HIGH COURT OF AUSTRALIA

KIEFEL CJ,
BELL, GAGELER, KEANE, NETTLE, GORDON AND EDELMAN JJ

PETER ALLEY PLAINTIFF

AND

DAVID GILLESPIE DEFENDANT

Alley v Gillespie
[2018] HCA 11
21 March 2018
S190/2017

ORDER

1. *The questions referred to the Full Court under s 18 of the* Judiciary Act *1903 (Cth) be amended and answered as follows:*

Question (1)

Can and should the High Court decide in this proceeding 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 section 3 of the Common Informers (Parliamentary Disqualifications) Act *1975 (Cth) ("Common Informers Act")?*

Answer

No.

Question (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 section 3 of the Common Informers Act?

Answer

Unnecessary to answer.

2. *The plaintiff's proceeding under the Common Informers Act be stayed until the question whether the defendant is incapable of sitting is determined.*

Representation

B W Walker SC with J E Mack for the plaintiff (instructed by Maurice Blackburn Lawyers)

G O'L Reynolds SC with D P Hume for the defendant (instructed by Colin Biggers & Paisley Solicitors)

S P Donaghue QC, Solicitor-General of the Commonwealth with C L Lenehan and J D Watson for the Attorney-General of the Commonwealth, intervening (instructed by Australian Government Solicitor)

CATCHWORDS

Alley v Gillespie

Constitutional law (Cth) – Parliamentary elections – Common informer action – Where plaintiff commenced common informer action in original jurisdiction of High Court – Where liability to penalty under *Common Informers (Parliamentary Disqualifications) Act* 1975 (Cth) requires determination of whether defendant incapable of sitting as member of House of Representatives – Whether High Court has jurisdiction to determine eligibility of member of House of Representatives in common informer action – Proper construction of s 46 of Constitution – Proper construction of s 47 of Constitution.

Words and phrases – "common informer", "common informer action", "Court of Disputed Returns", "declared by the Constitution", "declared by this Constitution", "exclusive cognisance", "incapable of being chosen or of sitting", "jurisdiction", "until the Parliament otherwise provides".

Constitution, ss 44(v), 45, 46, 47, 49.
Common Informers (Parliamentary Disqualifications) Act 1975 (Cth), s 3.
Commonwealth Electoral Act 1918 (Cth), s 376.

1 KIEFEL CJ, BELL, KEANE AND EDELMAN JJ. Section 3(1) of the *Common Informers (Parliamentary Disqualifications) Act* 1975 (Cth) ("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 to any person who sues for it the penalty prescribed. Section 5 of the Common Informers Act provides that original jurisdiction is conferred on the High Court in respect of actions under the Common Informers Act and no other court.

2 On 20 July 2016 the defendant, Dr David Gillespie, was declared elected as a member of the House of Representatives. On 7 July 2017 the plaintiff, Mr Peter Alley, commenced proceedings in this Court against the defendant under the Common Informers Act claiming the imposition of penalties. In those proceedings, the plaintiff contends that the defendant was incapable of being chosen as a member of the House of Representatives and was and is incapable of sitting as a member of that House because, on about 3 September 2015, a company in which the defendant is a shareholder leased premises to Australia Post. The plaintiff claims that the lease agreement is an agreement of the kind referred to in s 44(v) of the Constitution. Section 44(v) refers to an agreement "with the Public Service of the Commonwealth" and provides that any person who has a direct or indirect pecuniary interest in such an agreement "shall be incapable of being chosen or of sitting as a senator or a member of the House of Representatives"[1]. The defendant has filed a defence to that claim.

3 Whether the defendant is liable to a penalty under the Common Informers Act requires an anterior determination as to whether the defendant has been or is incapable of sitting as a member of the House of Representatives. The question whether this Court has jurisdiction to decide that question was raised in directions hearings before Bell J. In addition, the plaintiff sought notes from a Justice pursuant to r 24.02.1 of the High Court Rules 2004 (Cth) for the issue of five subpoenas. The defendant objected to the issue of those notes. Bell J ordered that the following questions be referred to the Full Court under s 18 of the *Judiciary Act* 1903 (Cth):

"(1) Can and should the High Court decide [in this proceeding[2]] whether the defendant was a person declared by the Constitution to be incapable of

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1 See *Re Day (No 2)* (2017) 91 ALJR 518; 343 ALR 181; [2017] HCA 14.

2 These words were suggested in the course of argument for clarity. It is not suggested that the Court cannot determine a question whether a person is incapable of sitting in a proceeding under the *Commonwealth Electoral Act* 1918 (Cth).

sitting as a Member of the House of Representatives for the purposes of section 3 of the [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 section 3 of the Common Informers Act?"

4 It will not be necessary to answer question (2). The answer to question (1) is no. Whether the defendant is incapable of sitting as a member of the House of Representatives by reason of the Constitution is a question to be determined by that House unless it resolves to refer the matter to the Court of Disputed Returns pursuant to s 376 of the *Commonwealth Electoral Act* 1918 (Cth) ("the Electoral Act").

5 Question (1) and the plaintiff's contentions with respect to it direct attention to the provisions of Ch I Pt IV of the Constitution, in particular ss 46 and 47 and their relationship to s 44 in the scheme of that Part.

Constitutional provisions

6 The initial positive qualifications for senators and members of the House of Representatives alike, such as age and citizenship status, were stated in s 34 of the Constitution[3]. Section 43 provides that a member of either House of Parliament shall be incapable of being chosen or of sitting as a member of the other House. Section 44 lists five conditions, the existence of any of which will render a person "incapable of being chosen or of sitting as a senator or a member of the House of Representatives". Section 45(i) provides that if a senator or a member of the House of Representatives "becomes subject to any of the disabilities" referred to in s 44, "his place shall thereupon become vacant".

7 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."

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3 And see now s 163 of the *Commonwealth Electoral Act* 1918 (Cth).

8 The Parliament has otherwise provided for the purposes of s 46 by enacting the Common Informers Act. It may be observed that s 3(1) of the Common Informers Act mirrors the requirement for liability under s 46.

9 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."

10 The Parliament has made other provision with respect to s 47. It first provided for a method of disputing elections or returns in the *Commonwealth Electoral Act* 1902 (Cth). Section 353(1), which appears in Pt XXII Div 1 of the Electoral Act, now provides that the validity of any election or return may be disputed by petition addressed to the Court of Disputed Returns and not otherwise. This Court is constituted as the Court of Disputed Returns[4]. The time for bringing a petition is limited to within 40 days after the return of the writ for the election in dispute or, where the choice or appointment of a person to hold the place of a senator pursuant to s 15 of the Constitution is in dispute, the notification of that choice or appointment[5]. No proceedings were commenced by the plaintiff under Pt XXII Div 1 with respect to the election or the return of the defendant.

11 The process whereby either House might refer questions concerning the qualification of a senator or member of the House of Representatives or a vacancy in either House to the Court of Disputed Returns was first provided for in the *Disputed Elections and Qualifications Act* 1907 (Cth). It is now provided for in s 376, in Pt XXII Div 2 of the Electoral Act. Any such question may, by resolution, be referred to the Court of Disputed Returns, which shall have jurisdiction to hear and determine the question.

12 Section 376 enables, but does not oblige, the Houses to refer such questions to the Court of Disputed Returns. The House of Representatives has not referred any question relating to the defendant's ability to sit to the Court of Disputed Returns. It has not itself determined that question.

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4 *Commonwealth Electoral Act* 1918 (Cth), s 354(1).

5 *Commonwealth Electoral Act* 1918 (Cth), s 355(e).

13 It remains to mention that s 49 of the Constitution provides that the powers, privileges and immunities of the Senate and of the House of Representatives "shall be such as are declared by the Parliament", and until declared shall be those of the House of Commons of the United Kingdom Parliament at the time of Federation.

The issue and contentions

14 The liability of a person who sat as a senator or member of the House of Representatives to a penalty under the Common Informers Act depends upon the answer to the question whether that person was a person declared by the Constitution to be incapable of sitting. The issue in this matter is whether the forum for the resolution of that question is this Court or the House of Representatives.

15 The plaintiff contends that the jurisdiction of this Court in proceedings under the Common Informers Act extends to all elements necessary to decide a person's liability to a penalty. This follows because of the nature of the question and because the words "declared by this Constitution" are referable to the exercise of judicial power. Further, the scheme of Ch I Pt IV of the Constitution contemplates courts deciding the question arising under s 46.

16 The Attorney-General submits that the words "declared by this Constitution to be incapable of sitting" direct attention to the constitutional provisions which provide for the circumstances in which a person may be disqualified from sitting. Relevantly, s 44 provides that if a person suffers from any of the disabilities there stated, that person "shall be incapable of being chosen or of sitting as a senator or a member of the House of Representatives". Questions concerning the qualifications of a person who is a senator or member of the House of Representatives fall within one of the categories of questions in s 47. Questions of this kind fall to be determined by the House in which they arose unless the Parliament otherwise provides. Part XXII Div 2 of the Electoral Act permits either House to refer such a question to the Court of Disputed Returns, but the House of Representatives has not done so.

17 The plaintiff construes the words "shall be incapable of being chosen or of sitting" in s 44 as providing for a "singular condition". Those words refer to a person who is incapable of sitting because he or she is incapable of being chosen. That question is to be determined under s 46. The position of a person who has been duly elected or chosen and who subsequently comes under a disability is different. The singular condition does not apply to such a person because he or she has been duly elected or chosen. That person is incapable of sitting, not

because of the operation of s 44, but because s 45 operates to render the person's seat vacant. Whether s 45 does so is a question to be dealt with under s 47.

18 The plaintiff's construction of the provisions of Ch I Pt IV appears to create something of a division of responsibility with respect to questions concerning whether a person is incapable of sitting. The plaintiff explains that division by reference to constitutional policy and underlying notions of judicial power.

The background to s 46

19 The proceedings for which the Common Informers Act provides are in the nature of the old common informer action, by which a citizen could, for his or her own benefit, sue a person who breached a statute. When the statute allowed such an action to be brought, the citizen suing could recover the prescribed statutory penalty on proof of the breach[6].

20 The origins of the common informer action lay in the need to provide incentives to citizens to put the processes of the law in train at a time when the State was weak and its laws not always enforced[7]. English statutes gave common informers the right to bring a case to recover penalties for breaches of a wide range of laws including, by way of example, unlawful gaming, unlicensed disorderly houses, depositing of rubbish on the streets and throwing of fireworks[8].

21 By the mid-19th century it appears that the need for common informers to bring actions had substantially diminished. In the Second Reading Speech for the Common Informers Bill 1951 (UK), it was observed that there had been no new enactment of common informer provisions in the last 100 years[9]. This

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6 *Tranton v Astor* (1917) 33 TLR 383 at 385.

7 Holdsworth, *A History of English Law*, 3rd ed (1923), vol 2 at 453.

8 Radzinowicz, *A History of English Criminal Law and its Administration from 1750*, (1956), vol 2 at 140-150.

9 United Kingdom, House of Commons, *Parliamentary Debates*, vol 483 at 2085 (9 February 1951).

decline seems to have coincided with the creation of police forces in England and the low regard in which common informers had come to be held[10].

22 The action contemplated by s 46 of the Constitution has its origins in legislation in the United Kingdom dating from the 18th century, as Gaudron J observed in *Sue v Hill*[11]. The first such provision appears to be the *Succession to the Crown Act* 1707[12], which set out the circumstances in which a person was disabled or declared incapable by the statute from being elected but nevertheless sits. Such a person was liable to a penalty to be recovered by a person who sued for it. The common informer action in its parliamentary context was transplanted to the Australian Colonies. The Constitution of each Colony contained a section providing for such an action to lie in the case of persons incapable of sitting or voting in the Colony's Parliament[13].

23 The first official draft of the Commonwealth Constitution Bill prepared for the National Australasian Convention in 1891 did not contain a clause in terms similar to s 46. The precursor to s 46 was first introduced during a meeting of the Constitutional Committee on 30 March 1891, in the handwriting of Andrew Inglis Clark, in what Professor John Williams describes as "[a] curious addition"[14]. It was adopted without discussion.

24 There was little discussion about it thereafter. Sir Samuel Griffith provided a critique of the 1897 draft Bill but no comment was made by him about the provision, which was by then cl 49 of the draft Constitution[15].

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10 Radzinowicz, *A History of English Criminal Law and its Administration from 1750*, (1956), vol 2 at 153-155.

11 (1999) 199 CLR 462 at 509 [116]-[117]; [1999] HCA 30.

12 6 Anne c 41, s 28.

13 *Constitutional Act* 1854 (Tas), 18 Vict No 17, s 28; *New South Wales Constitution Act* 1855 (Imp), 18 & 19 Vict c 54, Sched 1, s 29; *Victoria Constitution Act* 1855 (Imp), 18 & 19 Vict c 55, Sched 1, s 26; *Constitution Act* 1855-6 (SA), Act No 2 of 1855-6, s 18; *Constitution Act* 1867 (Q), 31 Vict No 38, s 7; *Constitution Act* 1889 (WA), 52 Vict No 23, s 32 and *Constitution Acts Amendment Act* 1899 (WA), 63 Vict No 19, s 39.

14 Williams, *The Australian Constitution: A Documentary History*, (2005) at 259.

15 Williams, *The Australian Constitution: A Documentary History*, (2005) at 614, 647.

Clause 49 was the subject of brief debate during the Sydney Convention in September 1897. Dr Quick drew attention to the nature of cl 49 as a penalty and compared the provision to the consequences for breach of the law against plural voting, which had been struck out of the draft. Dr Quick observed that "[i]n this clause, not only is an offence created, but a penalty is also created in the constitution"[16]. He suggested that it be struck out, as the penalty against plural voting had been, and that provision be made for a simple prohibition against doing certain acts. The Hon Edmund Barton undertook to produce such a clause, but it was ultimately not implemented[17]. The words "[u]ntil The Parliament otherwise provides" were introduced into the final draft arising from the Sydney Convention[18]. Clause 49 was thereafter subject to only slight revision and no debate.

The background to s 47

25 By contrast with s 46, there was significant debate concerning the precursors to s 47, particularly concerning the appropriate forum for the determination of the questions concerning qualifications, vacancies and disputed elections.

26 At the time of the Adelaide Convention of 1897, there were two clauses which together were in substantially the same terms as the first form of s 47, though they dealt with the Senate and the House of Representatives separately[19]. During that Convention, Sir Edward Braddon suggested that these questions, particularly the question of disputed returns, should be determined by the High Court[20]. The Hon George Reid expressed a similar sentiment[21]. Mr Barton

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16 *Official Record of the Debates of the Australasian Federal Convention*, (Sydney), 21 September 1897 at 1034.

17 Williams, *The Australian Constitution: A Documentary History*, (2005) at 776.

18 Williams, *The Australian Constitution: A Documentary History*, (2005) at 776.

19 Williams, *The Australian Constitution: A Documentary History*, (2005) at 504 (Senate) and 507 (House of Representatives).

20 *Official Report of the National Australasian Convention Debates*, (Adelaide), 15 April 1897 at 680.

21 *Official Report of the National Australasian Convention Debates*, (Adelaide), 15 April 1897 at 681.

discouraged the amendment, explaining that the clause reflected significant discussion in the Constitutional Committee which had added the proviso "until The Parliament otherwise provides"[22]. In his view it was preferable to leave it to the federal Parliament to decide after the Houses were called together.

27 During the same debate, Bernhard Wise pointed to there being distinct questions. He described the question of a disputed return as "a matter of altogether a different character"[23] from questions as to the qualifications of a member or as to vacancies. Whilst these latter questions might be decided by the relevant House, he proposed that disputed returns be decided by the High Court when it was established. This was accepted. The reference to disputed returns was removed from the two clauses and another[24], dealing with disputed returns, was inserted. In the result, disputed elections were to be referred to the Court and questions of qualifications and vacancies were left to be determined by the Houses of Parliament unless they otherwise provided[25].

28 At the Sydney Convention in 1897, the question whether to restore disputed elections to the other two clauses was considered. After initial objection, Mr Wise conceded that the matter was best left to the Drafting Committee[26]. Mr Barton was of the same view[27]. The revised draft presented by the Drafting Committee replaced all prior clauses with one which was in terms substantially the same as s 47. Only minor drafting changes were made thereafter and no further debate took place. The result was that all three questions – as to the qualifications of a senator or member of the House of

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22 *Official Report of the National Australasian Convention Debates*, (Adelaide), 15 April 1897 at 681.

23 *Official Report of the National Australasian Convention Debates*, (Adelaide), 15 April 1897 at 681.

24 Clause 48A: see *Official Report of the National Australasian Convention Debates*, (Adelaide), 22 April 1897 at 1150.

25 *Official Report of the National Australasian Convention Debates*, (Adelaide), 22 April 1897 at 1150.

26 *Official Record of the Debates of the Australasian Federal Convention*, (Sydney), 13 September 1897 at 465.

27 *Official Record of the Debates of the Australasian Federal Convention*, (Sydney), 21 September 1897 at 1034.

Representatives, as to a vacancy in either House, and concerning a disputed election – were left to be determined by the House in which the question arose.

29 It 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. It is not necessary to consider what changes were made to those arrangements by statute in the period leading up to Federation and the extent to which those changes may have been imported by s 49[28]. It is not necessary to do so because s 47 expressly provides for the determination of these questions.

Section 47 and authority

30 The authority given in s 47 to the Houses of the Commonwealth Parliament to determine the questions there stated, and the denial of that authority to the courts unless Parliament otherwise provided, is confirmed by the Convention Debates and it is confirmed by authority.

31 In *R v Governor of South Australia*[29], the election of a person to the Senate was held to be void. The Parliament of South Australia purported to treat it as a casual vacancy and appointed another person as a senator. The claim for mandamus against the Governor of South Australia, to issue writs for a new election, failed for the reason that the Governor was not an officer of the Commonwealth. The Court also declined to answer the question whether there was or was not a vacancy in the representation of South Australia. Barton J, speaking for the Court, expressly refrained from doing so. His Honour explained[30]:

> "It seems to be clear that the question whether there is or is not now a vacancy in the representation of South Australia in the Senate is one of the questions to be decided by the Senate under sec 47 'unless the Parliament otherwise provides.' Parliament can, no doubt, confer authority to decide such a question upon this Court, whether as a Court of Disputed Returns or otherwise. But until the question is regularly raised for decision we reserve our opinion upon it."

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28 *Sue v Hill* (1999) 199 CLR 462 at 483 [36].

29 (1907) 4 CLR 1497; [1907] HCA 31.

30 *R v Governor of South Australia* (1907) 4 CLR 1497 at 1513.

32 This passage was referred to with approval by this Court in *In re Wood*[31]. It was there observed that the jurisdiction given by s 47 to the respective Houses of Parliament, to determine questions respecting the qualifications of their own members or respecting a vacancy, had been acknowledged in that case.

33 *Stott v Parker*[32] concerned the question of a vacancy in the House of Assembly of the Parliament of South Australia. Section 43 of the *Constitution Act* 1934 (SA) was of similar effect to s 47 of the Commonwealth Constitution. It provided that any question respecting any vacancy shall be determined by the House of Parliament in which the vacancy occurred. The Speaker of the House of Assembly took the view that a seat had become vacant by reason of a member's bankruptcy and withheld that person's parliamentary salary. In proceedings by the person to enforce payment of the salary, he contended that he remained a member of the House. Napier J[33] and Richards J[34] considered that the legal right to payment depended upon a determination whether there was a vacancy. Their Honours held that the Court had no jurisdiction to determine that question as it was one for the House pursuant to s 43[35].

34 In *Sue v Hill*[36] it was said of the jurisdiction given by s 376 of the Electoral Act to the Court of Disputed Returns that there is no reason to think that it is more limited than that of the relevant House, if the House was itself determining the question. In the joint judgment in that case it was said that any question respecting the qualification of Mrs Hill as a senator, any question respecting a vacancy in the Senate, and any question of her disputed election to the Senate would, if the Parliament had not otherwise provided, have been for determination by the Senate[37]. This would have followed from the operation of s 47.

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31 (1988) 167 CLR 145 at 159; [1988] HCA 22.

32 [1939] SASR 98.

33 *Stott v Parker* [1939] SASR 98 at 103-105.

34 *Stott v Parker* [1939] SASR 98 at 106.

35 *Stott v Parker* [1939] SASR 98 at 105, 109.

36 (1999) 199 CLR 462 at 476 [16], 478-479 [21], 480 [27].

37 *Sue v Hill* (1999) 199 CLR 462 at 473 [5].

The Common Informers Act – purpose

35 The extrinsic materials suggest that the principal purpose of the Common Informers Act was to limit the amount that a person might have to pay by way of penalty in the event that he or she was found to be incapable of sitting. That possibility was regarded as distinctly real at the time[38]. In the Second Reading Speech for the Bill[39], the Attorney-General described the total penalty which such a person might have to pay as "enormous sums". This was so, not the least, because s 46 provided for a penalty for every day that a person had sat whilst disqualified, without limit. The Common Informers Act provided that limit[40].

36 The mischief to which the plaintiff submits the Common Informers Act was directed may be seen in what the Attorney-General said in Parliament about public perceptions. He envisaged a situation where a majority of the House resolved not to refer a question about a person's incapacity to sit to this Court. He considered that the public might think this to be little different from a conspiracy. This was a situation which the Government was anxious to avoid, he said[41]. These remarks were made by the Attorney-General at the conclusion of debate. They do not form any part of the materials which may be used as an aid to construction[42].

37 It is nevertheless correct to observe, as McHugh J did in *Sue v Hill*[43], that there appears to have been something of an assumption made in the Second Reading Speeches in the Senate and the House of Representatives that this Court would be dealing with the question whether a person was disqualified and unable to sit in a proceeding brought under the Common Informers Act. Assumptions of this kind are not useful to determine questions of the construction of the Constitution.

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38 *In re Webster* (1975) 132 CLR 270; [1975] HCA 22.

39 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 22 April 1975 at 1978-1979.

40 See *Common Informers (Parliamentary Disqualifications) Act* 1975 (Cth), s 3(2).

41 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 22 April 1975 at 1985.

42 *Acts Interpretation Act* 1901 (Cth), s 15AB.

43 (1999) 199 CLR 462 at 556 [244].

The Common Informers Act and judicial power

38 The plaintiff submits that the Common Informers Act should not be read less amply than the provisions of the Electoral Act were read in *Sue v Hill*[44]. They should be read so as to authorise the determination by this Court of all elements of liability necessary for the imposition of a penalty, including the defendant's ability or otherwise to sit. Reliance is placed in this regard on what was said in *Sue v Hill* concerning the conferral of judicial power.

39 One of the issues in *Sue v Hill* concerned whether Pt XXII Div 1 of the Electoral Act is a law for the determination of a matter falling within the judicial power of the Commonwealth. In the passage in the joint judgment on which the plaintiff relies[45] it was said that, regarding the incapacity specified in s 44 from which Mrs Hill was said to suffer, the Parliament had provided the means of resolving the facts and their legal consequences by enacting Pt XXII Div 1. And it was said that that Division is a law for the judicial determination of a matter arising under the Constitution or involving its interpretation, within the meaning of s 76(i) of the Constitution.

40 It may be accepted that Pt XXII Div 1 of the Electoral Act and the Common Informers Act have in common that they involve a conferral of the judicial power in s 71 of the Constitution. It is also clear from the joint judgment in *Sue v Hill* that Pt XXII Div 1 is a law of the kind referred to in s 76(i) of the Constitution, but that is because it is a law made under s 47.

41 The petition brought in *Sue v Hill* raised the question whether Mrs Hill was incapable of being chosen as a senator because she was a "citizen of a foreign power" within the meaning of s 44(i). In the passage in the joint judgment immediately following that relied upon by the plaintiff[46], it was observed that if the Parliament had not otherwise provided by enacting Pt XXII Div 1, that question would have "been for the determination of the Senate". Their Honours said "[t]hat would have followed from the operation of s 47 of the Constitution"[47].

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44 (1999) 199 CLR 462.

45 *Sue v Hill* (1999) 199 CLR 462 at 472-473 [4].

46 *Sue v Hill* (1999) 199 CLR 462 at 473 [5].

47 *Sue v Hill* (1999) 199 CLR 462 at 473 [5].

42 The Common Informers Act is a law made under s 46 not s 47, as the plaintiff concedes. It does not share the characteristics of a law made under s 47, from which it may be concluded that it is also a law conferring authority to decide questions arising under s 76(i). Whether it does so is to be resolved by a process of construction, not by analogy with a law of a different kind.

43 *Sue v Hill* is not authority for the proposition for which the plaintiff contends. It is authority for the proposition that the context for questions as to qualification arising under s 47 is s 44. This is a proposition which the plaintiff's argument largely denies.

44 The plaintiff submits that the words "declared by this Constitution" necessarily involve the exercise of judicial power. The plaintiff overstates the importance of these words. The word "declared" is used throughout the Constitution in various contexts. The use of the word "declared" in s 46 and the use of the word "determined" in s 47 do not identify, respectively, a judicial and a non-judicial power. The words "declared by this Constitution to be incapable of sitting" in s 46, in relation to the person to be penalised, are apt to direct attention to other provisions in the Constitution which provide the circumstances which render a person incapable of sitting. As the words suggest, the Constitution itself states the circumstances which render a person incapable of sitting[48]. It does so in s 44 and in other provisions relating to qualifications.

45 The question as to which forum has the authority to determine whether a person is incapable of being chosen or of sitting – because he or she suffers from a disability referred to in s 44 or is otherwise disqualified from sitting – is not to be decided by assumptions about whether it must have been intended to provide courts with the authority to decide the first element of liability in a common informer action. In the absence of express provision in s 46 conferring an authority to decide, the question is whether an implication of that power is necessary. That depends largely upon whether provision has been made for the determination of the question elsewhere in the Constitution. Attention is immediately directed to s 47.

Questions arising under s 47

46 The disabilities referred to in s 44 may prevent a person from being elected, or otherwise chosen, or from continuing to sit. In the latter respect the section has a continuing operation. Questions as to whether a person is

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48 *Sue v Hill* (1999) 199 CLR 462 at 472 [4], 484 [38].

disqualified might arise with respect to a forthcoming election or an election which has been held, or they might arise during the term that the person sits in either House. The three categories of questions in s 47 are apt to deal with questions arising under s 44 at any time.

47 In *Sykes v Cleary* [No 1][49], *In re Wood*[50] and *Sue v Hill*[51] it was pointed out that the three categories of questions in s 47 are not mutually exclusive. In *Sykes v Cleary* [No 1], Dawson J observed that a question of the qualification of a person may arise in a context other than that of a disputed election; conversely a disputed election may involve a qualification of a person to be chosen[52]. In some circumstances the question of a vacancy may arise in connection with a disputed election; in others it may arise independently of it. In *Sue v Hill*[53] Gaudron J took up what his Honour had said in *Sykes v Cleary* [No 1] and Gleeson CJ, Gummow and Hayne JJ agreed[54].

48 There can be no doubt about the breadth of the operation of s 47. This is evident from the use of the words "any" and "respecting" with respect to the questions referred to in it.

49 The question whether the defendant is disqualified by reason of s 44(v) and therefore incapable of sitting would seem readily to fall within the language of s 47. A determination of that question could supply the necessary element for liability for the purposes of s 46.

Questions arising under s 46

50 The question most clearly arising under s 46 is the amount of the penalty which is to be imposed on a person who sat in either House whilst disqualified in some respect. Clearly enough, the court in which the common informer

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49 (1992) 66 ALJR 577 at 578; 107 ALR 577 at 579; [1992] HCA 32.

50 (1988) 167 CLR 145 at 160.

51 (1999) 199 CLR 462 at 480 [25], 507-508 [113]-[114].

52 *Sykes v Cleary* [No 1] (1992) 66 ALJR 577 at 578; 107 ALR 577 at 579.

53 (1999) 199 CLR 462 at 507-508 [112]-[113].

54 *Sue v Hill* (1999) 199 CLR 462 at 480 [25].

proceeding is brought is to make that order in the exercise of its judicial power and it must determine the quantum.

51 Unlike s 47, s 46 does not contain any express authorisation for the court to determine any matter as to the qualifications of a person from which it may be concluded that he or she is incapable of sitting. The words "any person declared by this Constitution to be incapable of sitting" strongly suggest that the circumstances rendering the person incapable of sitting are to be found elsewhere in the Constitution. The particular forum which is to determine whether the provisions of the Constitution have that effect in a given case is not identified by these words. It is to be identified within the scheme of Ch I Pt IV and in particular by reference to the authority given to determine questions arising under s 44 and the other provisions.

52 Whilst the question posed by these words in s 46 is one necessary to be determined before a person is liable to the imposition of a penalty, it is not necessary that the answer to that question be determined by the court hearing a common informer action. Indeed, there may be good reason to conclude that the question should not be determined in that proceeding, given that the same question is to be dealt with under s 47 and that it may be part only of the overlapping questions which may there arise.

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 decision as to qualifications in common informer proceedings.

Section 44 – a singular condition?

54 It is necessary then to consider the plaintiff's argument concerning the construction of s 44 and the scheme of Ch I Pt IV in some more detail.

55 The starting point for it is the words "any person", which appear in s 46 and also at the commencement of s 44. The plaintiff submits that they are an important textual feature of s 46. It is difficult to discern any special connection from their use in the two sections. The words are used in s 44 because it applies the disabilities there stated to both persons who seek to be chosen and those who have been chosen. They are used in s 46 to refer to any person who, by reason of

s 44, was or is incapable of sitting as a senator or member of the House of Representatives and does so.

56 The plaintiff points to a distinction between the words "any person" in ss 44 and 46 and other provisions of Ch I Pt IV, which have as their subject "a senator or a member of the House of Representatives". It may be observed, however, that the subject of s 47 in the first category of questions is not such a person; its subject is any question respecting the qualifications of that person to hold those offices.

57 The further distinction which the plaintiff seeks to draw between a senator or a member, as persons who have been chosen, on the one hand, and a person who is incapable of being chosen, on the other, is more closely related to his argument that s 44 contains a singular condition, as referred to earlier in these reasons[55].

58 The singular condition in s 44 for which the plaintiff contends is where a person is incapable of being chosen *and* sits. Section 44 is to be construed in this way, on the plaintiff's argument, because s 46 does not impose a penalty if a person is chosen but does not sit. The words "or of sitting" do not furnish an alternative path to liability in a common informer suit.

59 It follows from the singular condition in s 44 that a person who has been duly elected or otherwise chosen, but who later becomes subject to any of the disabilities mentioned in s 44, is not a person "incapable of being chosen" within the meaning of s 44. The plaintiff submits that that person is incapable of sitting or continuing to sit not because of the operation of s 44, but because s 45 provides that his or her place "shall thereupon become vacant".

60 The operation of the scheme of Ch I Pt IV for which the plaintiff contends is not entirely clear. It can nevertheless be deduced that questions as to the qualifications of persons seeking to be chosen do not fall within s 47, but they do within s 46. On the plaintiff's argument, s 47 authorises the determination of questions relating to qualifications which arise under s 34 (and presumably also s 43) and it authorises questions relating to a vacancy or a disputed election.

61 The plaintiff does not explain how the text of s 47 is to be construed either alone or in the context of s 44 in order to accommodate this division of responsibility. He does not explain why questions under ss 34 and 43 would be assigned to s 47, but not those arising under s 44.

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55 At [17].

62 The constitutional division of responsibility effected by the plaintiff's argument is said to be explained by reference to constitutional policy. The Constitution, he says, was less concerned with people who had been duly elected but subsequently became subject to a s 44 disability during his or her term than it was with respect to the person being chosen. It is not explained how such a policy was to be gleaned, or why the Constitution would create such a division and at the same time make it subject to Parliament otherwise providing.

63 In his written submissions, the plaintiff went so far as to assert that s 47 is not "the exclusive source, or even a source" of a court's authority to decide a matter under s 44. In oral submissions the plaintiff acknowledged that even on his argument it could not be said that s 47 does not refer to s 44. It must necessarily do so because s 45 includes s 44 in its reference to a person becoming subject to the disabilities referred to in that section. The plaintiff did not suggest that this altered the general tenor or structure of his argument.

64 It is not necessary to further consider the scheme for which the plaintiff contends and the difficulties in the operation of the provisions of Ch I Pt IV which might arise from it. It is not necessary to do so because the construction for which he contends founders on its fundamental premise. It involves a misconception concerning ss 44 and 45.

65 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.

66 The plaintiff's argument that s 44 does not itself render a person who becomes subject to a disability during his or her term incapable of sitting, but s 45 does so, cannot be accepted. It is plainly inconsistent with what was said in *Re Nash (No 2)*[56]. It was there explained that if a person, after becoming a senator or member of the House of Representatives, becomes subject to a disability mentioned in s 44, "not only does s 44 operate to prevent the person from sitting but s 45(i) operates to vacate his or her place. Section 45(i) has that operation even if the person has not yet taken his or her seat for the place for which he or she was chosen and, by reason of becoming subject to the disability, is prevented by s 44 from ever doing so."

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56 (2017) 92 ALJR 23 at 29-30 [33]; 350 ALR 204 at 212; [2017] HCA 52.

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.

Conclusion and orders

68 The questions should be answered:

(1) No.

(2) Unnecessary to answer.

69 The plaintiff's proceeding under the Common Informers Act should be stayed until the question whether the defendant is incapable of sitting is determined[57].

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57 *Stott v Parker* [1939] SASR 98.

70 GAGELER J. I agree that the questions reserved should be answered in the terms stated by Kiefel CJ, Bell, Keane and Edelman JJ. My reason for considering that the High Court lacks jurisdiction in a common informer action to determine whether a person is constitutionally incapable of sitting as a senator or member of the House of Representatives comes down to an overriding concern to ensure coherence in the operation of ss 46, 47, 76 and 77 of the Constitution.

71 Section 46 of the Constitution does no more than to create a cause of action, which is to exist unless and until the Parliament otherwise provides by a law enacted under s 51(xxxvi) of the Constitution either abolishing the cause of action altogether or substituting another cause of action. The section does not confer upon any court authority to decide any of the elements of that cause of action. The section's reference to suit on the cause of action being brought "in any court of competent jurisdiction" is premised on the jurisdiction of the court – its authority to decide – being found in another source[58]. The source of the jurisdiction of a court of competent jurisdiction might be a State law conferring State jurisdiction on a State court which is then bound in the exercise of that State jurisdiction by the Constitution and any applicable Commonwealth law, as recognised in covering cl 5 of the Constitution. The source of the jurisdiction of a court of competent jurisdiction might alternatively be a Commonwealth law conferring federal jurisdiction on the High Court under s 76(i) or (ii) of the Constitution or on a State court or another federal court under s 77(i) or (iii) of the Constitution.

72 Section 47 of the Constitution, in contrast, is squarely addressed to authority to decide and to nothing other than authority to decide. The relevant effect of the section is that, unless the Parliament otherwise provides and to the extent that the Parliament does not otherwise provide[59], "any question" which answers the description of a "question respecting the qualification of a senator" can only be determined by the Senate and "any question" which answers the description of a "question respecting the qualification of a ... member" can only be determined by the House of Representatives. As with the prescription in Art I §5 of the Constitution of the United States that "[e]ach House shall be the Judge of the … Qualifications of its own Members", there is in s 47 a "textually

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58 Cf *R v Ward* (1978) 140 CLR 584 at 588-589; [1978] HCA 27.

59 See *R v Pearson; Ex parte Sipka* (1983) 152 CLR 254 at 260-261; [1983] HCA 6; *In re Wood* (1988) 167 CLR 145 at 157-162; [1988] HCA 22.

demonstrable constitutional commitment" of the determination of the identified questions "to a coordinate political department"[60].

73 Absent the Parliament otherwise providing for the purpose of s 47 of the Constitution by a law enacted under s 76(i) or (ii) or s 77(i) or (iii) of the Constitution, no question respecting the qualification of a senator or of a member is within the adjudicatory competence of the High Court or of any other court. Conversely, jurisdiction conferred on a court by a law enacted under s 76(i) or (ii) or s 77(i) or (iii) of the Constitution that is not for the purpose of otherwise providing for the purpose of s 47 of the Constitution cannot extend to jurisdiction to determine any question respecting the qualification of a senator or of a member.

74 The question posed by s 46 of whether a senator or member against whom a suit is brought is a "person declared by this Constitution to be incapable of sitting" answers the description of a "question respecting the qualification" of that senator or member within the meaning of s 47. The consequence is that, unless the Parliament otherwise provides for the purpose of s 47, that element of the cause of action created by s 46 or by a law enacted under s 51(xxxvi) for the purpose of s 46 can only be established by a prior determination of the Senate or the House.

75 The alternative view of the relationship between ss 46 and 47 is not without precedent. It was the view to which Gaudron J was persuaded in *Sue v Hill*[61]. It was presaged by Professor Enid Campbell in an opinion prepared for the Royal Commission on Australian Government Administration in 1976[62]. Professor Campbell called in aid what she fairly described in that opinion as "dictum in the English case of *Bradlaugh v Gossett*[63] which suggests that the court trying the suit for penalties would not be bound by the House's adjudication"[64]. The same dictum was noted in the edition of Erskine May's well-known treatise on parliamentary practice current at the time of federation as

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60 See Lindell, "The Justiciability of Political Questions: Recent Developments", in Lee and Winterton (eds), *Australian Constitutional Perspectives*, (1992) 180 at 184, quoting *Baker v Carr* 369 US 186 at 217 (1962). See also *Powell v McCormack* 395 US 486 at 548 (1969).

61 (1999) 199 CLR 462 at 510 [118]; [1999] HCA 30.

62 Royal Commission on Australian Government Administration, *Report of Royal Commission*, (1976), Appendix, vol 1 at 208-209 [54]-[55].

63 (1884) 12 QBD 271 at 281-282.

64 Royal Commission on Australian Government Administration, *Report of Royal Commission*, (1976), Appendix, vol 1 at 208 [54].

one of a number of "conflicting opinions as to the limits of parliamentary privilege, and the jurisdiction of courts of law"[65].

76 The alternative view, however, bristles with difficulty. First, it treats s 46 as addressed to the topic of authority to decide, when that section is not. Second, it departs from the language of s 47 in order to treat the authority of a court to decide one of the questions posed by s 46 as an exception to the generality of the exclusive authority conferred on the Senate and the House by s 47 to decide all of the questions referred to in that section. In so doing, it gives rise to the potential for the constitutional structure to produce contradictory yet equally authoritative answers to the same constitutional question – one emanating from a court and another emanating from the Senate or the House. It countenances legal uncertainty and institutional disharmony.

77 To the objection that rejection of the alternative view robs s 46 of meaningful practical operation, two responses can be made. The first is to observe that the progenitor of s 46, s 28 of the *Succession to the Crown Act* 1707[66], appears never to have been acted on to give rise to a single common informer action at any time in the two and a half centuries in which that section remained in force until its repeal by the *House of Commons Disqualification Act* 1957 (UK). The second is to note that the practical operation that is left to s 46 perfectly fulfils the function which the Report of a Select Committee of the House of Commons in 1941 suggested may have been intended by that House when participating in the enactment of s 28. Having noted that how provision for a common informer action came to be incorporated in the Act of 1707 was "somewhat obscure", the authors of the Report expressed the opinion that "[i]t is difficult therefore to believe that the Commons in 1707 had any deliberate intention of giving the courts any jurisdiction which would interfere with the privileges they had been so jealously fighting to maintain, or of giving the courts a right to interfere with the exclusive control of the Commons over questions relating to membership of the House". The authors of the Report went on to proffer the suggestion that "it may well be held that the Commons in 1707 not only did not intend to, but did not in fact, give up their claim to exclusive jurisdiction in regard to qualification for membership of their House, but that they merely established machinery for enforcing by penalties a decision made by them"[67].

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65 Erskine May, *A Treatise on the Law, Privileges, Proceedings and Usage of Parliament*, 10th ed (1893) at 134.

66 6 Anne c 41.

67 United Kingdom, House of Commons, *Report from the Select Committee on Offices or Places of Profit under the Crown*, (1941) at xxxi-xxxii [55]-[56].

78 The Commonwealth Parliament has, by a law enacted under s 76(i) and (ii) of the Constitution, otherwise provided for the purpose of s 47 of the Constitution in the enactment of Pt XXII of the *Commonwealth Electoral Act* 1918 (Cth) ("the Electoral Act")[68].

79 By enacting ss 3 and 4 of the *Common Informers (Parliamentary Disqualifications) Act* 1975 (Cth) ("the Common Informers Act"), the Parliament has exercised its power under s 51(xxxvi) to make a law which replaces the constitutional cause of action created by s 46 with a statutory cause of action. As is common ground in the present case, however, the Parliament has not by enacting s 5 of the Common Informers Act otherwise provided for the purpose of s 47 in conferring jurisdiction on the High Court under s 76(i) and (ii) of the Constitution. The jurisdiction conferred by s 5 is therefore circumscribed to the extent of the continuing exclusive operation of s 47 of the Constitution.

80 The consequence of the jurisdiction conferred on the High Court under s 76(i) and (ii) of the Constitution by s 5 of the Common Informers Act being circumscribed to the extent of the continuing exclusive operation of s 47 of the Constitution is that the element of the statutory cause of action spelt out in s 3 of the Act which requires that the person against whom suit is brought be "a person declared by the Constitution to be incapable of so sitting" as a senator or member can be established only by a separate determination of that question by the Senate or the House or by this Court sitting as the Court of Disputed Returns under Pt XXII of the Electoral Act. The High Court cannot determine the question for itself in the exercise of the jurisdiction conferred by s 5 of the Common Informers Act.

81 That outcome, it must be acknowledged, means that the Common Informers Act fails to meet the central concern identified by the then Attorney-General when introducing the Bill for its enactment. That concern, borne out by then recent experience[69], was that a political majority in the Senate or the House might prevent a putative disqualification from being tested by voting down referral of the question of disqualification to the High Court sitting as the Court of Disputed Returns under the Electoral Act[70]. The discrepancy is perhaps explicable on the basis suggested by McHugh J in *Sue v Hill*[71] that the Bill was prepared with an expedition which did not allow for adequate reflection. More

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68 *In re Wood* (1988) 167 CLR 145 at 157-161.

69 See Sawer, *Federation under Strain*, (1977) at 35.

70 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 22 April 1975 at 1985-1986.

71 (1999) 199 CLR 462 at 556 [244].

likely, I think, is that the Attorney-General was acting on a considered view of the constitutional structure which the High Court now unanimously rejects. Whatever the explanation, 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.

82 NETTLE AND GORDON JJ. Section 3(1) of the *Common Informers (Parliamentary Disqualifications) Act* 1975 (Cth) ("the Common Informers Act") provides that "[a]ny 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" shall be liable to pay a penalty to any person who sues for it.

83 The plaintiff, Mr Alley, commenced proceedings in the High Court claiming, pursuant to s 3(1)(a) and (b) of the Common Informers Act, that the defendant, Dr Gillespie, was liable to pay to him $200 for any or all of the days that Dr Gillespie sat as a member of the House of Representatives of the Parliament of the Commonwealth of Australia when allegedly incapable of doing so.

84 The House of Representatives has not determined or declared that Dr Gillespie was not capable of being chosen as a member of the House of Representatives, was not or is not capable of sitting as a member of the House, was not or is not qualified to be a member of the House, or was or is declared by the Constitution to be incapable of sitting as a member of the House.

85 The House of Representatives has not referred any question respecting the qualifications of Dr Gillespie as a member of the House to the Court of Disputed Returns under s 376 of the *Commonwealth Electoral Act* 1918 (Cth).

86 No proceedings have been commenced under Pt XXII of the Commonwealth Electoral Act disputing the validity of the election or the return of Dr Gillespie as a member of the House of Representatives in July 2016.

87 The High Court of Australia, whether sitting as the Court of Disputed Returns or otherwise, has not determined or declared that Dr Gillespie was not capable of being chosen as a member of the House of Representatives, was not or is not capable of sitting as a member of the House, was not or is not qualified to be a member of the House, or was or is declared by the Constitution to be incapable of sitting as a member of the House.

88 Two questions have been referred to the Full Court under s 18 of the *Judiciary Act* 1903 (Cth). First, can and should the High Court decide whether Dr Gillespie 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?

89 Second, if the answer to the first question 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 Dr Gillespie 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?

90 The first question should be answered "No". Whether a member or senator is incapable of being chosen or is ineligible to sit in the House or Senate is to be decided in accordance with s 47 of the Constitution, including the additional mechanisms prescribed by legislation made under it. It is not open in a proceeding under s 3 of the Common Informers Act for the High Court to decide whether Dr Gillespie was a person declared by the Constitution to be incapable of sitting as a member of the House of Representatives.

91 It is therefore unnecessary to answer the second question.

92 Section 3 of the Common Informers Act must be understood and applied in its constitutional context. In particular, it must be understood and applied having regard to ss 46 and 47 of the Constitution.

93 Section 46 of the Constitution is headed "Penalty for sitting when disqualified". It provides that "*[u]ntil the Parliament otherwise provides*" a penalty may be recovered by a person who sues for it in any court of competent jurisdiction, where a person is *declared by the Constitution* to be incapable of sitting and has sat (emphasis added).

94 Section 47 of the Constitution is headed "Disputed elections". It provides that:

> "*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." (emphasis added)

95 Both sections give the Parliament power to make "other" provision. The Parliament has "otherwise provide[d]" with respect to s 46[72] by enacting the Common Informers Act. Parliament has "otherwise provide[d]" with respect to s 47 by enacting Pt XXII of the Commonwealth Electoral Act.

96 The Common Informers Act limits both the time within which a penalty may be sought[73] and the amount of the penalty that may be recovered[74].

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72 Read with s 51(xxxvi) and s 76(i) and (ii) of the Constitution.

73 s 3(2) of the Common Informers Act.

74 s 3(1) of the Common Informers Act.

The Commonwealth Electoral Act provides for, and fixes, means additional to s 47 by which questions about the eligibility of senators and members are to be determined[75].

97 The plaintiff seeks to have a question about eligibility decided in a way which is not provided for by s 47 of the Constitution, or by the Commonwealth Electoral Act, but rather in a proceeding he has instituted under the Common Informers Act. That cannot be done.

98 The title of the Common Informers Act is "[a]n Act to make other Provision with respect to the Matter in respect of which Provision is made by section 46 of the Constitution", not s 47 of the Constitution. The matter in respect of which provision is made by s 46 is the imposition of a penalty for a person declared by the Constitution to be incapable of sitting as a senator or as a member of the House of Representatives.

99 The Common Informers Act uses express language to confirm that the legislature has "otherwise provide[d]" pursuant to s 46 of the Constitution.

100 Section 3(1) of the Common Informers Act provides that "any person" may commence proceedings against "[a]ny 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" for a prescribed amount[76] (emphasis added).

101 Section 4 provides that on or after the date of commencement of the Common Informers Act, a person is not liable to pay any sum under s 46 of the Constitution and no suit shall be instituted, continued, heard or determined in pursuance of that section. The effect of s 4 of the Common Informers Act is that s 3 of that Act replaces the right to institute a suit under s 46 of the Constitution.

102 Original jurisdiction is conferred on the High Court in suits under the Common Informers Act and no other court has jurisdiction in such a suit[77]. A suit under the Common Informers Act must be brought within 12 months after

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75 See generally Pt XXII of the Commonwealth Electoral Act.

76 The amount is equal to the total of $200 in respect of his or her having so sat on or before the day on which the originating process in the suit is served on him or her and $200 for every day, subsequent to that day, on which he or she is proved in the suit to have so sat: s 3(1)(a) and (b) of the Common Informers Act.

77 s 5 of the Common Informers Act.

the sitting of the senator or member to which the suit relates[78]. The High Court shall refuse to make an order in a suit under the Common Informers Act that would, in the opinion of the Court, cause the person against whom it was made to be penalized more than once in respect of any period or day of sitting as a senator or as a member of the House of Representatives[79].

103 What issues may be raised in a proceeding under the Common Informers Act directs attention to s 47 of the Constitution, and the Commonwealth Electoral Act.

104 Sections 46 and 47 are adjacent to each other. Section 46 creates an enforceable liability and empowers the Parliament to alter that liability. Section 47 provides for means of determining any question respecting qualifications. The plaintiff's submissions – that s 46 should be seen as empowering the Parliament to provide for means of determining whether a person is incapable of *sitting* as a senator or member of the House of Representatives, and that s 47 should be seen as empowering the Parliament to provide for means of determining questions concerning the qualification of a senator or member only in relation to questions other than whether a person is incapable of sitting as a senator or member – are untenable. Section 46 does not expressly or by necessary implication empower the Parliament to provide for means of determining any question concerning the qualification of a senator or member of the House of Representatives. Section 47 does. That difference, and the considerations mentioned in what follows, signify that the determination of who is disqualified is left to the processes fixed under s 47.

105 First, s 47 states 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). The word "any" makes 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. If it had been intended that a proceeding by a common informer could (in any court of competent jurisdiction) determine the qualification of a senator or member, it is unlikely that it would provide, as it does, that "any question" shall be determined by the House in which the question arises.

106 Secondly, before the Parliament otherwise provided under s 47, the determination of any question respecting the qualification of a member or senator was to be made by the relevant House. That is, the question whether, in the

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78 s 3(2) of the Common Informers Act.

79 s 3(3) of the Common Informers Act.

words of s 46, a person was "declared by this Constitution to be incapable of sitting" was a matter within the exclusive cognisance of the relevant House. Unless and until the relevant House made such a determination in accordance with s 47, no liability under s 46 would arise. A determination under s 47 was antecedent to the determination that a penalty was payable under s 46.

107 Thirdly, that relationship between ss 46 and 47 of the Constitution, and, in particular, that the determination of qualifications of members of Parliament was within the exclusive cognisance of the Parliament, is consistent not only with the text and structure of the Constitution but also with the common law principle of exclusive cognisance.

108 The principle of exclusive cognisance is that each House of Parliament has "the exclusive right … to manage its own affairs without interference from the other or from outside Parliament"[80]. Exclusive cognisance can be waived or relinquished by Parliament; and, as a result, the areas of exclusive cognisance have changed, significantly, as a result of legislation. Here the Parliament has made other provision under s 47. Parliament has altered the existing and long-standing institutional arrangements for the determination of questions about the qualification of persons by enacting Pt XXII of the Commonwealth Electoral Act. That Part of the Act is a law which otherwise provides under s 47 of the Constitution. But it provides only two additional means by which questions concerning the qualifications of senators or members or the validity of elections or returns may be determined.

109 In Div 1 of Pt XXII, the Commonwealth Electoral Act provides a mechanism for an election to be disputed by petition addressed to the Court of Disputed Returns, and not otherwise, within a prescribed time limit[81]. In Div 2 of that Part, s 376 provides that:

> "Any 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." (emphasis added)

Unless a petition is instituted within time, or a question is referred to the Court of Disputed Returns by resolution of the House in which the question arises, the Court of Disputed Returns has no jurisdiction.

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80 *R v Chaytor* [2011] 1 AC 684 at 712 [63].

81 See ss 353 and 355 of the Commonwealth Electoral Act.

110 Fourthly, to say that Parliament has, by enacting Pt XXII of the Commonwealth Electoral Act, "otherwise provide[d]" for the determination of questions concerning the qualification of senators or members does not mean that s 47 can be regarded as the "source" of the Court of Disputed Returns' jurisdiction in respect of such matters. As has been seen, the long-standing institutional arrangement was for such questions to be determined by the relevant House.

111 Fifthly, it was not contended, and it is not the case, that the Common Informers Act is a law that otherwise provides for the purposes of s 47. It was passed in 1975 in the wake of the Webster controversy[82]. It is a law that otherwise provides for the purposes of s 46 as a complete displacement of it. But it does not alter or add to the provisions that were then, and are now, made by s 47 of the Constitution and by Pt XXII of the Commonwealth Electoral Act for deciding any question respecting the qualifications of a senator or member to be chosen or sit as a senator or member.

112 Finally, the plaintiff's contention that the High Court can and should decide whether Dr Gillespie 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 not only is contrary to the text and context of s 47 of the Constitution and the common law principle of exclusive cognisance but also would create uncertainty. Allowing the Court to decide that issue in a suit instituted under s 3 of the Common Informers Act would permit an action to be brought up to seven years after an election for the Senate and up to four years after an election for the House of Representatives[83], contrary to the prescribed time limits[84] in the Commonwealth Electoral Act, and create the potential for inconsistent determinations on disqualification between a House of the Parliament and the High Court. The plaintiff's submissions did not address these difficulties.

113 In the result, it is to be concluded that any question respecting the qualifications of a senator or member to be chosen or to sit as a senator or member may be determined only by the House in which the question arises or by one of the processes prescribed by the Commonwealth Electoral Act. It may not be determined in a proceeding under the Common Informers Act. In the absence

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82 See *In re Webster* (1975) 132 CLR 270; [1975] HCA 22; *Sue v Hill* (1999) 199 CLR 462 at 556 [244]; [1999] HCA 30.

83 See ss 13 and 28 of the Constitution read with s 3(2) of the Common Informers Act.

84 See s 355(e) of the Commonwealth Electoral Act.

of a determination by the House in which the question arises, or by one of the processes prescribed by the Commonwealth Electoral Act, the Court does not have jurisdiction to determine liability under s 3 of the Common Informers Act.

Conclusion

114 The questions referred to this Court under s 18 of the Judiciary Act should be answered in the terms stated by Kiefel CJ, Bell, Keane and Edelman JJ.