IN THE HIGH COURT OF AUSTRALIA

SYDNEY REGISTRY

No S190 of 2017

BETWEEN: **PETER ALLEY**

Plaintiff

AND: **DAVID GILLESPIE**

Defendant

DEFENDANT'S REPLY SUBMISSIONS

Filed on behalf of the Defendant by
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(1) First Question

1. At [10]-[16] of the plaintiff's written submissions ("PWS"), it is asserted that ss.46 and 47 of the Constitution have independent areas of operation with the result that there is no need to read s.46 (or presumably the *Common Informers Act* which supplanted it) as being subject to s.47.

2. This submission has substantial difficulties. The very broad language of s.47 (any question respecting a qualification or vacancy or disputed election) is clearly much wider than the question of whether a person is declared by the Constitution to be incapable of sitting (s.46). The equivalent aspect of exclusive cognisance under the general law is similarly broad.

3. At PWS [13] Mr Alley suggests that neither House of the Commonwealth Parliament has a role in determining what the Constitution declares, this being "the exclusive function of the judicial power".

4. This is not accurate. The Parliament from its inception had a role in determining constitutional questions relating to electoral matters, vacancies and qualifications (see s.47, *White v Director of Military Prosecutions* (2007) 231 CLR 570 at [11] and Harrison Moore, *The Constitution of the Commonwealth* (1910, 2nd ed) at p.321). And it also had a role in determining some questions relating to privilege under s.49 (see *R v Richards; ex parte Fitzpatrick and Browne* (1955) 92 CLR 157). Sections 47 and 49 are qualifications on a strict notion of separation of powers.[1]

5. At PWS [17] it is submitted that the clear intention of s.46 of the Constitution was to provide for a large penalty if a person sat as an MP whilst disqualified under s.44. It is then submitted that that intention would be frustrated if a penalty action could only be brought after a determination of disqualification by the relevant House.

6. However, an intention to penalise disqualified persons is not frustrated by allocating the power to determine disqualifications to the relevant House and the Court of

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[1] Compare US Constitution Article 1 section 5, discussed in *Powell v McCormack*, 395 US 486 (1969).

Disputed Returns. The constitutionally prescribed systems of representative and responsible government provide a sufficient check on any possible abuse of Parliament's power to determine questions respecting qualifications: *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129, at 151-152.

7. At PWS [20] Mr Alley accepts that on his construction of s.47 there would in some situations be an "unseemly conflict" between the judicial determination by one of the Houses of Parliament on the one hand and this Court on the other. The unseemliness is then said to be "a constitutionally mandated unseemliness" which is to be rendered "seemlier" by "deference to the judicial organ" rather than deference to the relevant House because the former deference is "deference to the Constitution" whereas the latter form of deference "has no basis in the Constitution".

8. That analysis has difficulties. It proceeds upon an acceptance that Mr Alley's construction may lead to unseemly conflict. Dr Gillespie submits that a reading of the Constitution which would avoid such conflict (and the potential therefor) is to be preferred to one which involves (or may involve) unseemly conflict. Moreover, it is difficult to see how the Constitution mandates deference to the judiciary rather than the Parliament as the means of reducing or obviating the potential for conflict. Section s.47 makes it clear that *any* question respecting qualifications of MPs is to be determined by the relevant House. Deference to the Constitution requires that that occur, absent a law which clearly provides otherwise. Nor does s.46 of the Constitution assist Mr Alley. That section does not confer any jurisdiction on a court but merely creates a cause of action.

9. At PWS [26] Mr Alley asserts that ss.3 and 5 of the *Common Informers Act* are an exclusive grant to the High Court of "the duty and power to hear and determine if any person was declared by the Constitution to be incapable of sitting" and "to decide whether any person possessed a s.44 disability".

10. The problem with this submission is that a grant of jurisdiction will not include the power to determine a matter which is not justiciable by reason of a specific provision of the Constitution (here s.47). Similarly, it would not include power to determine an

issue which is within Parliament's exclusive cognisance. See the defendant's written submissions ("DWS") at [13], [32]-[35].

11. At PWS [27] Mr Alley relies upon Mr Enderby's second reading speech (he asserts) to confirm that the meaning of ss.3 and 5 of the Act is the ordinary meaning (referring to s.15AB(1)(a) of the *Interpretation Act*).

12. The difficulty with this is that Mr Alley is not using the second reading speech to confirm the ordinary meaning of ss.3 and 5 (which is relevantly fairly clear) but rather to attempt to clarify their effect (namely, whether they "provide otherwise" within the meaning of s.47 of the Constitution). There are difficulties in attempting to use a second reading speech in that way. And it is clear that Mr Enderby did not advert to the s.47 issue. It is also clear that the law was enacted hurriedly, passing through all stages in both Houses in one evening and coming into effect the following day.[2] The issues pivotal to the determination of the present case were not matters which were adverted to and were certainly not thought through.

13. At PWS [28] Mr Alley accepts that there may be a "confluence of proceedings" on his construction of the Act but suggests that were that to happen the issue could be dealt with by an exercise of "ordinary case management".

14. This underlines a difficulty with Mr Alley's construction which does not exist on Dr Gillespie's approach. On Dr Gillespie's construction there is a clear hierarchy of determining bodies and little, if any, potential for conflict. On Mr Alley's construction there are conflicts, difficulties and inconvenience.

(2) Second Question

15. At DWS [54]-[75] Dr Gillespie provides a detailed analysis as to why a broad rule was adopted in civil penalty proceedings that the courts would not make any order for discovery, production of documents or the provision of information for the benefit of

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2 See Gareth Evans (1975) 49 ALJ 464, at 472.

the plaintiff. As part of that discussion, reference was made to the history relating to common informers: DWS [62]-[63].

16. Mr Alley responds very briefly to these submissions at PWS [32]-[35].

17. At PWS [32] Mr Alley asserts that it is not legitimate to call in aid historical disapproval of common informers when construing the jurisdiction created by the *Common Informers Act* 1975 (Cth) ("the Act").

10 18. However, the references to common informers made by the Attorney-General and Dr Gillespie are in the context of the history of the development of the rule relied upon. They are not otherwise "called in aid".

19. At PWS [32]-[33] Mr Alley submits that the Act does not enable a plaintiff to enrich himself but rather enables an informer to engage in the worthy public pursuit of exposing a person as incapable of being an MP. The worthiness of the aims of the Act are then said to be a reason why the rule should not apply to actions under the Act.

20. However, the applicability of the rule relied upon by Dr Gillespie cannot depend upon
20 the worthiness of the policy of a particular Act. Otherwise the rule would not have been applied, as it has been, to ASIC and the Australian Competition and Consumer Commission. Many (perhaps all) of the Acts policed by common informers have had noble or worthy policies. However, that has not meant that the rule and the related policy were rendered inapplicable. The effect of Mr Alley's submission is to make the applicability of the rule dependent on the court's perception of whether the Act fulfils a noble policy. That cannot be correct.

21. At PWS [34] it is submitted that in conferring jurisdiction on this Court under the *Common Informers Act* the Parliament must have done so knowing that this Court had
30 powers to issue subpoenas.

22. One difficulty with this argument is that it may also be assumed that Parliament in passing such a statute knew that there was a rule of public policy whereby plaintiffs in civil penalty proceedings were not able to obtain compulsory production of

documents etc, a principle which had existed for more than 100 years. Moreover, if Mr Alley's argument were correct, it would have been held to apply to all other instances of Parliament's enactment of civil penalty statutes: the many cases accepting the rule show that his argument is not sound.

23. At PWS [34] it is submitted that the policy of the law would be frustrated if the Court could not issue subpoenas in the present case.

24. The difficulty with this submission is that (as DWS show) there is a clear and well-established policy of the law that the courts will not utilise their compulsory processes in relation to documents in civil penalty cases. Thus the policy of the law is furthered (not frustrated) by refusing to permit subpoenas.

25. Finally, at PWS [35] Mr Alley seems to assert that Dr Gillespie is somehow relying on penalty privilege.

26. However, Dr Gillespie's written submissions do not rely in terms on that privilege as a reason why a subpoena should not issue, although the rule of policy relied upon has some similarity of provenance to penalty privilege.

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