re Wood* (1988) 167 CLR 145, 172 (Mason CJ).

50 *In re Wood* (1988) 167 CLR 145, 166 (The Court).

51 *In re Wood* (1988) 167 CLR 145, 166 (The Court).

52 *Sykes v Cleary* (1992) 176 CLR 77, 102 (Mason CJ, Toohey and McHugh JJ); *Free v Kelly* (1996) 185 CLR 296, 302-4 (Brennan CJ).

the election void, with the consequence that a fresh election would be required.

60. If a special count would give effect to the true legal intent of the voters and not result in a distortion of voter intention, then it should be preferred to a fresh election, which would occasion significant cost and inconvenience.

Proposed answer to question (b).

61. No question of distortion arises in this case, which is on all fours with the Senate elections considered in *In re Wood* and *Sue v Hill*, and distinguishable from the House of Representatives elections considered in *Sykes* and *Free v Kelly*.

62. Question (b) should be answered as follows: The vacancy should be filled by a special count of the ballot papers and any directions necessary to give effect to the conduct of the special count should be made by a single judge.

Questions (c) and (d)

63. Question (c) would most appropriately be answered after questions (a) and (b). As to question (d), the Commonwealth would submit to an order that it pay Senator Culleton's costs.

PART VI ESTIMATED HOURS

64. The Commonwealth estimates that it will require 1.5 hours for the presentation of its oral argument.

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