IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

NO S190 OF 2017

BETWEEN: **PETER ALLEY**
Plaintiff

AND: **DAVID GILLESPIE MP**
Defendant

AND: **ATTORNEY-GENERAL OF THE COMMONWEALTH**
Intervening

REPLY 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.

PART II ARGUMENT

2. The plaintiff's essential submission is that there is a dichotomy in Part IV of Chapter I of the Constitution. The determination of questions respecting the capacity of a person to sit in Parliament under s 44 are assigned to judicial bodies; the determination of all other questions respecting qualifications and disqualifications, vacancies and disputed elections are assigned to the House in which they arise (subject to other provision by the Parliament). That submission should be rejected. It is premised on a slender and unpersuasive textual basis, has no evident purpose, and is contrary to the historical reservation of questions concerning disqualifications to the Parliament.

Sections 44, 45 and 46

3. The first limb of the plaintiff's argument involves an analysis of ss 44, 45 and 46 of the Constitution. The plaintiff makes two essential submissions in this respect.

4. ***First***, he submits that the language of "any person" in ss 44 and 46 distinguishes those provisions from other provisions in Chapter I of the Constitution that deal with senators and members of the House of Representatives. However, the use of the language "any person" in s 44 simply reflects the fact that s 44 operates both to prevent persons who are not Parliamentarians from being chosen as senators or members of Parliament if they are subject to certain disabilities, and also to prevent persons who are already senators and members of the House of Representatives from continuing to sit if they become subject to those disabilities. The plaintiff's apparent submission that s 44 is a "singular condition" confined in its operation to persons who are both "incapable of being chosen or of sitting" (PS) is wrong. Textually, it ignores the disjunctive "or". Further, it mistakes the operation of s 45. Contrary to PS [6], a Parliamentarian who becomes subject to a disability mentioned in s 44 during his or her term is not incapable of sitting "because" s 45 provides that his or her place has become vacant. Such a Parliamentarian is the very kind of "person" that s 44 states – in express terms – is incapable of sitting. It is only because s 44 makes such a person "incapable of sitting" that he or she "becomes subject to any of the disabilities" that engage s 45(i).

5. The use of "any person" in s 46 likewise reflects that that provision is intended to operate in respect both of persons who were incapable of being chosen by reason of s 44 (who cannot properly be described as senators and members of the House of Representatives) and also people who are incapable of sitting in the manner just described. The language of "any person" in ss 44 and 46 does not have any constructional significance beyond that both sections operate on both groups.

6. ***Second***, the plaintiff's submission at PS [8] that the prayer for relief in a common informer's suit does not need to include a declaration of vacancy skims over the real issue in the case. The issue is not whether the Court can make a declaration, but whether it can determine that a Parliamentarian is incapable of sitting otherwise than pursuant to a law that "otherwise provides" for the purposes of s 47 of the Constitution (being Part XXII of the *Commonwealth Electoral Act 1918* (Cth) (**Electoral Act**)).

7. *Stott v Parker*[1] (***Stott)*** provides a useful illustration of why such a determination in a common informer proceeding will necessarily trench upon the jurisdiction reserved to the Houses of Parliament under s 47 of the Constitution. In *Stott*, a question had arisen as to whether a member of the House of Assembly in South Australia had become

[1] (1939) SASR 98.

bankrupt. Section 31 of the *Constitution Act 1934-1936* (SA) provided that if any member of the House of Assembly became bankrupt his seat would become vacant. Section 43 provided that whenever any question arose respecting any vacancy in either House of Parliament it shall be heard and determined by the House in which the vacancy occurred. The Speaker of the House withheld the member's salary after being advised that the member's seat had become vacant. The member presented a petition of right to the Supreme Court of South Australia praying for payment.

8. A majority of the Court (Napier and Richards JJ) held that although the member's petition of right was cognisable by the Court, the Court had no jurisdiction to determine the question upon which the right to a salary depended and that, until the House had determined whether the place was vacant, the Court could not adjudicate on the member's claim for payment. In so holding, Napier J observed that "the question of title is not one which arises incidentally".[2] His Honour agreed that the right to payment of the salary was a legal right, but held that it did not "stand upon the same plane as the ordinary rights between party and party".[3] Rather, the legal right was "dependent upon the determination of the question which the House is entitled and required to determine", and that the "statute which gives [jurisdiction to the House] must be read as taking it away from the Courts".[4] Justices Napier and Richards held that the matter should be stayed to enable the plaintiff to apply to the House of Assembly for a hearing and determination under s 43 of the *Constitution Act 1934-1936*.

9. Likewise here, a "question" as to whether a person is "declared by the Constitution to be incapable of sitting" within the meaning of s 46 will necessarily involve one or more of the three overlapping categories of "question" specified in s 47 – "question" being a broad term that extends to any matter where qualification is a step in the reasoning process, and not just to proceedings where it constitutes the ultimate issue. "Any" such question is to be determined by the relevant House, or by such other mechanism as Parliament otherwise provides under s 47: see CS [27]-[30]. As in *Stott* (see at 103), those textual features indicate that s 47 is "peremptory and exclusive". It is therefore not to the point that the plaintiff does not seek a declaration of a vacancy: see, in that regard, *Patterson v Solomon* [1960] AC 579 at 590-591. The question is whether the Court can enter upon questions of qualification even as a step in the proceeding. The plaintiff fails to grapple with the real issue before the Court.

Terms of ss 46 and 47

10. The next step in the plaintiff's argument involves the proposition that a comparison between ss 46 and 47 shows that the Constitution assigns power to judicial bodies in s 46 and assigns power to parliamentary bodies in s 47. This proposition is entirely premised on the phrase "declared by the Constitution" in s 46 (PS [9], [13]-[14], [16]).

11. Textually, it seems that s 46 uses the words "declared by this Constitution to be incapable of sitting" to direct attention to those provisions of the Constitution that expressly state (ie declare) that a person is "incapable of sitting" (ie ss 43 and 44).[5] That appears to be the way the same phrase is used in s 52(iii).[6] It would also reflect

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2 *Stott* (1939) SASR 98 at 104. Cf *Egan v Willis* (1998) 195 CLR 424 where the Court held that the Court could determine a question that would otherwise fall within the exclusive cognisance of a House of Parliament, in circumstances where the statutory context in which the proceeding arose did not include a provision equivalent to s 47 of the Constitution or s 43 of the *Constitution Act 1934-1936* (SA).

3 *Stott* (1939) SASR 98 at 104.

4 *Stott* (1939) SASR 98 at 105.

5 Cf CS at [23].

6 See *Roughley v NSW; ex parte Beavis* (1928) 42 CLR 162 at 198; *Re Residential Tenancies and Henderson; ex parte Defence Housing Authority* (1997) 190 CLR 410 at 489 (Kirby J).

the distinction drawn in the constitutional text between "incapacity to sit" and "vacancy" (which may arise absent "incapacity to sit": eg s 20, 45(ii) or (iii)). The words "declared by this Constitution" are therefore a sign-post to the provisions that give content to s 46. Contrary to PS [13] or [16], they do not signal a distinction between matters assigned to a judicial body on the one hand, and a House of Parliament on the other. If such a distinction had been intended, it would have been irrational to leave it within Parliament's power to abolish common informer actions entirely by a law that "otherwise provided" under s 46, as that would defeat the alleged assignment of that matter to the judicial branch. The Plaintiff attempts to elevate his argument by invoking the undoubted principle that it is the role of this Court to determine whether the legislature and the executive act within their constitutional powers.[7] However, this Court recognised in *R v Richards; Ex Parte Fitzpatrick and Browne*[8] that that principle does not provide a sufficient ground for placing upon the express words of s 49 of the Constitution an "artificial limitation". The same is true of what is (equally expressly) provided by s 47 of the Constitution.[9]

12. It is entirely consistent with the duty of this Court to enforce constitutional boundaries to recognise that, in certain areas, the Constitution leaves it to branches of government other than the judiciary to determine what the Constitution requires. *Fitzpatrick and Browne* illustrates that point. So do the authorities that recognise that ss 53, 54 and 56 of the Constitution govern "the intra-mural activities of the Parliament" in respect of which "this Court does not interfere", with the consequence that a failure to comply with those provisions "is not contemporaneously justiciable".[10] Those observations recognise that the duty of this Court to uphold the Constitution does not have the consequence that Parliament cannot be allowed to determine for itself how particular constitutional requirements are applied, particularly where they concern matters committed by the Constitution to Parliament.[11]

13. The plaintiff is right to recognise that the framers of the Constitution intended that questions respecting "vacancy", "qualifications" and "disputed elections" were not questions for a body exercising judicial power, unless Parliament otherwise provides, and that until then these matters were within the exclusive jurisdiction of each House: AS [12] and see CS [40]. Given that acknowledgement, it is a critical step in the plaintiff's argument that the reference in s 47 to "any question respecting" the "qualification" of a Parliamentarian does not include any question respecting the operation of s 44 (the plaintiff seeking to limit the word "qualification" in s 47 to the qualifications referred to in s 34, or prescribed by a law otherwise providing for the purposes thereof): AS [12]. But that submission is untenable. If accepted, it would follow that a law that "otherwise provides" for the purposes of s 47 cannot confer jurisdiction on this Court to determine a question under s 44. That would mean (amongst other things) that s 376 of the Electoral Act does not validly empower

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7 Eg *Marbury v Madison* (1803) 1 Cranch 137; 5 US 1371.

8 (1955) 92 CLR 157 at 165-166.

9 See further the CS at [33]-[34]. See also *Stott* (1939) SASR 98 at 105 (Napier J); *Martin v Nicholson* (1850) 1 Legge 618 at 623: "It occurred to me at the trial that the question of vacancy... was unavoidably in contest because such was the precise issue, in terms, which the parties came prepared to try. But it did not follow that any direct evidence of the fact, or of circumstances tending to establish the fact, was therefore, admissible as in an ordinary case. If the law has specifically provided a tribunal, for instance, for the determination of the fact, the decision of that tribunal would be the only evidence of it".

10 *Wilkie v Commonwealth* [2017] HCA 40 at [63], and the authorities there cited.

11 Note also, in that regard, *White v Director of Military Prosecutions* (2007) 231 CLR 570 at 584-585 [11] (Gleeson CJ) – "There was no suggestion by any member of the Court [in *Sue*] that the principle of the separation of powers obliged Parliament to confer jurisdiction [in respect of disputed elections or qualifications] on a Ch III court".

Parliament to refer questions concerning s 44 to the Court of Disputed Returns, contrary to *Re Canavan*.[12]

14. The submission that the matters exclusively reserved to Parliament by s 47 exclude "any question" as to disqualification under s 44 is also contrary to authority. It is clearly established that s 47 is to "be construed in its constitutional setting" and "[i]n particular it must be construed in the context of s 44".[13] In *Sue v Hill*, that led this Court to reject the submission that the phrase "disputed election" in s 47 did not include any question as to the disqualification of a candidate by reason of s 44(i).[14] Even more clearly than the term "disputed election", as a matter of ordinary language "any question" as to disqualification encompasses the matters referred to in ss 34 and 44 respectively (as the headings of those sections reflect).

15. Notwithstanding the exclusive cognisance of the Parliament under s 47 that is acknowledged at PS [12], the plaintiff submits that the framers intended that "a s 46 court" (apparently including each of the courts identified at CS [41]) would "superintend the s 44 constitutional imperative": PS [21]. Subject to the somewhat uncertain caveat at PS [19], [20], that "superintending" role is said to be exclusive of, and different to, the powers in s 47 that were conferred exclusively upon Parliament until it "otherwise provided". Following that same logic, it is also presumably said to be exclusive of the powers now conferred upon this Court by Pt XXII of the Electoral Act.

16. There are three difficulties facing that submission. ***Firstly***, as the plaintiff accepts, the necessary consequence of his argument that s 46 is "independent" of s 47 is that one must embrace "constitutionally mandated unseemliness": PS [19], [20]. The resolution of that "unseemliness" is said to depend on some form of "deference". But that concept is no more helpful here than it is in other Australian constitutional contexts.[15] Those boundaries are clear on the Commonwealth's proposed construction. On the plaintiff's construction they dissolve into the entirely unsatisfactory notion that Parliament might defer to the judicial branch.

17. ***Secondly***, it appears to be the plaintiff's argument that the various constitutional provisions that may affect one's capacity to sit other than s 44 (ss 19, 20, 34, 37, 38, 43 and 45) are not subject to the "superintending" role of the various courts referred to in s 46. They are rather to be dealt with by the relevant House under s 47 or as "otherwise provided" under that provision (see PS [12], [15]). The basis for that distinction is not explained. As submitted above, the words "declared by this Constitution" in s 46 do provide some textual basis for the existence of a relationship between ss 44, 46 and 43, but not one that signals a distinction of the nature suggested by the plaintiff (ie between matters assigned to a judicial body on the one hand, and a House of Parliament on the other). The plaintiff's position as regards s 43 is particularly curious. For obvious reasons, s 43 refers to the members of either House yet, like s 44, also uses the phrase "incapable of being chosen or of sitting". Accordingly, the textual indicia that lead to the plaintiff's suggested relationship between ss 44 and 46 could run in either direction in respect of s 43. It is perhaps for that reason that the plaintiff has not assigned that provision to either limb of the ss 46/47 taxonomy he sketches at PS [11] and [12]. But that only serves to emphasise that that taxonomy has no firm footing in the text.

18. ***Thirdly***, as was noted at CS [32], there is a long history of Parliament having decided

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12 [2017] HCA 45.
13 *Sue v Hill* (1999) 199 CLR 462 at [112] (Gaudron J).
14 *Sue v Hill* (1999) 199 CLR 462 at 479-480 [23]-[25] (Gleeson CJ, Gummow and Hayne JJ). 508 [114] (Gaudron J).
15 See eg *McCloy v NSW* (2015) 257 CLR 178 at 220, [90], [91] (French CJ, Kiefel, Bell and Keane JJ).

questions of qualification, unconstrained by the artificial distinctions proposed by the plaintiffs (see also the authorities collected in *Stott* at 102).

In terrorem arguments

19. Part IV of the Constitution is not to be construed by reference to in terrorem arguments about how an irresponsible Parliament may or may not behave (cf PS [17]-[18]).[16] It should be presumed that Parliament will act responsibly.[17] Further, and in any case, questions of qualification can be revisited by the Court of Disputed Returns by way of election petition under s 353 of the Electoral Act following any subsequent election.

20. In any event, the Constitution sets up three branches of government and a system of representative and responsible government. It is consistent with that scheme that the framers intended that some issues could properly be left to the Parliament, without recourse to the courts (cf PS [19]-[20]), with Parliamentarians then being accountable for their choices via the democratic process.

The source of the Court's authority to decide questions respecting qualifications

21. The Commonwealth's case is that s 47 of the Constitution reserves questions respecting qualifications to the House in which those questions arise until the Parliament otherwise provides, and that that reservation excluded such questions from determination in common informer proceedings under s 46 of the Constitution. The Parliament has otherwise provided for the regulation of the subject matter in s 47 by passing the Electoral Act pursuant to s 51(xxxvii) and s 47, and has otherwise provided for the regulation of the subject matter in s 46 by passing the Common Informers (Parliamentary Disqualifications) Act 1975 (Cth) (**Common Informers Act**) under s 51(xxxvii) and s 46 (although in doing so it did not expand the role of the Court to determine questions of qualification, as the plaintiff correctly accepts: cf PS [22]). As noted in CS [27], fn 30, those enactments also necessarily involved the exercise of the legislative powers conferred by ss 76(i) and 76(ii). But that says nothing of the scope of any authority so conferred to determine questions of qualification – contra AS [25].

Construction of Common Informers Act

22. The outcome of this proceeding will be largely governed by the Court's construction of ss 46 and 47, as both parties submit that the Common Informers Act was intended to continue the constitutional scheme with some limited modifications. That constitutional context is critical to the proper construction of the Common Informers Act. To the extent that the Second Reading Speech may, on its face, support the plaintiff's case, the Commonwealth relies on its submissions in chief at [60], which demonstrate that the Second Reading Speech proceeded on a wrong understanding of s 46.

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[16] *Sue v Hill* (1999) 199 CLR 462 at 480 [26] (Gleeson CJ, Gummow and Hayne JJ).
[17] See the Commonwealth's submissions in chief at [48].