IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No S190 of 2017

BETWEEN: **PETER ALLEY**
Plaintiff

AND: **DAVID GILLESPIE**
Defendant

DEFENDANT'S WRITTEN SUBMISSIONS

Filed on behalf of the Defendant by
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Dated: 10 November 2017
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Part I: Internet publication

1. The defendant certifies that these submissions may be placed on the internet.

Part II: Statement of issues

2. On 5 October 2017, Bell J ordered that the following questions be referred to a Full Court pursuant to s.18 of the *Judiciary Act* 1903 (Cth):

   (1) Can and should the High Court decide whether the defendant was a person declared by the Constitution to be incapable of sitting as a Member of the House of Representatives for the purposes of s.3 of the *Common Informers (Parliamentary Disqualifications) Act 1975* (Cth) ("Common Informers Act")?

   (2) If the answer to question (1) is yes, is it the policy of the law that the High Court should not issue subpoenas in this proceeding directed to a forensic purpose of assisting the plaintiff in his attempt to demonstrate that 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*?

Part III: Section 78B certification

3. The defendant certifies that various constitutional issues arise in this case which need to be the subject of a section 78B notice.

Part IV: Judgment citation

4. This matter is in the Court's original jurisdiction. There is no lower court judgment.

Part V: Statement of material facts

5. An agreed statement of facts is to be found in the Questions Reserved Book ("QRB") at page 6. There is no point in repeating it here.

6. It should be noted that at the last federal election the plaintiff was an unsuccessful Labor party candidate for the NSW seat of Lyne, the seat won by Dr Gillespie.

7. One of the subpoenas is to Golden Boot Pty Ltd, a company of which Dr Gillespie is a director and shareholder.

Part VI: Defendant's argument

8. The two questions need to be addressed separately.

(1) First Question

9. It is convenient to begin with some background matters.

10. The Constitution was enacted on the basis of an assumption that the Commonwealth Parliament (like the Parliament at Westminster) was, subject to the Constitution, supreme. The founding fathers respected and admired parliamentary sovereignty: *Roach v Electoral Commissioner* (2007) 233 CLR 162, at [1]. The doctrine of supremacy of Parliament[1] has many manifestations. They include the primacy of Parliament in some matters.

11. One of the well-established areas of parliamentary primacy, power and privilege is the determination of whether members of Parliament are qualified to sit. A similar area of exclusive cognisance exists in relation to the determination of parliamentary election disputes and filling parliamentary vacancies. Parliament has traditionally exercised cognisance over such matters: *Holmes v Angwin* (1906) 4 CLR 297 at 305, 307-9; *In re Wood* (1988) 167 CLR 145, at 157-159. That is in part because "[i]n all legislatures ... one of the first duties of a body newly called together has been to verify the credentials of the persons claiming to be members of it": *Holmes* at 305 per Griffith CJ. That cognisance is exclusive unless and to the extent that Parliament cedes that exclusivity. Parliament's power to cede that exclusivity is itself an aspect of parliamentary sovereignty. However, "whenever [legislatures] have thought fit to delegate a part of that duty to another tribunal, as they have done from time to time,

[1] Discussed, for example, by Sir Owen Dixon in *The Law and the Constitution*, Jesting Pilate p.38f and by A.V. Dicey in *An Introduction to the Study of the Law of the Constitution* (10th edition) chapter one.

they have nevertheless retained control to a certain extent": *Holmes* at 305 per Griffith CJ.

12. From time to time, Parliament has exercised its powers to determine whether members are qualified to sit. For example, in 1999 the House of Representatives determined that Mr Entsch MHR was not in breach of s.44(v) of the Constitution.[2] On that occasion the House passed a resolution in the following terms:

> That the House determines that the Member for Leichhardt does not have any direct or indirect pecuniary interest with the Public Service of the Commonwealth within the meaning of section 44(v) of the Constitution by reason of any contract entered into by Cape York Concrete Pty Ltd since 3 October 1998 and the Member for Leichhardt is therefore not incapable of sitting as a Member of the House.

13. Where an issue is within Parliament's exclusive cognisance, the courts decline to exercise jurisdiction on that issue. In such instances the courts exercise "a self-denying ordinance" (*R v Parliamentary Commissioner for Standards; ex parte Al Fayed* [1998] 1 WLR 669 (CA), at 670G) and apply a "principle of non-intervention" whereby they "leave [the legislature] to determine exclusively for itself matters of this kind": *Leung Kwok Hung v President of the Legislative Council (No 1)* (2014) 17 HKCFAR 680, at [28], [33]; *Prebble v TVNZ* [1995] 1 AC 321, at 334C. Thus, in *Clayton v Heffron* (1960) 105 CLR 214, at 246, four justices referred to a matter as being "a matter once outside the ordinary scope of inquiry by the Courts". In these areas, "the judicial process does not lie": E.C.S. Wade, *Introduction to A. V. Dicey, An Introduction to the Study of the Law of the Constitution*, 10th Ed at page xliv.

14. Although it is possible for Parliament to oust its exclusive cognisance by statute, Parliament will only be taken to have ousted its exclusive cognisance where the statute use "[e]xpress words (or, as would probably now be said, unmistakable and unambiguous language).": *Criminal Justice Commission v PCJC* [2002] 2 Qd R 8, at 23 per McPherson J; *Duke of Newcastle v Morris* (1870) LR 4 HL 661 at 671 ("some special clause in the Act striking at and distinctly abolishing [the privilege]") (adopted by Evans QC and Byers QC in a joint opinion: appendix II, 1985 *Report of the Senate Standing Committee on Constitutional Legal Affairs, Commonwealth Law-Making Power and the Privilege of Freedom of Speech in State Parliaments*); *Hammond v The Commonwealth* (1982) 152 CLR 188, at 200 ("unmistakable language"); *Harvey*

[2] Parliamentary Debates 10.6.99, at p.6733.

v New Brunswick (1996) 137 DLR (4th) 142 at [70]; *Aboriginal Legal Service v WA* (1993) 9 WAR 297, at 304. See also the *New South Wales Legislative Council Practice* (ed Lovelock and Evans) at 108 (citing *Criminal Justice Commission v PCJC* [2002] 2 Qd R 8, at 23); *Chamberlist v Collins* (1962) 34 DLR (2d) 414, at 416.

15. When the Constitution was enacted, s.47 of that document made the Commonwealth Parliament's exclusive cognisance[3] over qualifications (etc) very clear. Section 47 provided that "*any* question *respecting* the qualification of a senator or of a member of the House of Representatives ... *shall* be *determined* by the House in which the question arises" (emphasis added). That broad and mandatory language[4] ensured that the general law position was adopted in relation to issues of qualification (as well as questions relating to vacancies and disputed elections). However, by stating that the Parliament might "otherwise provide" the Constitution also provided that an ouster of these areas of exclusive cognisance could occur by a law made under s.51(xxxvi) of the Constitution.

16. By s.49 of the Constitution, it was provided that the Senate and the House of Representatives should have the same "powers, privileges, and immunities" as the "Commons House of Parliament of the United Kingdom". Those powers and privileges included powers in relation to the determination of members' qualifications, disputed elections and vacancies.

17. Shortly after federation, the Commonwealth Parliament made provision in the *Electoral Act* for petitions disputing elections: *Commonwealth Electoral Act* 1902 (Cth) ss.192-193. In 1907, following the decision *R v Governor of the State of South Australia* (1907) 4 CLR 1497, Parliament made provision[5] for references by resolution to the Court of Disputed Returns of issues concerning qualifications of members of Parliament or vacancies: *Disputed Elections and Qualifications Act* 1907 (Cth) ss.206AA, 206DD. These are instances of Parliament providing otherwise

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[3] Quick and Garran, in *Annotated Constitution of the Commonwealth of Australia* (1901), refer at 496 to s.47 giving "exclusive jurisdiction". See also Sawer, *Australian Federal Politics & Law: 1901-1929* (1956) 22 (fn 45) stating that, prior to the enactment of the *Commonwealth Electoral Act 1902* (Cth), election disputes "were decided by Committees of the Houses".

[4] A similar provision in South Australia's Constitution has been described as a "peremptory direction" (p.101) and "peremptory and exclusive" (p.103): *Stott v Parker* [1939] SASR 98 (FC).

[5] See *In re Wood* (1988) 167 CLR 145, at 159.

under s.47. Such provisions are now to be found in Divisions 1 and 2 of Part XXII of the *Electoral Act* (set out in the annexure to these submissions).

18. A number of provisions in Division 1 of the Part XXII (relating to disputed elections) are particularly significant. Section 353(1) provides that the validity of any election or return may be disputed by a petition addressed to the Court of Disputed Returns and not otherwise. Various sections prescribe the procedures for such petitions. Section 355 prescribes the formal requirements for an election petition. Amongst other things, such a petition must in effect be brought within 40 days of the election: s 355(e). Section 356 requires the provision of security for costs. Section 358 makes it clear that compliance with ss 355, 356 and 357 is jurisdictional. Section 359 permits the Electoral Commission to appear with leave. Section 363A obliges the court to make its decision as quickly as is reasonable in the circumstances. Section 364 directs the court to be guided by the substantial merits and good conscience of each case. And section 368 provides that all decisions of the Court "shall" be final and conclusive and without appeal, and shall not be questioned in any way It has been observed that "one of the purposes of [Division 1] is to achieve finality in an election": *In re Wood* (1988) 167 CLR 145, at 160 citing *In re Berrill* (1978) 52 ALJR 359.

19. Such statutory provisions relating to election petitions are "peculiar in their character": *Theberge v Laudry* (1876) 2 App Cas 102, at 106 per Lord Cairns. Lord Cairns continued (in a passage which has often been quoted):

> "They are not Acts constituting or providing for the decision of mere ordinary civil rights; they are Acts creating an entirely new, and up to that time unknown, jurisdiction in a particular court of the colony for the purpose of taking out, with its own consent, of the Legislative Assembly, and vesting in [the] Court, that very peculiar jurisdiction which, up to that time, had existed in the Legislative Assembly of deciding election petitions, and determining the status of those who claimed to be members of the Legislative Assembly. A jurisdiction of that kind is extremely special, and one of the obvious incidents or consequences of such a jurisdiction must be that the jurisdiction, by whomsoever it is to be exercised, should be exercised in a way that should as soon as possible become conclusive, and enable the constitution of the Legislative Assembly to be distinctly and speedily known."

20. See also *Strickland v Grima* [1930] AC 285, at 295-297; *Senanayake v Navaratne* [1954] AC 640, at 647-649; *Patterson v Solomon* [1960] AC 579, at 587 (in

arguendo); *Devan Nair v Yong Kuan Teik* [1967] 2 AC 31, at 40-41; *Mârie v Electoral Commissioner* [2011] UKPC 47 at [47]-[53].

21. Division 2 of Part XXII also contains some important provisions. Section 376 provides that questions respecting the qualifications of a member of the Parliament may be referred by resolution of either House to the Court of Disputed Returns which "shall *thereupon* have jurisdiction to hear and determine the question". Under s.379 the powers of the Court include the power to declare that any person was not qualified to be a senator or member of the House of Representatives and to declare that any person was not capable of being chosen or of sitting as a Senator or a Member of the House of Representatives. And s 381 picks up a number of the Division 1 provisions.

22. Despite the enactment of Divisions 1 and 2, "as ... Division [2] makes clear, the Houses of Parliament retain the right to rule on the qualification of a member": *Sue v Hill* (1999) 199 CLR 462 at [239].

23. Section 46 of the Constitution provided that:

> "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 £100 to any person who sues for it in any court of competent jurisdiction."

24. This provision created an enforceable liability but did not confer jurisdiction on any court.

25. In 1975, in the wake of the controversy over Senator Webster[6], the Commonwealth Parliament passed the *Common Informers (Parliamentary Disqualifications) Act 1975* (Cth) ("the Act"). The Act provides that it is "an Act to make other provision with respect to the matter in respect of which provision is made *by s.46* of the Constitution" (emphasis added). It is noteworthy that the Act does not purport to be a "provision otherwise" in relation to s.47 of the Constitution. By section 3(1) the Act provided that:

[6] See *Re Webster* (1975) 132 CLR 270

> "[a]ny person who ... has sat ... as a member of the House of Representatives while he or she was a person declared by the Constitution to be incapable of so sitting shall be liable to pay to any person who sues for it in the High Court [a specified penalty]."

26. Section 5 of the Act provides that "[o]riginal jurisdiction is conferred on the High Court in suits under this Act and no other court has jurisdiction in such a suit".

27. It is clear that the Act operates not only as a "provision otherwise" in relation to s.46 but as a complete displacement of s.46 "[o]n and after the date of commencement of [the] Act": s.4.

10 28. In 1987 the Parliament passed the *Parliamentary Privileges Act 1987* (Cth). Section 5 of that Act provides as follows:

> "Except to the extent that this Act expressly provides otherwise, the powers, privileges and immunities of each House, and of the members and of the committees of each House, as in force under s.49 of the Constitution immediately before the commencement of this Act, continue in force."

29. None of the other provisions of the *Parliamentary Privileges Act* deals with qualification/disqualification of MPs, election disputes or parliamentary vacancies. Thus s.5 is apt to include the traditional parliamentary powers and privileges relating to the determination of MP's qualifications.

20 30. Dr Gillespie submits that prior to the passing of the Act in 1975 only two bodies could determine that he was "a person declared by the Constitution to be incapable of ... sitting" as an MP (the wording of s.3 of the Act), namely, the Parliament and the Court of Disputed Returns, the latter either on an election petition or on a reference by the Parliament. And he also submits that the Act does not alter that position with the consequence that this Court cannot make that determination, which can still only be made by the Parliament or the Court of Disputed Returns.

31. That the Act creates an action one element of which is that the defendant must be "a person declared by the Constitution to be incapable of sitting" is not sufficient to amount to an ouster of the exclusive cognisance which the Parliament and the Court
30 of Disputed Returns have in relation to the determination of the qualification (or disqualification) of MPs. The creation of a penalty provision in those terms does not amount to an ouster (and certainly not a clear ouster) of the exclusive cognisance

which would otherwise exist over such a matter and does not amount to a "provision otherwise" in relation to s.47.

32. Nor does the conferral by s.5 of the Act on this Court of jurisdiction in relation to that crime amount to an ouster of the exclusive cognisance of the Parliament and the Court of Disputed Returns to determine such matters. Again, s.5 is not a clear ouster of the exclusive cognisance which would otherwise exist and is not stated to be a "provision otherwise" in relation to s.47. That is supported by two decisions which are helpful to Dr Gillespie in a number of respects.

33. *Stott v Parker* [1939] SASR 98 (FC) involved a claim for salary as an MP by Mr Stott under the *Payment of Members Act* 1936 (SA). The Speaker of the House of Assembly had withheld his salary payable under that statute because the Speaker had been advised that Stott's seat was vacant on the ground that he was an insolvent debtor and public defaulter within the meaning of s.31 of the *Constitution Act* 1934 (SA). The Full Court held that, although it had jurisdiction under the *Payment of Members Act*, it could not determine the question of whether there was a vacancy because s.43 of the Constitution provided that "[w]henever any question arises respecting any vacancy in either House of Parliament it shall be heard and determined by the House in which the vacancy occurred". It was held (p.103) that s.43 was "peremptory and exclusive [and] ... *requires* the House to determine the question" (emphasis in original). The case was therefore stayed "to enable the plaintiff to apply to the House of Assembly for a hearing and determination under sec. 43" (p.105). That reasoning is equally applicable in relation to s.47 of the Constitution which is very similar in wording to s.43 of the *Constitution Act* (SA).

34. *Ellis v Atkinson* [1998] 3 VR 175 is a decision to similar effect. Vincent J there considered the Victorian *Constitution Act 1975* which had provided for a Court of Disputed Returns to deal with election disputes and to consider references by the Victorian Houses of Parliament in relation to the qualifications (and vacancies) of members. Section 19 of that Constitution gave the Victorian Houses the same privileges and powers as the House of Commons as at 21 July 1855. The plaintiffs claimed declarations that the defendant since his election as an MP had contravened

s.55 of the Constitution[7] and that his seat had therefore become vacant. The plaintiffs asserted that the Court could grant this relief by virtue of the conferral on the Supreme Court of "unlimited jurisdiction" by s.85 of the *Constitution Act*. Mr J. D. Merralls QC submitted for the defendant that s.85 did not enable the Court to determine matters involving parliamentary vacancies and disqualifications as these were matters which were within the exclusive powers and cognisance of Parliament. Vincent J upheld that submission and gave judgment for the defendant.

35. Further, the Act certainly does not state that it is "providing otherwise" in relation to s.47 of the Constitution. Indeed the Act states only that it is providing otherwise in relation to s.46. Likewise, "the second reading speeches also assumed that the [Act] was otherwise providing for the purpose of s.46 of the Constitution, not s.47": *Sue v Hill* (1999) 199 CLR 462 at [244] per McHugh J.

36. Nor are the plaintiff's prospects of construing the Act as ousting the established exclusive cognisance of Parliament assisted by the well established proposition that as a penal Act the Act must be construed strictly.

37. Moreover, at federation any action for a penalty could not have proceeded to judgment against a defendant unless the relevant House had first determined that the defendant was not qualified. When one reads ss.46 and 47 in context it is clear that at federation the *only* body which could determine disqualification was the Parliament.

38. Section 47 immediately follows s.46. Section 46 creates an offence but does not grant jurisdiction to any court. The offence created has as its key integer a disqualification from sitting as an MP which is "declared by [the] Constitution". This penal provision is then immediately followed by section 47 which states in very clear and mandatory terms that *any* question respecting the qualifications of an MP *shall* be determined by the relevant House. Moreover, determination of such disqualifications/qualifications is one of the standard powers and privileges of a house of parliament.[8] That makes it difficult to suggest that when "any court of competent jurisdiction" hears the case it is the court and not the relevant house which determines the disqualification. Nor would

[7] Which is very similar to s.44 of the Commonwealth Constitution
[8] Cf section 49 of the Constitution and s.5 of the *Parliamentary Privileges Act 1987* (Cth).

the statutory conferral of jurisdiction on a court change that analysis: see the decisions in *Stott v Parker* and *Ellis v Atkinson* discussed at [33] – [34] above.

39. If this is the correct construction of ss.46 and 47, this makes it difficult to construe the Act as operating any differently from its constitutional antecedent. That is particularly so when the Act is said to provide otherwise in relation to s.46, but not in relation to s.47 which thus continues to operate as a residual source of exclusive cognisance subject only to the two jurisdictions exercised by the Court of Disputed Returns.

40. The contrary views of Gaudron J on s.46 in *Sue v Hill* (1999) 199 CLR 462 at [118] are, it is respectfully submitted, incorrect. Her Honour takes no account of the matters in the previous three paragraphs. And the three reasons given by Gaudron J for her view all have difficulties.

41. The first is that "constitutional provisions are to be read broadly and according to their terms". However, this does little to sustain her Honour's argument. Even if that proposition is correct as a general principle, it is subject to the words of the Constitution and the context relevant to the words under interpretation. Sections 46 and 47 are adjacent to each other; s.47 is in clear and mandatory terms and is declaratory of the established constitutional position that *any* question in relation to qualifications [etc] *shall* be determined by the relevant House of Parliament. And section 46 confers no jurisdiction.

42. Secondly, Gaudron J relies upon a principle that "constitutional provisions ... are not to be read as subject to limitations which their terms do not require". However, on Dr Gillespie's interpretation, s.46 does not need to be read subject to any relevant limitation. Moreover, the principle relied upon by Gaudron J is subject to qualifications based on text, context and established constitutional doctrine.

43. Thirdly, Gaudron J cites five English decisions on penalties wherein (it is asserted) "the Courts themselves determined whether the person concerned was disqualified". That statement is not correct in relation to *Burnett v Samuel* [1913] KB 742 (note); (1913) 29 TLR 583. In that case, Scrutton J did not determine whether the defendant was disqualified: he decided the case by refusing an amendment sought to enable the

action to be brought under the correct statute. In *Bird v Samuel* (1914) 30 TLR 323 Rowlatt J held (at 325) that the reasoning of the Privy Council on a reference by the House of Commons on the issue of the defendant's disqualification[9] was "binding upon him". Rowlatt J said that he "did not quite follow" the earlier approach of Scrutton J. In *Forbes v Samuel* [1913] KB 706 (at 732) Scrutton J (albeit exhibiting some uncertainty) had held that he was "not technically bound" as a judge of the King's Bench Division by the earlier Privy Council determination on the reference by parliament but nonetheless, according it "the greatest respect" agreed with the Privy Council's report and reasons and adopted same without one iota of independent reasoning. In *Tranton v Astor* (1917) 33 TLR 383 Low J did determine that the defendant was not disqualified but no point seems to have been raised with him as to his ability to make that determination. *Thompson v Pearce* (1819) 1 Brod & B 25 [129 ER 632] was determined by the entry of a non-suit. Thus these five decisions (four of which were decided after federation) provide little support for Gaudron J's assertion. In none of them, except *Bird v Samuel* (and possibly *Forbes v Samuel*) does the problem seem to have been raised.

44. Moreover, if the Act was interpreted as Mr Alley suggests, this would result in a number of inconvenient and unsatisfactory consequences.

45. The first is that on the plaintiff's case any person could bring a penalty action years after an election. This would create uncertainty as to the membership of Parliament. On Dr Gillespie's construction any doubt would need to be resolved within a short period of about 40 days after an election. Thereafter the issue would only be agitated in the Parliament or on a reference by Parliament. On the plaintiff's view, common informers could bring actions up to 7 years after an election for the Senate and up to 4 years after an election for the House of Representatives: see Constitution ss.13 and 28 read with s.3(2) of the Act. For reasons noted in the cases discussed at [19]-[20] above, such uncertainty is highly undesirable. Such actions would throw doubt on the validity of prior acts (eg by Ministers)[10] and legislation. And an unsuccessful candidate (as here) could effectively circumvent the 40 day time constraint under the *Electoral Act* by bringing an action under the *Common Informers Act*, an action which

[9] See *In re Samuel* [1913] AC 514. Compare *In re Macmanaway* [1951] AC 161, at 162.
[10] See s.64 of the Constitution.

can be brought at any time when the relevant "member" is acting in that capacity and up to one year thereafter.

46. The second and third difficulties were raised by McHugh J in *Sue v Hill.* At [241] McHugh J noted that:

> "[t]here is a real question ... whether a person can be sued under the *Common Informers Act* until either the relevant House of Parliament has declared that that person is disqualified or this Court has done so on a reference under Div 2 of Pt XXII of the *Electoral Act.*"

47. McHugh J then referred at [243] to a construction of the Act whereby "the determination is made by the relevant House of Parliament or by this Court on a Division 2 reference, and the function of s.3 [of the Act] is to authorise a suit for the recovery of a penalty once a declaration of incapacity has been made", and continued as follows:

> "Favouring this construction is the fact that it avoids potential and unseemly conflicts between the Court and a House of Parliament over the qualifications of a member of that House. It might also seem surprising that Parliament, in enacting the *Common Informers Act*, had intended, so to speak, to allow a person to bypass the restrictively worded provisions of Div 2 of Pt XXII of the *Electoral Act.*"[11]

48. McHugh J's reasoning reflects the maxim *quando aliquid prohibetur, prohibetur et omne per quod devenitur ad ilud* which this Court has often applied to the construction of instruments: see, eg, *Bank of NSW v The Commonwealth* (1948) 76 CLR 1 at 249-250; *Grannall v Marrickville Margarine Pty Ltd* (1955) 93 CLR 55 at 78. That maxim has, in particular, been applied in the strand of authority commencing with *Anthony Hordern & Sons Ltd v Amalgamated Clothing and Allied Trades Union of Australia* (1932) 47 CLR 1 at 7; see also *R v Wallis; Ex parte Employers' Association of Wool Selling Brokers* (1949) 78 CLR 529, 550-551 (Dixon J); *Leon Fink Holdings Pty Ltd v Australian Film Commission* (1979) 141 CLR 672, 678 (Mason J); *Minister for Immigration and Multicultural and Indigenous Affairs v Nystrom* (2006) 228 CLR 566 at 589 [59] (Gummow and Hayne JJ); *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144 at [50] (French CJ), [84] (Gummow, Hayne, Crennan and Bell JJ). The effect of that strand of authority is that, where Parliament has conferred a specific power the exercise of

[11] See, for example, *Rudolphy v Lightfoot* (1997) 197 CLR 500.

which is attended by specific procedural protections, it is inherently unlikely that Parliament intended those protections to be able to be circumvented by reliance on some broader power which is not attended by the same protections.

49. Dr Gillespie's construction has none of these difficulties or inconvenient consequences: an action under the Act can only result in judgment against a defendant after a prior determination by the relevant House or the Court of Disputed Returns. There are no conflicts between Parliament and the courts. And the plaintiff's action does not bypass the restrictions in Division 1 on Division 2 because those restrictions will either have been complied with or the relevant House will have determined the matter.

50. The plaintiff will no doubt attempt to rely on the two second reading speeches made in relation to the Act. These seem to envisage that a common informer's action may be brought in the High Court, even if there has not been any prior determination of a member's qualifications by either the Court of Disputed Returns or by the Parliament.

51. McHugh J addressed this issue in *Sue v Hill* at [244] and had this to say:

> "However, the second reading speeches ... assume that the Bill was otherwise providing for the purpose of s.46 of the Constitution, not s.47. Furthermore, the Bill seems to have been drafted and debated hastily because of concern that actions for penalties could be brought against Senator Webster, pursuant to s.46 of the Constitution. For that reason, the debates may be regarded as less persuasive than usual on the construction of legislation."

52. Further, although s.15AB of the *Interpretation Act* permits reliance in some situations on second reading speeches in interpreting federal statutes, the speeches are unlikely to be of substantial utility in the present context. They do not enable the words of a minister to be substituted for the text of the law (*Re Bolton* (1987) 162 CLR 514). And although s.15AB permits the Court to refer to second reading speeches, it does not oblige the Court to do so: *Brennan v Comcare* (1994) 50 FCR 555, at 573 per Gummow J.

53. In addition:

(i) to use the speeches in the present context would not be to confirm that the meaning of the provision is the ordinary meaning conveyed by the text: s.15AB(1)(a);

(ii) nor would it be to use the speeches to determine the meaning when the provision is ambiguous or obscure because the relevant words are not relevantly ambiguous or obscure: s.15AB(1)(b)(i);

(iii) to use such speeches here would not be to use them to determine the meaning of the provision when the ordinary meaning conveyed by the text leads to a result that is manifestly absurd or unreasonable: s.15AB(1)(b)(ii);

(iv) absent ambiguity, obscurity, manifest absurdity or unreasonableness, s.15AB does not permit second reading speeches to be relied upon in order to depart from a meaning determined without reference to such speeches: *Re Australian Federation of Construction Contractors* (1986) 61 ALJR 37 at 39 (Gibbs CJ, Mason, Wilson, Brennan, Deane and Dawson JJ); *Amos v BCC* [2006] 1 Qd R 300 at [32] per Muir J (Keane and Jerrard JJA concurring); *Moody v French* (2008) 36 WAR 393 at [49] per Steytler P, Wheeler, McLure and Buss JJA; *Shorten v DHCPL* (2008) 72 NSWLR 211 at [25] per Basten JA.

(2) Second Question

54. The second question referred to this Court is whether the policy of the law prevents the issue of subpoenas in penalty proceedings instituted by a common informer.

55. This issue arises because the plaintiff proposes five subpoenas to various entities (including Golden Boot Pty Ltd – a company associated with Dr Gillespie): QRB 56-65. Under the High Court Rules "no subpoena shall be issued except upon a note from a justice": rule 24.02.1. Dr Gillespie submits that this rule should be interpreted in accordance with the established rule whereby the courts do not permit orders to be made for production of documents in penalty proceedings brought by common informers.

56. In *Mexborough (Earl of) v Whitwood Urban District Council* [1897] 2 QB 111, Lord Esher MR made the following observations at 114-115:

> "I think that there are two rules of law which have always existed as part of the common law of England, and have been recognised as such by all courts whether of law or equity, and the rights conferred by them have never been taken away by any statute. The first is that *where a common informer sues for a penalty, the Courts will not assist him by their procedure in any way*: and I think a similar rule has been laid down and acted upon from the earliest times in respect of actions brought to enforce a forfeiture of an estate in land. These are no doubt rules of procedure, but they are much more than that: they are rules made for the protection of people in respect of their property, and against common informers. There has been a great searching for reasons for these rules; but it does not signify what the reasons for them are, if they are well recognised rules which have existed from time immemorial." (emphasis added)

57. A similar broad view of the rule was adopted by a majority of this Court (Mason ACJ, Wilson and Dawson JJ) in *Pyneboard Pty Ltd v TPC* (1983) 152 CLR 328, at 336. There their Honours referred to "a mere action for a penalty" and noted that:

> "In [that] situation, the Court should, in the absence of statutory provision to the contrary, refuse to make any order for discovery, production of documents or the provision of information for the reason that an intended consequence of the discovery, production of documents or provision of information is the imposition of the penalty, this being the object of the action."

58. Their Honours went on to approve a statement by Deane J to the effect that this was the result of "a broad and unqualified rule whose origins are apparently to be found in a reluctance on the part of a Court of Chancery to lend the aid of its discovery proceedings to the common informer" (referring to *Mexborough* and *Heimann v Commonwealth* (1935) 54 CLR 126, at 130). The three justices concluded (at 336) by adopting a statement of Lord James in *National Association of Operative Plasterers v Smithies* [1906] AC 434, 437-438 that "courts of equity were averse to actions for penalties and forfeitures being brought and would not assist them".

59. The relevant passage in *Heimann v Commonwealth* (1935) 54 CLR 126 at 130 (per Evatt J) reads as follows:

> "It has been contended on behalf of the Commonwealth that, whether such an action proceeds in the High Court or the Supreme Court, an application for discovery would necessarily be dismissed, because the plaintiff is in the position of a common informer. It was said by Lord Esher MR in *Earl of Mexborough v Whitwood Urban District Council* that, *where a common informer sues for a penalty, the courts will not, or will not readily, assist him by their procedure*. In accordance with such principles, Pring J, in the case of *Ballard v Coles*, held that discovery should not be granted in aid of an action for a penalty brought by a common informer." (emphasis added)

60. Similarly *Cross on Evidence* (loose leaf Aust ed by J. D. Heydon) at [25125] states the rule as follows:

> "Where the proceedings are brought to recover a penalty against a natural person *the court should*, in the absence of statutory provisions to the contrary, *refuse to order discovery or production of documents or the provision of information*, for such proceedings are akin to the old common informer proceedings." (emphasis added)

61. It is clear that this rule is broad and operates as a threshold or "*in limine*" objection (traditionally by demurrer) to any order for production of documents: see, for example, *Mexborough* p.121. It applies before any claim for privilege. And it is applicable whenever application is made for an order for production of documents or information, including discovery from third parties[12] or a bill of discovery prior to the initiation of proceedings against a defendant: see, for example, *Norwich Pharmacal v CEC* [1974] AC 133.

62. The development of this "rule" is closely connected with the history relating to common informers. According to W.S. Holdsworth (*History of English Law* at 4.356) "permitting the public to enforce statutes which created penalties "was an expedient open to many obvious abuses". He continued:

> "Old statutes which had been forgotten were unearthed and used as means to gratify ill-will. Litigation was stirred up simply in order that the informer might compound for a sum of money. Threats to sue were easy means of levying blackmail. A "turbidum genus" arose whom Coke classes with "the monopolist, the concealer and the dispencer with publick and profitable penal laws" as the four varieties of "viperous vermin", "which endeavoured to have eaten out the sides of church and commonwealth."

63. Leon Radzinowicz (*History of English Criminal Law* vol 2, p.139) writes to similar effect:

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

[12] In Chancery discovery could be obtained "against any third persons who had the necessary evidence in their possession": (Holdsworth, *History of English Law*, 5.282).

> individual extortion, caprice and tyranny'. In the end, this long-continuing distaste caused the very name of 'common informer' to be regarded as a term of abuse."

64. The common law courts had no inherent or general power to order discovery: *Commonwealth v Baume* (1905) 405 at 413 (Griffith CJ); *The Commonwealth v Miller* (1910) 10 CLR 742 at 752 (O'Connor). They had no such power until the *Common Law Procedure Act 1852* (UK): *Miller* at 754 (Isaacs J). A party to an action at common law wishing discovery needed to commence separate proceedings by bill of discovery in Chancery: Bray, *The Principles and Practice of Discovery* (1885) 4-5; note also *Miller* at 754. The Court of Chancery refused to lend its aid to a plaintiff at law who was bringing penalty proceedings or proceedings seeking forfeiture or loss of office, loss of a seat as an MP or ecclesiastical censure: *Monnis v Monnis* (1673) Rep Ch 68 [21 ER 618]; *Duncalf v Blake* (1737) 1 Atk 52 [25 ER 926]; *Chauncey v Tahourden* (1742) 2 Atk 392 [26 ER 637]; *Honeywood v Selwin* (1744) 3 Atk 276 [26 ER 961]; *Orme v Crockford* (1824) 13 Price 376 [147 ER 1022]; *Chadwick v Chadwick* (1852) 22 Law Journal (Chancery) 329; *Pye v Butterfield* (1864) 5 B&S 829 [122 ER 1038].

65. Prior to the passing of the *Judicature Acts*, but after the common law courts were permitted to make orders for discovery, the common law courts adopted the equity rule: *Jones v Jones* (1889) 12 QBD 425, at 427-428 per Lord Coleridge CJ.

66. After the passing of the *Judicature Acts*, plaintiffs in penalty (and like) proceedings argued that the general and relatively unqualified provisions in the rules permitting discovery should be interpreted as permitting discovery in such proceedings. However, this argument was rejected and the courts continued to apply the pre-*Judicature Act* rule: *Hunnings v Williamson* (1883) 10 QBD 459; *Martin v Treacher* (1886) 16 QBD 507; *Jones v Jones* (1889) 22 QBD 425; *Mexborough (Earl of) v WUDC* (1897) 2 QBD 111; *Earl of Powis v Negus* [1923] Ch 186; *Seddon v Commercial Salt Company Ltd* [1924] 1 Ch 187; *Colne Valley Water Co v Watford & St Alban's Gas Company* [1948] KB 500.

67. The Australian Courts have consistently adopted the same view: see, for example the cases cited at [57] – [59] above.

68. As noted at [56] and [60] above, the rule is broad and applies to any form of order for production of documents or provision of information. Thus, the principle has been applied to a subpoena *duces tecum* to a third party to proceedings. In *Earl of Powis v Negus* [1923] 1 Ch 186, Sargant J (as he then was) held (at 190) that the rule was applicable to a subpoena *duces tecum* to a "witness" (p.192). At 190 Sargant J noted that the "question is whether the general objection to the production of the documents on the ground that it is in aid of an action for forfeiture is sustainable on the terms of this particular subpoena". Sargant J held that the "practice is the same at common law and in Chancery in these matters" and that "the subpoena would be bad" "if ... served ... with the object of enforcing the forfeiture of a lease": page 190. However, Sargant J held that the particular causes of action were not causes of action for forfeiture (page 192).

69. In *Seddon v Commercial Salt Co* [1925] 1 Ch 187 the Court of Appeal accepted the rule but held that Sargant J's decision was incorrect insofar as he had held that the particular causes of action were not causes of action for forfeiture. At 193 Sir Ernest Pollock MR quoted the statements of Lord Esher MR in *Mexborough* (see [56] above) as "summarising a well-known rule, obtaining both at common law as well as in equity". Pollock MR added a reference to the "antiquity of that rule" and added that:

> "...the rule applies not only to cases in which a man must suffer if he makes the discovery, but also to cases where he may be subject to a penalty, or to a forfeiture, and the width of the rule, I think, is well laid down in the judgments which appear in the *Earl of Mexborough*'s case."

70. In this context it is important to note the observations of Gummow J in *TPC v Abbco Iceworks* (1994) 52 FCR 96 at 132 where his Honour pointed out that in *Environment Protection Authority v Caltex* (1993) 178 CLR 477, at p.528 three justices had stated "that the subpoena *duces tecum* was originally a Chancery writ, and that when the common law courts were given the power to use the subpoena, they did so consistently with Chancery practice".

71. It is also important to observe that the notion of penalty privilege "seems to have originated in the doctrine that equity would not assist a common informer by making an order for discovery in his favour": *Cross on Evidence* (loose leaf Australian ed by

J. D. Heydon) at [25125]. There is therefore no reason to limit the operation of the "rule" by reference to one of its progeny.

72. The "rule" is clearly wider than any notion of penalty privilege: it applies to forfeiture (and other) cases: see [64] above. In some such cases no penalty privilege is applicable. Moreover, because the rule applies "in limine" to prevent any production, it operates so as to prevent production even where some documents susceptible to production (or discovery) may not be privileged. And the rule as formulated is clearly broad enough to cover discovery to third parties, bills of discovery prior to the commencement of proceedings, discovery in a penalty case against defendants against whom no penalty is sought[13] and subpoenas. In all of these instances "penalty privilege" either will not or may not apply.

73. It is submitted that the rule (or the policies behind it) have also influenced other court practices. Thus it has been held that a defendant in penalty proceedings will not be compelled to plead a positive case until the case for the plaintiff has concluded: *ASIC v Mining Projects* (2007) 164 FCR 32 at [12]-[17]; *MacDonald v ASIC* (2007) 73 NSWLR 612 at [69]-[73], [77] (CA). Similarly, there are cases involving natural persons as defendants in penalty proceedings where the courts have declined to order that the defendant file and serve witness statements: *ACCC v J McPhee* (1997) 77 FCR 217 at 218-220; *Refrigerated Express v AMLC* (1979) 42 FLR 204, 207; *ACCC v Amcor Printing Papers Group Ltd* (1999) 163 ALR 465; *ACC v FFEBSL* (2003) 130 FCR 37. It is obvious that not every pleading of a "positive case" and not all witness statements would come within penalty privilege. Indeed, most "positive cases" would be exculpatory of the defendant to a penalty suit, as would most witness statements filed for a defendant in such a case.

74. The rule is also connected with the broad notion that in penalty (and like) proceedings common informers (and their ilk) should prove their case: *Daniels Corp v ACCC* (2002) 213 CLR 543 at [31]; *Rich v ASIC* (2004) 220 CLR 129 at [24]. An informer should prove his case without assistance from the Court to compel the production of material to enable that proof to be facilitated.

[13] For example P sues D^1, D^2 and D^3 but only seeks a penalty against D^3.

75. It is submitted that the rule should be held to be applicable to the interpretation of the provisions in the *High Court Rules* relating to notes issuing by a justice for subpoenas (viz rule 24.02) and that the request for subpoenas should be refused.

Part VII: Constitution, Statutes and Regulations

76. See the annexure to these submissions.

Part VIII: Orders Sought

77. Question 1: should be answered "no".

78. Question 2: should be answered "unnecessary to answer" or (if it is necessary to answer) "yes".

10 **Part IX: Time estimate**

79. The defendant estimates two hours for the presentation of his argument in chief.

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