28 Litigation notes

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Dual citizens ineligible for election to the Senate or House of Representatives by reason of section 44(i)

In a joint judgment the High Court, sitting as the Court of Disputed Returns, unanimously held that Mr Scott Ludlam, Ms Larissa Waters, Mr Malcolm Roberts, Ms Fiona Nash and Mr Barnaby Joyce were not eligible to have been elected at the 2016 federal election by reason of s 44(i) of the Constitution. Senator Matthew Canavan and Senator Nicholas Xenophon were found not to have been ineligible by reason of s 44(i).

The Court held that the resulting vacancies in the representation in the Senate should be filled by a special count of the ballot papers and the vacancy in the House of Representatives created by the ineligibility of Mr Joyce should be filled by a by-election.

Re Canavan; Re Ludlam; Re Waters; Re Roberts [No 2]; Re Joyce; Re Nash; Re Xenophon
High Court of Australia, 27 October 2017
[2017] HCA 45; (2017) 91 ALJR 1209; (2017) 349 ALR 534

Background

In August and September 2017, the Senate resolved, pursuant to s 376 of the *Commonwealth Electoral Act 1918* (CEA), to refer a number of questions to the Court of Disputed Returns concerning the qualifications of 6 persons elected as senators at the general election for the Parliament held on 2 July 2016. Senator Canavan, Mr Ludlam, Ms Waters, Mr Roberts, Ms Nash and Senator Xenophon were all referred because there was material to suggest that each held dual citizenship at the date he or she nominated for election as a senator. The House of Representatives referred equivalent questions concerning the eligibility of Mr Joyce in similar circumstances.

The central question in each reference was whether there was a vacancy in the relevant House of Parliament because of s 44(i) of the Constitution, which relevantly provides (emphasis added):

> Any person who is under any acknowledgement of allegiance, obedience, or adherence to a foreign power, or *is a subject or a citizen … of a foreign power* … shall be incapable of being chosen or of sitting as a senator or a member of the House of Representatives.

The main issue for the Court was the construction and operation of s 44(i) of the Constitution.

The High Court's decision: construction of s 44(i)

The Court concluded that, properly construed, s 44(i) operates to disqualify persons 'who have the status of subject or citizen of a foreign power' ([71]). Whether a person has the relevant status is 'determined by the law of the foreign power in question' ([71]). A person who has that status at the time he or she nominates for election 'will be disqualified by reason of s 44(i), except where the operation of the foreign law is contrary to the constitutional imperative that an Australian citizen not be irremediably prevented by foreign law from participation in representative government' ([72]).

'… s 44(i) operates to disqualify persons "who have the status of subject or citizen of a foreign power' ([71]). Whether a person has the relevant status is 'determined by the law of the foreign power in question" …'

The Court further explained that this 'constitutional imperative' will be engaged (and a person will not be disqualified) '[w]here it can be demonstrated that the person has taken all steps that are reasonably required by the foreign law to renounce his or her citizenship and within his or her power' ([72]) (the Constitutional Imperative Exception). The Court elaborated on the scope of the Constitutional Imperative Exception in the subsequent decision in *Re Gallagher* [2018] HCA 17 (see below at page 4).

In adopting this construction of s 44(i) of the Constitution, the Court rejected the approach advanced by the Commonwealth Attorney-General – that s 44(i) requires that the person voluntarily obtain or retain their foreign citizenship – including because that approach would involve 'a substantial departure from the ordinary and natural meaning of the text' ([47]; see also [52]). Indeed, the text expressly draws a distinction between a voluntary act of allegiance on the one hand; and a state of affairs existing under foreign law (being the status of subjecthood or citizenship) on the other ([23]). The Court determined that this construction is consistent with the provision's purpose of ensuring 'that members of Parliament did not have a split allegiance' ([24]), regardless of whether there is 'conduct manifesting an actual split' ([25]).

Furthermore, nothing in the drafting history of s 44(i) supported a narrower purpose that would constrain the language ultimately chosen ([27]). The Court considered that to introduce a knowledge element into the operation of s 44(i) would open up conceptual and practical difficulties that are apt to undermine the stability of representative government ([48], [54]–[58]). The Court also rejected any distinction being drawn between naturalised Australian citizens and natural-born citizens ([53]) – a distinction that arose in the application of the Attorney-General's approach ([15]).

Application to the facts

Based on the construction that the Court adopted, the Court held that Mr Ludlam, Ms Waters, Mr Roberts, Ms Nash and Mr Joyce were each disqualified by s 44(i) because, at the date of nomination, they each held the status of a foreign citizen according to the law of the relevant foreign power. None fell within the Constitutional Imperative Exception identified by the Court ([92], [98], [103], [111], [119]).

In relation to Senator Canavan, the Court concluded that, on the evidence before it, it could not be satisfied that he was a citizen of Italy ([86]). In light of 'the potential for Italian citizenship by descent to extend indefinitely', the Court held that 'one can readily accept that the reasonable view of Italian law is that it requires the taking of the positive steps … as conditions precedent to citizenship' ([86]). Senator Canavan had not taken those steps. Thus, without expressly stating that Senator Canavan was not an Italian citizen, the Court held that he was not disqualified and that therefore there was no vacancy in the representation of Queensland in the Senate for the place for which he was returned ([87]).

In relation to Senator Xenophon, the Court concluded that the status he held under the relevant foreign law – that of a 'British Overseas Citizen' – 'distinctly does not confer the rights or privileges of a citizen as that term is generally understood' ([134]). In particular, a person with that status does not have the right to enter or reside in the United Kingdom and, critically given the purpose of s 44(i), the status does not appear to entail 'any reciprocal obligation of allegiance to the United Kingdom per se or to Her Majesty the Queen in right of the United Kingdom' ([134]). Thus, Senator Xenophon, at the date of his nomination, was not a subject or citizen of the United Kingdom for the purpose of s 44(i) and there was no vacancy in the Senate for the place for which Senator Xenophon was returned ([135]).

The Commonwealth's legal team

AGS (Simon Thornton, Danielle Gatehouse, Thomas Wood and Andrew Buckland from the Constitutional Litigation Unit and Simon Daley and Brooke Griffin from AGS Dispute Resolution) acted for the Commonwealth Attorney-General, with the Solicitor-General, Dr Stephen Donaghue QC, Mark Costello and Julia Watson as counsel.

The text of the decision is available at:

http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA/2017/45.html

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High Court finds 'constitutional imperative' exception to section 44(i) is narrow in scope

A few months after the decision in *Re Canavan*; *Re Ludlam*; *Re Waters*; *Re Roberts [No 2]*; *Re Joyce*; *Re Nash*; *Re Xenophon* [2017] HCA 45 (*Re Canavan*), the High Court was again required to consider s 44(i) – this time in its application to the circumstances of Ms Katy Gallagher.

Ms Gallaher had been a British citizen at the time of the 2016 federal election. She had attempted to renounce that citizenship, but she ran into delays with the UK Home Office. Therefore, her renunciation did not become effective until after the 2016 election was over. The High Court unanimously held that 'the constitutional imperative' identified in *Re Canavan* – 'that an Australian citizen not be irremediably prevented by foreign law from participation in representative government' (the Constitutional Imperative Exception) – did not operate to prevent Ms Gallagher's disqualification by s 44(i). The High Court therefore held that Ms Gallagher was incapable of being chosen as a senator at the 2016 election.

Re Gallagher
High Court of Australia, 9 May 2018
[2018] HCA 17

Background

Ms Gallagher was, from her birth, a British citizen by descent (her father was a British subject). She retained that status until 16 August 2016, when her declaration of renunciation of her British citizenship was registered by the Home Office of the United Kingdom ([4]). She was therefore a British citizen on 31 May 2016 (and after), when she lodged her nomination as a candidate for election to the Senate in the 2016 federal election.

On or around 20 April 2016, Ms Gallagher had sought to renounce her British citizenship. She completed a declaration of renunciation and posted it, with supporting documentation, to the UK Home Office ([16]):

> At the time when Senator Gallagher applied to have her declaration of renunciation registered [by the UK Home Office], the time between lodgement of a declaration of renunciation and registration varied. It could take in excess of six months; it could be expedited if good reason was shown to the Home Office. These matters were not known to Senator Gallagher, who made no enquiry as to them.

On 20 July 2016 (after the election had taken place), Ms Gallagher received a reply from the UK Home Office. The Home Office asked Ms Gallagher to provide further evidence to demonstrate that she was indeed a British citizen – that is, that she had a British

citizenship to renounce. Ms Gallagher replied the same day, enclosing the necessary evidence. The Home Office was satisfied with that evidence. The formal registration of Ms Gallaher's declaration of renunciation (the step that makes a renunciation of British citizenship effective under UK law) was made on 16 August 2016.

On 6 December 2017, the Senate referred the question of Ms Gallagher's qualification to the High Court sitting as the Court of Disputed Returns.

Ms Gallagher argued that she had taken all steps reasonably required, and within *her* power, to renounce her citizenship. Accordingly, she argued that she satisfied the Constitutional Imperative Exception.

The High Court's decision

The High Court, sitting as the Court of Disputed Returns, delivered 3 judgments: a joint judgment of Kiefel CJ and Bell Keane, Nettle and Gordon JJ (the plurality); a judgment of Gageler J, who largely agreed with the plurality but added further comments; and a separate concurring judgment of Edelman J.

'Unless the relevant foreign law imposes an irremediable impediment to an effective renunciation, it is necessary that a candidate actually have divested himself or herself of his or her status as a foreign citizen before the commencement of the process of being chosen …'

The plurality

The essence of the plurality's reasoning is captured in this passage ([21]–[22], emphasis added):

> The principal submission of the Commonwealth Attorney-General is that it is not enough for a candidate merely to have taken steps to renounce his or her foreign citizenship. *Unless the relevant foreign law imposes an irremediable impediment to an effective renunciation, it is necessary that a candidate actually have divested himself or herself of his or her status as a foreign citizen before the commencement of the process of being chosen to which s 44(i) applies*. The exception to s 44(i) does not apply to British law because that law does not either in its terms or in its operation render it impossible or not reasonably possible to renounce British citizenship. At the time of her nomination Senator Gallagher remained a foreign citizen and was incapable of being chosen … The Attorney-General's primary submission is clearly correct.

A concern of the constitutional imperative discussed in *Re Canavan* is the ability of Australian citizens to participate in the representative government for which the Constitution provides: 'Its concern, properly understood, is that an Australian citizen might forever be unable to participate in elections because a foreign law prevents the person from freeing himself or herself from the foreign citizenship which, if s 44(i) were to apply in its terms, would disqualify that person from nomination' ([24]).

In consequence, in order to engage the exception, it was necessary for *both* of the following circumstances to be present:

- the foreign law must operate *irremediably* to prevent an Australian citizen from divesting himself or herself of his or her status as a foreign citizen
- the person must have taken *all steps reasonably required* by the foreign law which are within his or her power to free himself or herself of the foreign nationality ([26], [31]).

As to the first circumstance ([27]):

> A foreign law will not 'irremediably prevent' an Australian citizen from renouncing his or her citizenship simply by requiring that particular steps be taken to achieve it. For a foreign law to meet the description in *Re Canavan* and *Sykes v Cleary* it must present something of an insurmountable obstacle, such as a requirement with which compliance is not possible. Consistently with the approach taken in *Re Canavan*, the operation of the foreign law and its effect are viewed objectively.

As to the second circumstance, all steps reasonably required which were able to be taken towards renunciation were required be taken ([31]). Further ([32]):

> It may be added, for completeness, that all steps must be taken even though the foreign law will in any event operate to prevent renunciation being effected. The reason for such a requirement lies in the concerns of s 44(i) about a person's duty or allegiance to the foreign power.

Finally, the plurality addressed and rejected Ms Gallagher's submission that the constitutional imperative could not be made to 'depend upon the actions of foreign officials or exercised of discretion' ([35]). The plurality clarified that the Constitutional Imperative Exception focused upon how the foreign law operates with respect to renunciation. To ignore discretionary powers and their exercise 'would be to distort the reality of the foreign law and its effect'. A discretionary power was to be regarded as part of foreign law for the purposes of s 44(i) ([36]).

Application of the Constitutional Imperative Exception

Having identified the parameters and operation of the Constitutional Imperative Exception, the plurality held that Ms Gallagher was disqualified by s 44(i) ([37]–[39]). The exception had not been engaged because no aspect of the relevant British law had been identified which would irremediably prevent her from nominating ([37]):

> No requirement of the relevant provisions [of UK law] could be described as onerous. The procedure is simple.

'No requirement of the relevant provisions [of UK law] could be described as onerous. The procedure is simple.'

It could not be concluded that British law operated to irremediably prevent an Australian citizen from renouncing his or her citizenship 'merely because a decision might not be provided in time for a person's nomination' ([39]).

Gageler J's judgment

In a concurring judgment, Gageler J agreed with the plurality's reasons and answers and gave some additional reasons.

His Honour said that the exception to s 44(i) 'serves the function of ensuring that the disqualification [brought about by s 44(i)] does not operate so rigidly as to undermine the constitutionally prescribed system of representative and responsible government which the disqualification is designed to protect' ([43]). More specifically, 'an arbitrary or intransigent operation of the law of another country cannot be permitted to frustrate the ability of such an Australian citizen to participate in the parliamentary and executive government of Australia' ([43]).

The exception to the operation of s 44(i) could not be engaged merely by taking all steps reasonably within Ms Gallagher's power, as had been argued. Rather, its engagement required that the foreign law be characterised
for practical purposes as a process that would 'not permit the person to renounce the foreign citizenship by taking reasonable steps' ([45]). Here, this was not the case – Ms Gallagher's renunciation was simply incomplete. Her retention of British citizenship was evidently 'remediable' by the fact that it was eventually removed ([46]).

Justice Gageler also addressed, and found that nothing turned on, the contention raised by Ms Gallagher that the exception should accommodate the fact that the unknown timing of a federal election was productive of uncertainty ([47]–[49]). His Honour noted that multiple sections in the Constitution, and provision in the *Commonwealth Electoral Act 1918*, permit 'a degree of latitude as to the timing of elections'. He held that uncertainty of this nature simply formed part of the practical context in which s 44

operated and had 'no bearing on the operation of the disqualification expressed in s 44(i) or its implied exception' ([49]).

For Gageler J, participation in a particular election demanded 'a degree of vigilance' extending not just to taking the available remedial action but also to 'the timing of that available remedial action' ([50]).

Edelman J's judgment

Justice Edelman, who generally agreed with the plurality, identified 2 constraints on the operation of s 44(i).

The first constraint 'is that in some circumstances the foreign law [which purports to confer on a person the status of subject or citizen of a foreign power] will not be recognised' ([51]). For example, by operation of a rule of common law, a 'foreign law will not be recognised if the foreign law is inconsistent with local policy or the maintenance of local political institutions' ([52]). The second constraint, also discussed by the plurality and Gageler J, was the 'constitutional imperative' which Edelman J described as a 'constitutional implication' ([51]).

In support of the separateness of these 2 constraints, Edelman J noted that Brennan J, in *Sykes v Cleary* (1992) 176 CLR 77, had treated the question of whether foreign law operated to confer on a person that status of subject or citizen (that is, the first constraint) as an anterior question before considering the application of s 44(i). The first constraint could apply, for example, 'if a foreign power were mischievously to confer its nationality on members of the Parliament so as to disqualify them all' ([54]). However, Ms Gallagher did not rely on this constraint.

As to the second constraint, Edelman J favoured a narrow reading of it. It must be 'confined to that which is truly necessary to achieve the more abstract constitutional purpose … the constitutional implication is narrowly tailored to ensure that a foreign law does not stultify a person's qualified ability to participate [in the system of representative government established by the Australian Constitution]' ([58], [59]).

Justice Edelman did not consider 'irremediable' prevention to mean 'permanent impossibility' ([60]). Rather, if the legal or practical effect of a foreign law was to impose 'unreasonable obstacles' to renunciation, such as requiring renunciation be carried out in the foreign country's territory where there was risk to person or property, that could engage the Constitutional Imperative Exception ([61]). While it was conceivable that cases involving the actions of foreign officials could give rise to the constitutional implication, his Honour did not consider this to be such a case ([65]).

The Commonwealth's legal team

AGS (Gavin Loughton, Danielle Gatehouse, Liam Boyle and Duncan Handel from the Constitutional Litigation Unit) acted for the Commonwealth Attorney-General, with the Solicitor General Dr Stephen Donoghue QC and junior counsel.

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Holding an office of profit during the process of being chosen renders a person ineligable to be elected

During the process for filling the vacancy left by Ms Fiona Nash's disqualification (*Re Canavan*; *Re Ludlam*; *Re Waters*; *Re Roberts [No 2]*; *Re Joyce*; *Re Nash*; *Re Xenophon* [2017] HCA 45 (*Re Canavan*)), the High Court, sitting as the Court of Disputed Returns, unanimously held that Ms Hollie Hughes, the candidate identified to fill the vacancy by a special count, was ineligible to be chosen as a senator. This was because Ms Hughes held an office of profit under the Crown for the purposes of s 44(iv) of the Constitution during the period in which the process of choosing a senator under s 7 of the Constitution had not been completed.

Re Nash (No 2)
High Court of Australia, 6 December 2017
[2017] HCA 52; (2017) 350 ALR 204

Background

In *Re Canavan* the High Court held that several of those who were elected as senators at the 2016 federal election were ineligible to be chosen. Subsequent hearings were then necessary to determine who should fill the vacancies in the Senate.

The first step in the process for filling each such vacancy involved the High Court ordering the Australian Electoral Commission to conduct a special count of the ballots that omitted from the count the candidates who had been found to be ineligible. The special count identified the candidate who should fill the vacancy. Following the count, the High Court would then order that the identified candidate is duly elected.

However, at the hearing seeking an order that Ms Hughes be declared duly elected as a senator for the place for which Ms Nash was returned, affidavit evidence filed by Ms Hughes raised a question whether she held an office of profit under the Crown that would mean she was incapable of being chosen as a senator by reason of s 44(iv) of the Constitution. The question having been raised, Gageler J referred a question to the Full Court regarding the eligibility of Ms Hughes.

The issue arose because on 15 June 2017, some 10 months after the return of the writs for the 2016 election on 5 August 2016, Ms Hughes accepted a part-time appointment as a member of the Administrative Appeals Tribunal (AAT). Ms Hughes commenced as a member of the AAT on 1 July 2017 and held that position for a few months before resigning on 27 October 2017 – less than an hour after the High Court held there was a vacancy in the Senate for the place for which Ms Nash was returned.

There was no dispute that an AAT member held an 'office of profit within the Crown' within the meaning of s 44(iv) of the Constitution. Accordingly, the central issue for the Court to determine was whether holding that office for a period commencing after the return of the writs for the 2016 election in which Ms Nash was originally returned nevertheless rendered Ms Hughes 'incapable of being chosen' as a senator in that election.

The High Court's decision

The High Court commenced its decision by quoting the Full Court's judgment in *Re Canavan* that ([3]):

> It is settled by authority, and not disputed by any party, that in s 44 the words 'shall be incapable of being chosen' refer to the process of being chosen, of which nomination is an essential part.

The central issue for the Court, which had 'been left unanswered by binding authority', was to determine the 'temporal end-point of … "the process of being chosen" during which a disqualification under s 44 takes effect' ([28]).

In this regard, the Court held that ([35]):

> the processes of choice by electors to which ss 7 and 24 [of the Constitution] allude … are processes prescription of which is committed by s 51(xxxvi) read with ss 10 and 31 of the Constitution to Parliament. To recognise the centrality of electoral choice to such processes as might permissibly be prescribed by Parliament is not inconsistent with recognising that the processes of choice … encompass legislated processes which facilitate and translate electoral choice in order to determine who is or is not elected as a senator or member of the House of Representatives.

The Court then turned to consider the process prescribed by Parliament in the *Commonwealth Electoral Act 1918* (CEA). The Court noted that:

- the CEA 'establishes the structure by which the choice by the people is to be made' ([36])
- the legislated processes under the CEA do not end with polling and they include the scrutiny for which the CEA provides ([36])
- the processes of choice prescribed by Parliament in the CEA 'continue until a candidate is determined in accordance with those processes to have been chosen. They are brought to an end only with the declaration of the result of the election and of the names of the candidates elected' ([38]).

Considering the above, and relying on the decision in *Vardon v O'Loghlin* (1907) 5 CLR 201 as applied in *In Re Wood* (1999) 1999 CLR 462, the Court concluded that ([39]):

> [The] legislated processes which facilitate and translate electoral choice remain constitutionally incomplete until such time as they result in the determination as elected of a person who is qualified to be chosen and not disqualified from being chosen … [A] Senate election is not completed when an unqualified candidate is returned as elected.

'[A] Senate election is not completed when an unqualified candidate is returned as elected.'

Application of the temporal end-point to Ms Hughes

As a result of its conclusion as to the end-point of the processes of choosing, the Court held that Ms Hughes had held an office of profit under the Crown during a period in which the process of choice was incomplete due to Ms Nash's disqualification ([44]). Therefore, by operation of s 44(iv), Ms Hughes was 'incapable of being chosen' as a senator for the State of New South Wales for the place for which Ms Nash was returned ([44]).

While the Court recognised that this result 'might seem harsh or unduly technical', and that it was understandable that Ms Hughes accepted the appointment to the AAT after having not been returned as elected to the Senate, their Honours emphasised that the result must be understood in context. Choosing to accept the appointment was a voluntary step taken 'in circumstances where a reference by the Senate to the Court of Disputed Returns of a question concerning whether a vacancy existed … was always a possibility'. In those circumstances, the Court considered that accepting the appointment resulted in forfeiting the opportunity to benefit from any special count conducted as a result of a vacancy being found ([45]).

The Commonwealth's legal team

AGS (Simon Thornton, Danielle Gatehouse, Thomas Wood and Andrew Buckland from the Constitutional Litigation Unit and Simon Daley and Brooke Griffin from AGS Dispute Resolution) acted for the Commonwealth Attorney-General, with the Solicitor-General Dr Stephen Donaghue QC and junior counsel.

The text of the decision is available at:

http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA/2017/52.html

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Questions of qualification cannot be determined in common informer's action

In a unanimous decision, the High Court has held that, in a proceeding under the *Common Informers (Parliamentary Disqualifications) Act 1975* (Cth) (the Common Informers Act), it does not have jurisdiction to determine whether a person is disqualified from sitting in Parliament by operation of s 44 of the Constitution. Instead, under s 47 of the Constitution, the relevant House of Parliament is to determine any question of s 44 incapability unless either:

- an election petition is brought within time under s 353 of the *Commonwealth Electoral Act 1918* (Cth)
- the House resolves to refer the matter to the Court of Disputed Returns pursuant to s 376 of that Act.

The Court ordered that the plaintiff's proceeding under the Common Informers Act be stayed until Parliament or the Court of Disputed Returns determines the question whether the defendant is incapable of sitting.

Alley v Gillespie
High Court of Australia, 21 March 2018
[2018] HCA 11

Background

Common informer actions

Section 46 of the Constitution provides:

> Until the Parliament otherwise provides, any person declared by this Constitution to be incapable of sitting as a senator or as a member of the House of Representatives shall, for every day on which he so sits, be liable to pay the sum of one hundred pounds to any person who sues for it in any court of competent jurisdiction.

In 1975 Parliament did 'otherwise provide'. It enacted the Common Informers Act. The long title to the Act is 'an Act to make other Provision with respect to the Matter in respect of which Provision is made by section 46 of the Constitution'.

As its title suggests, the Common Informers Act provides for a particular type of action that was once well known but is now rare: a 'common informer action'. Common informer actions originated in medieval times, when the state was weak. In the absence of a police force of the kind that exists nowadays, the initiative of private citizens often had to be relied upon to set the law in motion. Therefore, on occasion it was thought expedient to provide incentives for them to do so by enacting that any person who successfully sued a wrongdoer for a penalty for an infringement of a law should have

that penalty or a portion of it. During the 19th century the state became more powerful and able to rely on its own agencies to enforce the law. Since then, statutes providing for common informer actions have become rare (see [19]–[21]).

Section 3(1) of the Common Informers Act provides that any person who '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' is liable to pay a prescribed penalty to any person who sues for it. The penalty is $200 for all days sat prior to service on the senator or member of the originating process in the common informer's action plus $200 for every day thereafter on which he or she is proved to have sat. (This is a lesser penalty than the £100 per day sat provided for in the Constitution.)

Section 47 of the Constitution provides:

> 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.

Again, Parliament has otherwise provided. It has enacted the Commonwealth Electoral Act. Section 353 of that Act provides for the bringing of election petitions, and in such proceedings questions can be raised about a successful candidate's qualifications for election. Further, s 376 provides that '[a]ny question respecting the qualifications of a Senator or of a Member of the House of Representatives ... 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'.

'The central question ... was whether, in an action under s 46 or the Common Informers Act, the High Court is authorised to rule on a question concerning the qualification of a senator or a member of the House of Representatives ...'

The central question in this case was whether, in an action under s 46 or the Common Informers Act, the High Court is authorised to rule on a question concerning the qualification of a senator or a member of the House of Representatives or whether that question can only be resolved by the mechanisms provided for in, or pursuant to, s 47.

Proceedings against Dr David Gillespie MP

On 2 July 2016, the defendant, Dr David Gillespie, was elected as the Member for Lyne. Mr Peter Alley was an unsuccessful candidate in Lyne.

On 7 July 2017, Mr Alley commenced proceedings in the High Court against Dr Gillespie, claiming penalties prescribed by s 3(1) of the Common Informers Act. Mr Alley claimed that Dr Gillespie was incapable of sitting as a member of the House of Representatives because of an alleged pecuniary interest in an agreement with the public service of the Commonwealth, contrary to s 44(v) of the Constitution.

Threshold jurisdictional questions referred to the Full Court

The Attorney-General intervened in the case under s 78A of the *Judiciary Act 1903*, in support of Dr Gillespie.

Dr Gillespie and the Attorney-General submitted that neither s 46 nor the Common Informers Act confers jurisdiction or power on the High Court to determine a question of qualification. The Common Informers Act does provide that a member of Parliament may be liable to a penalty, but only if either:

- the relevant House of Parliament determines that a member is disqualified, under s 47
- the Court of Disputed Returns declares that a member is disqualified, following a reference to that Court under s 376 of the Commonwealth Electoral Act.

Neither of these had happened in Dr Gillespie's case.

On 29 September 2017, Bell J referred 2 questions to the Full Court under s 18 of the Judiciary Act. The principal question was:

> 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 Act?

(The second question concerned whether the Court should issue subpoenas that the plaintiff sought so that he could obtain evidentiary material to support his claims that Dr Gillespie had entered into an agreement of the kind described in s 44(v) of the Constitution. In the result it was not necessary for the Court to answer that question.)

The Full Court's decision

The Full Court unanimously answered the principal question 'No'. Chief Justice Kiefel and Bell, Keane and Edelman JJ wrote a joint judgment, as did Nettle and Gordon JJ. Justice Gageler wrote a separate judgment.

The plurality judgment – Kiefel CJ and Bell, Keane and Edelman JJ

Section 47 gives Parliament the exclusive power to determine questions of qualification

Their Honours described the historical basis for common informer's actions generally, noting the low regard in which common informers came to be held in English law ([22]). They observed that s 46 attracted relatively little attention during the Convention Debates compared with the discussion of s 47 (at [22]–[29]) and concluded that '[i]t is no doubt correct to observe that s 47 reflects the long-standing tradition of the House of Commons in the United Kingdom, which reserved to itself questions concerning disputed elections and the qualifications of members' ([29]). The principle that it is for Parliament to determine questions of qualification and not for courts, unless Parliament has conferred that power, is confirmed by cases concerning both s 47 and equivalent provisions in State constitutions ([31]–[34]).

The plurality held (at [67]):

> Properly understood, the place of s 46 in the scheme of Ch I Pt IV is to allow for the imposition and recovery of a penalty in a common informer action. It is the role of the Court to determine the quantum of the penalty under the Common Informers Act. It may do so when the anterior question of liability is determined by the means provided by s 47.

The purpose of the Common Informers Act

The parliamentary debates on the Bill that became the Common Informers Act suggest that some members of Parliament, including the then Attorney-General, may have been concerned to ensure that the High Court had a role in determining questions of qualification to ensure that political majorities in Parliament did not opt not to refer those questions to the Court of Disputed Returns and thereby allow a person to sit while apparently disqualified. However, the plurality held that the main purpose of the Common Informers Act was simply to limit the amount that a person might have to pay by way of penalty if he or she were found to be incapable of sitting (under s 46 itself, the penalty was potentially very sizeable). While there is an 'assumption' reflected in the second reading speeches that the High Court would be dealing with questions of qualification, '[a]ssumptions of this kind are not useful to determine questions of the construction of the Constitution' ([37]).

The proper relationship between the provisions of Chapter I of the Constitution

Their Honours confirmed that questions as to whether a person is disqualified under s 44 might arise where there is a forthcoming election or where an election has been held or they might arise during the term that the person sits in either House ([46]). The 3 kinds of questions identified in s 47 cover the various ways in which disqualification under s 44 may arise.

Section 46 deals only with penalty. The court's role in a common informer's suit is to determine the quantum of that penalty ([50]). It is clearly necessary that a question of qualification be determined before a person becomes liable to a penalty under s 46, but it does not follow that the question should be determined by the court hearing a common informer's action ([52]), because (at [53]):

> It is not necessary to the scheme of Ch I Pt IV that s 46 itself may authorise the courts to determine questions of qualifications for the purposes of a common informer action. It is not necessary given that the question is one which may be determined by the relevant House or as Parliament otherwise provides under s 47. The silence of s 46 on the matter is explicable given the operation of s 47. The operation of s 47 and the scheme of Ch I Pt IV is less clear if s 46 permits the intrusion of a judicial decisions as to qualifications in common informer proceedings.

'It is clearly necessary that a question of qualification be determined before a person becomes liable to a penalty under s 46, but it does not follow that the question should be determined by the court hearing a common informer's action ...'

Their Honours also rejected the plaintiff's argument that s 44 provides for a 'singular condition' – that it disqualifies only a person who is subject to a disqualification at the time they are duly elected or chosen – and that s 45 (not s 44) renders incapable of sitting persons who become subject to a constitutional disability after they have been elected. Their Honours considered that argument in some detail (at [54]–[66]) before rejecting it:

> Section 44 does not contain a singular condition. The words 'incapable of being chosen or of sitting' are clearly disjunctive. If a person seeking to be chosen suffers from one of the disabilities there stated he or she is 'incapable of being chosen'. If a person subsequently comes under a disability he or she is 'incapable of sitting'. Section 45 then operates to vacate his or her seat.

Justice Gageler

Justice Gageler agreed that the questions should be answered in terms stated by the majority to 'ensure coherence in the operation of ss 46, 47, 76 and 77 of the Constitution' ([70]).

While s 46 creates a cause of action, s 47 is 'squarely addressed to authority to decide and to nothing other than authority to decide' ([72]). Section 47 confers exclusive jurisdiction to each House to govern the qualifications of its own members, subject to legislation to the contrary. The section reflects 'a "textually demonstrable constitutional commitment" of the determination of the identified questions "to a coordinate political department"' ([72]). Unless Parliament otherwise provides for the purposes of s 47, the element of the cause of action created by s 46 can only be established by a prior determination of the Senate or the House under s 47 ([74]).

His Honour held that any jurisdiction conferred under the Common Informers Act was 'circumscribed to the extent of the continuing exclusive operation of s 47 of the Constitution' ([79]).

Gageler acknowledged that there is an alternative view of the relationship between ss 46 and 47 which would allow qualification to be challenged collaterally in a common informer's action of the present kind but that view 'bristles with difficulty'

and, by giving rise to the potential for contradictory yet equally authoritative answers to a constitutional question, it 'countenances legal uncertainty and institutional disharmony' ([76]).

Finally, Gageler J acknowledged that limiting the jurisdiction conferred by the Common Informers Act to the extent of the continuing exclusive operation of s 47 means that the Act fails to meet the concern identified by the then Attorney-General when he introduced the Bill for its enactment. However, whatever the explanation for the then Attorney-General's view about how the Act would operate, 'the Attorney-General's failure to appreciate the scope of the continuing exclusive operation of s 47 of the Constitution cannot alter the constitutional characterisation of the Common Informers Act as an Act which otherwise provides solely for the purpose of s 46 of the Constitution' ([81]).

Justices Nettle and Gordon

In their joint reasons, Nettle and Gordon JJ held that determination of questions of qualification is regulated exclusively by s 47 and may only be determined by the House in which the question arises or by one of the processes prescribed by the Commonwealth Electoral Act.

Their Honours identified 6 key reasons for this conclusion:

1 The phrase 'any question' makes it clear that 's 47 deals entirely with questions concerning qualifications of senators or members of the House of Representatives, unless the legislature "otherwise provides" pursuant to s 47' ([105]).

2 Before Parliament otherwise provided, the determination of a question concerning qualification was within the exclusive cognisance of the relevant House. Any liability under s 46 depended on an antecedent determination under s 47 ([106]).

3 This conclusion is consistent with the common law principle that each House of Parliament has the exclusive right to manage its own affairs without outside interference. Parliament has waived that principle selectively by enacting Pt XXII of the Commonwealth Electoral Act but not otherwise ([107]–[109]).

4 Notwithstanding Parliament's choice to confer jurisdiction on the Court of Disputed Returns for certain questions of qualification, the longstanding institutional arrangement, reflected in s 47, is for such questions to be determined by the relevant House ([110]).

5 The Common Informers Act 'otherwise provides' for the purposes of s 46 but not for the purposes of s 47 ([111]).

6 The plaintiff's argument, if accepted, would create uncertainty in the operation of the scheme created under Ch I. An action could be brought under s 3 of the Common Informers Act up to 7 years after an election for the Senate and up to 4 years after an election for the House of Representatives, contrary to the prescribed time limits in the Commonwealth Electoral Act. The plaintiff's argument would also create the potential for inconsistent determinations on disqualification between a House of the Parliament and the High Court ([112]).

The Commonwealth's legal team

AGS (Gavin Loughton, Niamh Lenagh-Maguire and Duncan Handel from the Constitutional Litigation Unit) acted for the Commonwealth Attorney-General, with the Solicitor-General Dr Stephen Donaghue QC and junior counsel.

The text of the decision is available at:

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Disqualification for holding an office of profit under the Crown

Section 44(iv) of the Constitution relevantly provides that a person who 'holds any office of profit under the Crown' is incapable of being chosen or sitting as a senator or member of the House of Representatives. In this case, the High Court unanimously held that neither the office of mayor nor the office of councillor of Devonport City Council is an office of profit 'under' the Crown within the meaning of s 44(iv). Accordingly, Mr Steve Martin, who held both offices, was not incapable of being chosen or of sitting as a senator.

Re Lambie
High Court of Australia, 14 March 2018
[2018] HCA 6; (2018) 92 ALJR 285; (2018) 351 ALR 559

'... the High Court unanimously held that neither the office of mayor nor the office of councillor ... is an office of profit 'under' the Crown'.

Background

Following the election held on 2 July 2016, Ms Jacqui Lambie was declared elected as a senator for the State of Tasmania. On 14 November 2017 the Senate referred a set of questions concerning Ms Lambie to the Court of Disputed Returns pursuant to s 376 of the *Commonwealth Electoral Act 1918* (Cth). The Attorney-General became a party to that proceeding. The questions referred included whether, by reason of s 44(i) of the Constitution, there is a vacancy in the representation of Tasmania in the Senate for the place for which Ms Lambie was returned and, if so, by what means and in what manner that vacancy should be filled.

On 8 December 2017 the Court (Nettle J) declared that there was a vacancy because, at the time of the 2016 election, Ms Lambie was a citizen of the United Kingdom and therefore incapable of being chosen by reason of s 44(i) of the Constitution. Justice Nettle ordered that the vacancy be filled by a special count of the ballot papers for Tasmania.

That special count relevantly identified Mr Martin as the candidate who would be elected as a senator for Tasmania. A question then arose as to whether he was also incapable of being chosen as a senator, because at all relevant times he held the offices of mayor and of councillor of Devonport City Council – a local government corporation established under the *Local Government Act 1993* (Tas).

On 13 December 2017, pursuant to s 18 of the *Judiciary Act 1903* (Cth), Nettle J stated for the consideration of the Full Court the following question: 'Is Mr Martin incapable of being chosen or of sitting as a senator by reason of s 44(iv) of the Constitution?'

As well as the Attorney-General and Mr Martin, Ms Kate McCulloch was joined as a party in the reference. Ms McCulloch had appeared on the Senate ballot paper in Tasmania and might have been identified as a successful candidate had Mr Martin been excluded from the count. The Attorney-General for Victoria also intervened.

Constitutional issue

There was no dispute that the offices of mayor and councillor were offices of profit, each being 'a position of a public character constituted under governmental authority to which duties and emoluments are attached' ([9]). There was also no dispute that the reference to 'the Crown' in s 44(iv) included 'the executive government of a State as well as the executive government of the Commonwealth' ([9], [60]). The sole issue in the case was therefore whether either office was 'under' the Crown within the meaning of s 44(iv) ([10]).

Mr Martin, the Commonwealth Attorney-General and the Victorian Attorney-General each argued that Mr Martin did not hold an office of profit under the Crown. Ms McCulloch argued that he did and was thus incapable of being chosen or sitting as a Senator.

The High Court's decision

On 6 February 2018, at the conclusion of the hearing of the question stated, the Full Court held unanimously that Mr Martin was not incapable of sitting as a senator by reason of s 44(iv). The Full Court delivered its reasons on 14 March 2018. Chief Justice Kiefel and Bell, Gageler, Keane, Nettle and Gordon JJ (the plurality) delivered a joint judgment; Edelman J wrote a short judgment agreeing in the result but for different reasons.

The plurality held that an office of profit is 'under' the Crown if the holding or continued holding of that office, or the receipt of profit from it, depends on the will or continuing will of the executive government of the Commonwealth or of a State ([31]). Section 44(iv) will thus disqualify a person if either:

- the person is *appointed* to an office of profit by the executive government
- the executive government has power over an office of profit 'sufficient to amount to effective control over *holding* or *profiting* from holding' the office ([33]–[34]).

Neither limb applied to Mr Martin because he was elected, not appointed, to both offices, and the executive government of Tasmania did not have a sufficient degree of control over his continued occupation of the office or its terms ([36], [43]).

Principles relevant to the construction of s 44(iv)

In reaching this conclusion the plurality rejected an argument that there is a textually significant distinction between an office of profit 'under' the Crown and an office 'from' the Crown. Nothing in pre-federation history suggested that 'under' the Crown had relevantly 'acquired a technical meaning by the time of federation' or that the drafters ascribed any significance to 'the precise choice of language'. Therefore, 'discovering the historical connotation' of the preposition 'under' was of no assistance ([17]; cf Edelman J at [58]).

Instead, 2 overarching considerations were relevant to construing s 44(iv):

- The first was the purpose of the provision, understood by reference to pre-federation history (see [18]–[21]). Their Honours noted that, consistently with that history, Sykes v Cleary (1992) 176 CLR 77 identified the elimination or reduction of 'executive influence over the House' as the 'principal mischief' to which s 44(iv) is directed ([22]).

- The second was the precept, recognised in *Re Day (No 2)* (2017) 91 ALJR 518 and *Re Canavan* (2017) 91 ALJR 1209, that the 'limiting effect [of s 44(iv)] on democratic participation tells in favour of an interpretation which gives the disqualification … the greatest certainty of operation that is consistent with its language and purpose' ([22]; see also at [31]).

Even more significant was the function attributable to s 44(iv): to protect the framework for responsible government established by the Constitution and the capacity for Parliament to 'act as a check on executive action' ([23]). Accordingly, s 44(iv) 'can be seen to be quite narrowly tailored to eliminate a particular form of conflict of duty and interest … which, if permitted, would give rise to a real capacity for executive influence over the performance of [the parliamentary duty of a senator or member]' ([28]).

'An office of profit is "under" the Crown … if the holding or continued holding of that office, or the receipt of profit from it, depends on the will or continuing will of the executive government of the Commonwealth or of a State'

The plurality's interpretation 'substantially accord[ed] with that proposed by the Attorney-General of the Commonwealth. An office of profit is "under" the Crown … if the holding or continued holding of that office, or the receipt of profit from it, depends on the will or continuing will of the executive government of the Commonwealth or of a State' ([31]). An office will meet that description if:

- officeholders are appointed at the will of the executive government of the Commonwealth or of a State ([33])
- officeholders are *not* appointed at the will of the executive government of the Commonwealth or of a State, but 'the executive government has such power over the continued holding of the office or profiting from holding the office as to amount to effective control over holding or profiting from holding the office' ([34]).

The first aspect explains the disqualification of Mr Cleary (who was a state public school teacher) in *Sykes v Cleary* and of Ms Hughes (who was a part-time member of the Administrative Appeals Tribunal) in *Re Nash (No 2)* (2017) 92 ALJR 23, as each of them held an office of profit to which officeholders were appointed by the executive government ([35]; cf Edelman J at [59], [63], [78]–[79]). However, both of Mr Martin's offices were elected, so there was no suggestion that this aspect applied to him ([36]).

Application to Mr Martin – executive's power over holding or profiting from office

To determine whether the second limb of the s 44(iv) test applied, the plurality assessed the relationship between each office and the executive government by examining of the statutory incidents of the office as 'found entirely within the provisions of the *Local Government Act* and subordinate legislation' ([37]; see also at [11]). Their Honours held that:

- Provisions concerned with executive control over the *functions* of mayors were not relevant to whether the executive had 'effective control' over holding or profiting from holding the office of mayor ([43]–[44]).
- Certain provisions for the suspension or removal or dismissal of a councillor from office by the executive government of Tasmania could not be characterised as 'control' over the holding of the office, because ([49]):
  - the powers could generally only be exercised following 'an administrative finding of non-compliance with a statutory norm involving a measure of misconduct or dereliction of duty'

  - the Supreme Court of Tasmania had supervisory jurisdiction to ensure the powers were lawfully exercised.
- While the Governor had power to make regulations prescribing the allowances to which a mayor and councillors are entitled, such regulations were disallowable by resolution of either House of the Tasmanian Parliament under s 47 of the *Acts Interpretation Act 1931* (Tas); further, the power could not properly be used to penalise or reward a councillor or mayor, who was also a senator or member of the House of Representatives, for anything done in that latter capacity ([50]–[51]).

The plurality concluded that 'alone or in combination' the provisions did not 'confer power on the executive government of Tasmania over the continued holding of the office or profiting from holding the office of mayor or of councillor sufficient to amount to effective control over holding or profiting from holding those offices' ([43]). Accordingly, neither office was 'under the Crown' within the meaning of s 44(iv).

Justice Edelman – s 44(iv) applies to appointment or employment by the executive

In contrast to the plurality, Edelman J considered that the meaning of the phrase 'office of profit *under* the Crown' had 'crystallised after two centuries of legal usage prior to Federation'. He understood the phrase to encompass 2 limbs ([58]):

- offices 'from' the Crown, where the holder was appointed by the Crown ([63]–[68]; cf plurality at [13]). This limb explains Ms Hughes' disqualification in *Re Nash (No 2)* ([63]).
- offices, whether or not from the Crown, which involved employment by the Crown ([69]–[77]). This limb explains the disqualification of Mr Cleary in *Sykes v Cleary* ([59]).

Having regard to the statutory scheme as examined by the plurality, Edelman J concluded that neither of the offices that Mr Martin held fell within this understanding of the first or second limb of the phrase 'office of profit under the Crown': 'The offices held by Mr Martin were not under the Crown because he was neither appointed, nor employed, by the executive government of the State of Tasmania' ([80]).

The Commonwealth's legal team

AGS (Andrew Buckland, Simon Thornton, Niamh Lenagh-Maguire and Thomas Wood from the Constitutional Litigation Unit, with Simon Daley and Julian Ensbey from AGS Dispute Resolution) acted for the Commonwealth Attorney-General in this and related litigation, with the Solicitor-General Dr Stephen Donaghue QC and junior counsel.

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Ineligible candidate remains incapable of being chosen in special count to fill their own Senate vacancy

Ms Skye Kakoschke-Moore had previously been declared ineligible to be chosen at the 2016 federal election because she was a British citizen at the time of her nomination. In this case, the High Court, sitting as the Court of Disputed Returns, unanimously held that she was not eligible to be included in the special count to determine who should fill the vacancy in the Senate that her ineligibility had left, even though she had renounced her foreign citizenship by the time the special count was ordered.

The High Court also unanimously held that Mr Timothy Storer was to be included in the special count, despite the fact that he had ceased to be a member of the Nick Xenophon Team (NXT) before the order for a special count.

Re Kakoschke-Moore
High Court of Australia, 21 March 2018
(2018) 352 ALR 579; [2018] HCA 10

Background

On 24 January 2018, following a reference from the Senate to the High Court sitting as the Court of Disputed Returns, the High Court (Nettle J) declared that there was a vacancy in the representation of South Australia in the Senate because Ms Kakoschke-Moore, a member of the NXT, was incapable of being chosen at the 2016 federal election because she was a citizen of the United Kingdom at the time she nominated.

Constitutional issue

The constitutional issues concerned the method by which that vacancy should be filled. Justice Nettle reserved 3 questions for the Full Court pursuant to s 18 of the *Judiciary Act 1903*. In substance, they were:

- whether the Senate vacancy should be filled by a special count
- whether Ms Kakoschke-Moore was capable of being chosen by a special count in light of the fact that she had renounced her British citizenship
- whether Mr Storer, a candidate for NXT at the 2016 federal election, should be excluded from any special count because he had subsequently ceased to be a member of the NXT.

The High Court's decision

The High Court delivered short unanimous reasons, dealing with Questions 1 and 2 together, before dealing with Question 3.

Questions 1 and 2

Ms Kakoschke-Moore submitted that there was no need to conduct a special count. Instead, she argued, the Court could simply declare her duly elected because, having renounced her British citizenship, she was no longer 'incapable of being chosen'. In the alternative, Ms Kakoschke-Moore submitted that, if a special count was to be ordered, she should be included in the count because she would not be 'incapable of being chosen' at the time the order was made.

The Court rejected Ms Kakoschke-Moore's submissions on Questions 1 and 2. Their Honours noted that her approach to both questions was based on a 'fundamental misunderstanding'. In particular, her approach failed to appreciate that, because she was incapable of being chosen at the 2016 federal election, she was 'incapable of being chosen by the special count, the purpose of which is to complete that electoral process' ([27]).

By reference to *Re Nash (No 2)* [2017] HCA 52 (which the Court said was not distinguishable and should not be overruled ([33], [35])), the Court explained that a special count 'is part of the electoral process; it is not some separate new electoral process by which a new choice is to be made' ([30]; see also at [28]). Accordingly, Ms Kakoschke-Moore, 'who was a citizen of a foreign power from the beginning of and during most of' the electoral process', was not 'able to be included in the special count for the purpose of completing the electoral process' ([29]).

Question 3

On Question 3, Ms Kakoschke-Moore argued that Mr Storer should be excluded from any special count on the basis that this would 'reflect the practical reality that voting for the Senate took place along party lines' and would give effect to the voters' intentions, 'which could be taken to require that Ms Kakoschke-Moore be replaced by someone of the same political party' ([22]).

The Court rejected that submission. The Court reiterated that the purpose of a special count is to identify 'the true legal intent of the voters', which is 'no more or less than what is apparent from the valid ballots having regard to the relevant provisions' of the *Commonwealth Electoral Act 1918* ([36]). The effect of the Act was that '[t]hose voters who cast their votes above the line for NXT on 2 July 2016 must be taken to have intended that their votes should, if sufficient, elect Mr Storer'. This intention was not altered by the fact that Mr Storer was no longer a member of NXT. It was therefore necessary for Mr Storer to be included in the special count ([41]–[42]).

The Commonwealth's legal team

AGS (Simon Thornton and Thomas Wood from the Constitutional Litigation Unit, with Brooke Griffin and Julian Ensbey from AGS Dispute Resolution) acted for the Commonwealth Attorney-General, with the Solicitor-General Dr Stephen Donaghue QC and junior counsel.

The text of the decision is available at:

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