

**Section 44 of the Commonwealth Constitution:  
As Enigmatic as Pharaoh's Dreams – or, What were they Thinking?**

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*“And do you think it possible” said Socrates, “to know what a democracy or popular State is without knowing what the people is?”<sup>1</sup>*

*Introduction*

In the sixth century BC, the lawgiver Solon ordained a radical new constitution for the Athenian city-state, rooted in the notion that well-governed polis “*makes all things wise and perfect.*”<sup>2</sup> By cancelling all debts both public and private, he “*liberated the people once and for all*”<sup>3</sup> thus paving the way for all citizens to be admitted into the city’s sovereign political institution, the Assembly.<sup>4</sup> In the centuries that followed, the Athenians perfected this autochthonous system of government that we now call “democracy”.

In his eulogy to the fallen Athenians delivered towards the end of the first year of the Peloponnesian War in 431BC, Pericles praised the uniqueness of his city’s commitment to democracy. Citizens were not hindered in participating in the affairs of the *polis* by the obscurity of their condition. To the contrary, advancement in public life was determined by “*reputation for capacity*”.<sup>5</sup>

In still more recent antiquity, Aristotle recognised that “*if a constitution is to be permanent, all parts of the state must wish that it should exist and the same arrangements maintained.*”<sup>6</sup> The genius of the Athenians was to achieve this aim through the maximisation of the citizenry’s participation in the city’s political life.<sup>7</sup>

Over two millennia after the Athenians had created a new organising principle for their republic, Alexis de Tocqueville found examples of democracy in the New England townships of the United States which he described as “*more perfect than antiquity had dared dream of*”.<sup>8</sup> But whilst the principles of ancient democracy have animated and informed modern constitutional discourse, their substance and scope have necessarily remained mutable.<sup>9</sup>

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<sup>1</sup> Xenophon, “*The Memorable Thoughts of Socrates*” (George Faulkner, Dublin, 1747) at p.324.

<sup>2</sup> Kagan, D. “*Pericles of Athens and the Birth of Democracy*” (1991, MacMillan, New York) at p.138.

<sup>3</sup> Aristotle, “*The Athenian Constitution*”, Parts 6 and 43.

<sup>4</sup> In Athens, enslavement for debt had been a fundamental law from the time of Draco in the 39<sup>th</sup> Olympiad in the 7<sup>th</sup> Century BC: Sinclair, R.K., “*Democracy and Participation in Athens*” (Cambridge, 1988), pp1-2.

<sup>5</sup> Thucydides “*The History of the Peloponnesian War*” Book II, 40.2 (Trans. Thomas Hobbes. Chicago: University of Chicago Press, 1989).

<sup>6</sup> Aristotle (1996), *Politics* Book II, p. 495.

<sup>7</sup> Although in the Athenian form of direct democracy every ‘citizen’ could participate in government, it was a limited concept by modern standards. To become a citizen one had to be an adult male, born of citizen parents: Aristotle. “*The Athenian Constitution*”, Part 42.

<sup>8</sup> Tocqueville, Alexis de. “*Democracy in America*” (University of Chicago, 2000) Book 1; Chapter 2, Part I.

<sup>9</sup> *Attorney-General (Cth); Ex rel McKinlay v The Commonwealth* (1975) 135 CLR 1 at 56 (Stephen J).

The very nature of direct participation in the Athenian model meant that people were not prevented from taking part in politics by the pursuit of their own economic interests. To Pericles, both rich and poor were the “*same people .. concerned both with their own private business and with political matters; even those who turn their attention chiefly to their own affairs do not lack judgment about politics.*”<sup>10</sup>

Coevally with the time when Athenian tyrants were being seen off, the Romans were busy expelling their last King.<sup>11</sup> Livy rejoiced that the affairs, civil and military, of the Roman people “*were henceforward free*”.<sup>12</sup> But unlike the Athenian democracy, the republic that replaced the Roman *rex* restricted the role of the citizen assemblies by means of powerful annually-elected magistrates and a permanent, aristocratic Senate.<sup>13</sup>

Senators in the Roman Republic were not paid an emolument as the property qualifications for membership guaranteed the patrician class control of the body. The ethical requirements of senators were, however, significant. Senators could not engage in banking or be party to any form of public contract, they could not own a ship that was large enough to participate in foreign commerce, and they could not leave Rome without permission from their fellow senators.<sup>14</sup>

Despite the distinctly undemocratic character of Roman Republic, its institutions nevertheless served as models for subsequent political theory and practice in the Western tradition. Alexander Hamilton claimed that the Republic had “*attained to the utmost height of human greatness.*”<sup>15</sup>

By contrast, the Athenian model of “direct” democracy, centred as it was on the citizenry (*demos*) who governed with plenary competence<sup>16</sup>, was not considered by the Framers of the US Constitution to be the ideal blueprint for an enduring polity. James Madison rejected the Athenian notion that large numbers of people could meet together to legislate: “*Had every Athenian citizen been a Socrates, every Athenian assembly would still have been a mob.*”<sup>17</sup> It was this deep distrust of human nature and suspicion of tyranny of the majority that led the U.S. Framers to favour institutions comprised of representative bodies over the whims of mob rule.

The new American Constitution therefore deliberately eschewed what many had understood to be the central features of democracy: the sovereignty of majority rule, the autonomy of communities, and the direct participation of the citizenry. Instead, a representative form of government was created to cater for the exigencies of the new nation and that involved “*the*

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<sup>10</sup> Pericles’ Funeral Oration in Thucydides “*The History of the Peloponnesian War*” Book II, 40.2 (Trans. Thomas Hobbes; University of Chicago Press, 1989).

<sup>11</sup> King Tarquinius Superbus was deposed in 509BC; the Athenian tyrant Hippias was ousted in 510BC by Athenian opposition and Spartan intervention.

<sup>12</sup> Livy, “*The Early History of Rome. Books I-V of The History of Rome from Its Foundation*” (Harmondsworth, Penguin, 1971) Book 2.

<sup>13</sup> Lintott, A. “*The Constitution of the Roman Republic*” (1999, Oxford University Press) at p.34.

<sup>14</sup> Byrd, R.C., “*The Senate of the Roman Republic*” (1995, US Govt. Printing Office, Washington) at p.36.

<sup>15</sup> *The Federalist* No.34 (Hamilton).

<sup>16</sup> Sinclair, R.K., “*Democracy and Participation in Athens*” (Cambridge, 1988), p.106.

<sup>17</sup> *The Federalist* No.55 (Madison); He elsewhere referred critically to “*the turbulent democracies of ancient Greece*”: *Federalist* No.14.

*total exclusion of the people, in their collective capacity, from any share*” in the American government.<sup>18</sup>

Far from creating a more perfect, indissoluble union truly representative of the new nation’s population, the U.S. Framers had a narrow vision of what “*We the People of the United States*” entailed.<sup>19</sup> Echoing the themes in Pericles funeral oration<sup>20</sup>, Abraham Lincoln in his oration commemorating the fallen at Gettysburg in 1863 used possibly the most lapidary of perorations to signify exactly what was at stake in that great conflict: “*government of the people, by the people, and for the people*”. That is, that the institution of truly representative government might “*perish from the earth*”.<sup>21</sup>

The very nature of representative democracy meant that the choice of suitable electors became critical to both the quality and to the very legitimacy of this form of government. Madison wrote of the danger of “*Men of factious tempers, of local prejudices, or of sinister designs, may, by intrigue, by corruption, or by other means*” betraying the interests of the people.<sup>22</sup> No longer could conflicts of interest be tolerated.

Edmund Burke’s vision of the representative nonpareil was one whose duty to his electorate was “*to sacrifice his repose, his pleasures, his satisfactions, to theirs; and above all, ever, and in all cases, to prefer their interest to his own.*”<sup>23</sup> Hamilton wrote, “*Nothing was more to be desired than that every practicable obstacle should be opposed to cabal, intrigue, and corruption.*”<sup>24</sup> Self-interest and bias occasioned by venal causes had to be weeded out and eradicated. To this end, Thomas Jefferson wrote that “*In questions of power then, let no more be heard of confidence in man, but bind him down from mischief by the chains of the Constitution*”.<sup>25</sup>

The US Constitution, born as it was out of revolution and infected with a deep suspicion of human nature, was designed to limit the influence of its elected officials through checks and balances on government power. By contrast, the Australian Constitution was designed to create a more effective instrument of the popular will in the already flourishing democracies found in the colonies.<sup>26</sup>

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<sup>18</sup> *The Federalist* No.63 (Madison).

<sup>19</sup> The “three-fifths” clause in Article I of the U.S. Constitution created a system of ‘virtual representation’ which increased the representation of the slave-holding States based on slave numbers, whilst denying the right to vote to slaves themselves: Akhil Reed Amar, “*America’s Constitution, A Biography*”, (Random House, 2005), Chapters 2, 10.

<sup>20</sup> Louis Warren, “Abraham Lincoln’s Gettysburg Address: An Evaluation” (Charles E. Merrill Publishing Co. 1946), p. 18”.

<sup>21</sup> As revolutionary as Fifteenth Amendment was in enfranchising former bondsmen, women would not achieve the right to vote until 1920 with the passage of the Nineteenth Amendment. The Suffrage Revolution marked the largest numerical extension of the franchise in American history: Akhil Reed Amar, “*America’s Unwritten Constitution*” (Basic Books, 2013) at Chapter 7.

<sup>22</sup> *The Federalist* No. 10 (Madison).

<sup>23</sup> Speech to the electors of Bristol. 3 Nov. 1774 in Burke, E. “*The Works of the Right Honorable Edmund Burke*” (London: John C. Nimmo, 1899), Vol. II, p. 95; see also *The King v Boston* (1923) 33 CLR 386 at 400 (Isaacs and Rich JJ).

<sup>24</sup> *The Federalist* No. 68 (Hamilton).

<sup>25</sup> Resolutions Adopted by the Kentucky General Assembly – “*The Papers of Thomas Jefferson*”, Volume 30: 1 January 1798 to 31 January 1799 (Princeton University Press, 2003), pp.550-56.

<sup>26</sup> Gageler, S. “Foundations of Australian Federalism and the Role of Judicial Review” (1987) 17(3) *Federal Law Review* 162 at pp.171-172.

## *The Australian Experience*

The Framers of the Australian Constitution, in the course of second Federal Convention held in Adelaide in 1897, declared that the purpose of Federation was "*to enlarge the powers of self-government of the people of Australia.*"<sup>27</sup>

To achieve this aim, the Framers borrowed heavily from the US Constitutional model in terms of structure and terminology. However, unlike the U.S. blueprint, they included the institution of responsible government which "*created the British heart in an otherwise American federal body*".<sup>28</sup> It is now settled law in Australia that the Constitution prescribes and gives effect to a system of representative government taken from the U.S model, and responsible government taken from the English model.<sup>29</sup>

Our government is 'representative' because parliamentarians are "*directly chosen by the People*"<sup>30</sup>. The "*great underlying principle*" which informs the core requirement of the system of representative democracy in the Constitution is that the rights of individuals are sufficiently secured by ensuring to each, as far as possible, an equal share in political power.<sup>31</sup> Thus legislative provisions which operate without 'substantial justification' to impose legal or practical exclusions from the franchise offend this core requirement and are liable to be struck down as invalid.<sup>32</sup>

The Australian system of government is 'responsible' because (subject to the Constitution's Federal structure<sup>33</sup>) the Governor-General exercises the Executive power of the Commonwealth on the advice of his or her Ministers, and those Ministers hold office for only so long as they have the confidence of the lower house of Parliament.<sup>34</sup> That confidence is ultimately confirmed or denied by the operation of the electoral process.

Section 34(2) of the Australian Constitution requires that, to be member of the House of Representatives (and thus the Senate also<sup>35</sup>), a person "*must be a subject of the Queen, either natural-born or for at least five years naturalized under a law of the United Kingdom, or of a Colony which has become or becomes a State, or of the Commonwealth, or of a State*".

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<sup>27</sup> Convention Debates, Adelaide (1897), 17, p.395; see also *Federal Commissioner of Taxation v Munro* [1926] HCA 58; (1926) 38 CLR 153 at 178 (Isaacs J).

<sup>28</sup> Gageler, S. "Foundations of Australian Federalism and the Role of Judicial Review" (1987) 17(3) *Federal Law Review* 162 at p.172.

<sup>29</sup> *Lange v Australian Broadcasting Corporation* [1997] HCA 25; (1997) 189 CLR 520 at 557-559.

<sup>30</sup> Sections 7 and 24 of the Constitution, read in context, require the members of the Senate and the House of Representatives to be directly chosen at periodic elections by the people of the States and of the Commonwealth respectively; *Attorney-General (Cth); Ex rel McKinlay v The Commonwealth* (1975) 135 CLR 1 at 56.

<sup>31</sup> *Australian Capital Television Pty Ltd v The Commonwealth* [1992] HCA 45; (1992) 177 CLR 106 at 139-140 (Mason CJ, citing Harrison Moore, *The Constitution of the Commonwealth of Australia*, (1902) at 329).

<sup>32</sup> *Roach v Electoral Commissioner* (2007) 233 CLR 162 (regarding the disenfranchisement of prisoners); *Rowe v Electoral Commissioner* (2010) 243 CLR 1 (regarding the time available to enrol to vote after the calling of an election).

<sup>33</sup> *R v Kirby; Ex parte Boilermakers' Society of Australia* [1956] HCA 10; (1956) 94 CLR 254 at 275 per Dixon CJ, McTiernan, Fullagar and Kitto JJ.

<sup>34</sup> Section 64 of the Constitution; *Williams v Commonwealth (No 1)* [2012] HCA 23; 248 CLR 156 at [56]-[61] (French CJ), at [568]-[571] (Keifel J); *McCloy v State of New South Wales* [2015] HCA 34; (2015) 89 ALJR 857 at [104] (Gageler J); cf *Egan v Willis* [1998] HCA 71; (1998) 195 CLR 424 at 451, [42] per Gaudron, Gummow and Hayne JJ.

<sup>35</sup> Section 16.

The Commonwealth Constitution does not provide a definition of citizenship, nor an express power over it.<sup>36</sup> The concept of citizenship is found only in section 44(i), and only then by reference to citizenship “of a foreign power”. Thus at Federation no legal category of Australian citizen existed.

Whilst the US Constitution uses the concept of citizenship as a qualification for the president and members of Congress, the term 'citizen' was not employed in England where people who owed allegiance to the monarch were known as 'subjects'. It was not until the *Nationality and Citizenship Act 1948* (Cth) that Australians were distinguished from other British subjects by citizenship, and only then by reference to residence and rights of movement. But there never was a common law notion of "British subject" rendered into an immutable element of "the law of the Constitution".<sup>37</sup>

### *Qualifications for the office in the UK and the USA*

English nationality was traditionally founded on the principle of *jus soli*: all persons born within the realm became subjects of the monarch. This was to be contrasted with *jus sanguinis* tradition found in continental civil law countries.<sup>38</sup> But this described the common law position. Important exceptions were, however, developed by statute.<sup>39</sup>

In 1350, during the Hundred Years War while Edward III's subjects were fighting in France, the statute *De Natis Ultra Mare* was enacted declaring that children born “*beyond the Sea*” to British subjects “*shall have and enjoy the same Benefits and Advantages*” as their parents in regard to the right of inheritance.<sup>40</sup>

The statute of Edward III was referred to by Coke some two and a half centuries later in his report of *Calvin's Case* (1608).<sup>41</sup> Calvin brought a suit complaining that the defendants had dispossessed him of his freehold property. The Defendants argued that the writs were inadmissible as Calvin was an alien by virtue of the fact that he had been born “*within [James's] kingdom of Scotland, and out of the allegiance of the said lord the King of his kingdom of England.*”<sup>42</sup> The King's Bench found for Calvin, and in doing so determined that a person born within any territory held by the King of England – including Scotland from 1603 - could enjoy the benefits of English law, and would in turn owed allegiance to the sovereign.<sup>43</sup> However, people born in Scotland before James' ascension as King of England would enjoy no such rights or protection. *Calvin's Case* is therefore a clear articulation of the common-law rule that a person's status was vested at birth, and based upon place of birth (that is, the *jus soli*).

Under the English *Act of Settlement of 1701*, although paving the way for the reigns of the Hanoverian monarchs, some of whom had never set foot in Britain, naturalized foreigners could not serve in either of the houses of Parliament or Privy Council, have grants of land, or

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<sup>36</sup> cf section 51(xix).

<sup>37</sup> *Shaw v Mima* [2003] HCA 72; 218 CLR 28 at [29] (Gleeson CJ, Gummow and Hayne JJ).

<sup>38</sup> William Blackstone “*Commentaries*” (Bernard Gavit ed., Washington Law Book Co. 1941) pp.156–57.

<sup>39</sup> The Common Law also recognized exceptions: children born abroad to the Monarch's soldiers were considered British subjects, as were the children of the Monarch, and the children of ambassadors.

<sup>40</sup> 25 Ed III, ch 2; Keechang Kim “*Aliens in Medieval Law: The Origins of Modern Citizenship*” (Cambridge University Press, 2000) at p.116-117.

<sup>41</sup> *Calvin v. Smith* (1608) 7 Co Rep 1a; 77 Eng. Rep. 377 (K.B).

<sup>42</sup> 77 Eng. Rep 377 at p.380.

<sup>43</sup> 77 Eng. Rep 377 at p.409.

enjoy any office or place of trust, either civil or military.<sup>44</sup> However, the children of “*all natural born Subjects born out of the Ligeance of Her Majesty*” were taken to be “*natural born Subjects of this Kingdom*”.<sup>45</sup>

The US Constitution also contains ‘natural born’ qualifications. It imposes three eligibility requirements on the Presidency - the person must be at least 35 years of age, a natural born citizen, and a resident for at least the prior 14 years.<sup>46</sup>

*Calvin's Case* was one of the most important English common-law decisions adopted by courts in the early history of the United States.<sup>47</sup> *Jus soli* was thus in force in all the English colonies upon this continent down to the time of the Declaration of Independence, and in the United States afterwards, and continued to prevail under the Constitution as originally established.<sup>48</sup> Yet at the same time, the Framers were cognisant that British law gave natural born citizen-status to foreign-born children.

Despite the American Framers’ familiarity with the status of received law, the question of who qualifies as a “*natural born citizen*” remains vexed, not least because of the stakes involved. The birthright eligibility of many candidates for the office of President has been called into question.<sup>49</sup>

The origin of the “natural born” requirement in the U.S. is thought to lie in a letter John Jay wrote to George Washington. Jay wrote “Permit me to hint, whether it would not be wise & seasonable to provide a strong check to the admission of Foreigners into the administration of our national Government; and to declare expressly that the Command in chief of the american army shall not be given to, nor devolve on, any but a natural *born* Citizen.”<sup>50</sup> The sentiments in Jay’s letter are thought to reflect the Framers’ fear that a foreign interloper was being courted by certain factions to take up a Crown and rule as King in the place of a chief magistrate.<sup>51</sup> Alexander Hamilton had also recognised that “*One of the weak sides of republics, among their numerous advantages, is that they afford too easy an inlet to foreign corruption.*”<sup>52</sup>

The deliberations of the Philadelphia Convention shed little light on the subject matter of what was intended by the “natural born” requirement.<sup>53</sup> The Committee on Detail initially submitted without comment a recommendation that the President be a citizen and a resident for twenty-one years. The Committee of Eleven changed the wording to “*natural born*

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<sup>44</sup> 12 and 13 Will. 3 c 2 – s.3: “*no person born out of the kingdoms of England, Scotland or Ireland or the dominions thereunto belonging, although he be naturalised or made a denizen (except such as are born of English parents).*”

<sup>45</sup> *Foreign and Protestants Naturalization Act*, 1708, 7 Ann., c. 5, § 3; Parliament later extended the rule to the grandchildren of natural born subjects, allowing the transmission of British nationality by descent down to the second generation abroad: *British Nationality Act*, 1772, 13 Geo. 3, c. 21.

<sup>46</sup> By virtue of the Twelfth Amendment, the qualifications for Vice President are the same.

<sup>47</sup> Price, P. J. (1997). “Natural Law and Birthright Citizenship in Calvin's Case (1608)”. *Yale Journal of Law and the Humanities*, 9:74.

<sup>48</sup> Following these precedents, the Supreme Court in *US v Wong Kim Ark* 169 U.S. 649, 658 (1898) held that a child born in the United States to foreign nationals became a US citizen at birth.

<sup>49</sup> See for example discussion in Han, W., “*Beyond Presidential Eligibility: The Natural Born Citizen Clause as a Source of Birthright Citizenship*” *Drake Law Review*, Vol. 58, No. 2, (2010) at 463.

<sup>50</sup> Original emphasis; 3 Joseph L. Story, “*Commentaries on the Constitution of the United States*” §1473 (1833).

<sup>51</sup> Akhil Reed Amar, “*America’s Constitution: A Biography*”, (Random House, 2005), Chapter 4.

<sup>52</sup> *The Federalist* No.22 (Hamilton); and *The Federalist* No.68 (Hamilton)

<sup>53</sup> Pryor, J.A. “*The Natural-Born Citizen Clause and Presidential Eligibility: An Approach for Resolving Two Hundred Years of Uncertainty*” *Yale LJ* 97 (1988): 881 at 885.

citizen” without explanation, and the Convention ultimately adopted the modified provision without debate.<sup>54</sup>

There are strong contextual reasons to suggest “natural born” was intended to mean born within the borders of the USA (ie, a *jus soli* interpretation). The ‘natural born’ stipulation is not repeated in the text which sets out the qualifications required for members of Congress.<sup>55</sup>

To add to the irreducible ambiguity, the Framers permitted "*a Citizen of the United States, at the time of the Adoption of this Constitution*" to serve as President.<sup>56</sup> Thus it was not until 1837 and the presidency of Martin van Buren, the eighth President, that a person born in the USA was elected to office.

In the absence of a definitive interpretation by the Supreme Court, the academic consensus appears to be that the better reading is based on a “*naturalized-born*” approach. This approach dismisses the binary *jus soli/jus sanguinis* bases for construing the expression, and instead recognises the power inherent in Congress to determine the meaning of the phrase “natural born”.

Congress has power in Article I to “*establish an uniform Rule of Naturalization*”. If one draws a connection between ‘natural’ in Article II and ‘naturalization’ in Article I, then it follows that *naturalization* can create *natural* citizens.<sup>57</sup>

Support for this construction is found in the text of the *Naturalization Act of 1790*. Passed by the first Congress, which contained many of the Framers, the Act declared that "*the children of citizens of the United States, that may be born beyond sea, or out of the limits of the United States, shall be considered as natural born citizens*".<sup>58</sup>

On this view, which appears to be the prevailing account at present, children born abroad of American parentage would be eligible for the Presidency, so long as the citizenship rules in place at the time of their birth so provided.<sup>59</sup>

### *Qualification and Disqualification for Congress under the US Constitution*

There are only three standing qualifications for U.S. Senator or Representative in Congress, which are expressly set out in the U.S. Constitution: age (25 for the House, 30 for the Senate); citizenship (at least seven years for the House, nine years for the Senate); and inhabitancy in the state at the time elected.<sup>60</sup> These constitutional qualifications are the exclusive prerequisites for being a Member of Congress, and they may not be altered or added to by Congress or by any State unilaterally.<sup>61</sup> Once a person meets those constitutional qualifications, that person, if elected, is constitutionally qualified to serve in Congress, even if under indictment or a convicted felon.

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<sup>54</sup> 1 *The Debates in the Several State Conventions* (Jonathan Elliot editor, 1907) at pp.256–57 (2nd ed, 1836).

<sup>55</sup> Article I, sections 2, cl 2 & 3, cl 3 in respect of membership of the House and Senate respectively.

<sup>56</sup> Article II, section 1, cl 5.

<sup>57</sup> Pryor, J.A. “*The Natural-Born Citizen Clause and Presidential Eligibility: An Approach for Resolving Two Hundred Years of Uncertainty*” Yale LJ 97 (1988): 881 at 894.

<sup>58</sup> Act of Mar. 26, 1790, ch. 3, 1 Stat. 103 (repealed 1795).

<sup>59</sup> Akhil Reed Amar, “*America’s Constitution: A Biography*”, (Random House, 2005), Chapter 4, note 91.

<sup>60</sup> Article I, Section 3, clause 3 for Senators; and Article I, Section 2, clause 2 for Representatives.

<sup>61</sup> *Powell v. McCormack*, 395 U.S. 486, 522 (1969); *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 800-801 (1995); *Cook v. Gralike*, 531 U.S. 510 (2001).

The U.S. Constitution expressly delegates to each house of Congress the authority to judge the qualifications for office of its own Members.<sup>62</sup> By a simple majority, a house of Congress can *exclude* a member based on the standing qualifications prescribed in the Constitution, and no more.<sup>63</sup>

The question of “qualifications” does not, however, foreclose each house of Congress from judging a Member’s “fitness” for office in a disciplinary proceeding. Each house of Congress has significant discretion to discipline misconduct that is adjudged to be worthy of censure, reprimand, or expulsion from Congress. No specific guidelines exist regarding actionable grounds for congressional discipline under the constitutional authority of each house to punish its own Members. As a disciplinary matter, a member of either house may be *expelled* upon a vote of two-thirds of the members present in the house and voting.<sup>64</sup>

In the U.S. Senate, 15 Senators have been expelled, 14 during the Civil War period for disloyalty to the Union (one expulsion was later revoked by the Senate), and one Senator was expelled in 1797 for other disloyal conduct. The House of Representatives has expelled five Members - three for disloyalty to the Union, and two after conviction of various criminal corruption charges.<sup>65</sup>

The U.S. Constitution also provides that “no Person holding any Office under the United States, shall be a Member of either House during his continuance in Office.”<sup>66</sup> This provision is a prohibition on dual office holding, and is a recognition of the strict separation of powers inherent in the Constitution. Persons holding “civil office” can be removed and disqualified by the process of impeachment in the House of Representatives, and trial and conviction in the Senate.<sup>67</sup>

No express constitutional disability or “disqualification” from Congress exists for the conviction of a crime, other than under the Fourteenth Amendment for certain treasonous conduct by someone who has taken an oath to support the Constitution.<sup>68</sup>

This Fourteenth Amendment’s constitutional disqualification provision was applied against Victor Berger, a prominent member of the Socialist Party and a newspaper editor who wrote against the United States’ entry into World War I. By the time he presented himself for membership to the House in May of 1919, he had been convicted and sentenced to 20 years’ imprisonment for violating the *Espionage Act of 1917*, but was out on bail pending appeal. Congress formed a special committee and concluded that he was disqualified for disloyalty, and declared the seat vacant.<sup>69</sup> Wisconsin held a special election to fill the vacant seat, and re-elected Berger a second time. The House again refused to seat him. Berger was re-elected in 1922, 1924 and 1926.

A similar experience occurred in Britain. John Wilkes had been expelled from Parliament for “*sedition libel*” against the Crown. In the special election to fill the vacancy, Wilkes was re-

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<sup>62</sup> Article I, Section 5, clause 1. In 1972, the future Vice President Joe Biden was elected to the Senate shortly before his 30th birthday, but reached his 30th birthday in time for the swearing-in ceremony in January 1973.

<sup>63</sup> *Powell v. McCormack*, 395 U.S. 486, 550.

<sup>64</sup> Article I, Section 5, clause 2.

<sup>65</sup> Maskell, J., “*Qualifications of Members of Congress*” (CRS Report R41946) at pp.19-20.

<sup>66</sup> Article I, Section 6, clause 2.

<sup>67</sup> Article II, Section 4.

<sup>68</sup> The disability can be removed by Congress by a two-thirds vote of each house.

<sup>69</sup> Maskell, J., “*Qualifications of Members of Congress*” (CRS Report R41946) at pp.19-20.



elected, but again excluded by the House of Commons. Wilkes was eventually elected to the next Parliament, and was successful in having his previous exclusions expunged from the record.<sup>70</sup>

The Wilkes case was an important lesson that steeled the commitment of the U.S. Framers to entrenching only minimal qualifications to hold elective office so as to further the fundamental principle of electoral choice. This broad principle incorporated at least two fundamental ideas. First, the egalitarian concept that the opportunity to be elected was open to all. Secondly, the critical postulate that sovereignty is vested in the people, and that sovereignty confers on the people the right to choose freely their representatives to the National Government.<sup>71</sup>

As was the case with the intent of the U.S. Framers, the “high purpose” of the electoral process in Australia is to maximize participation in the public affairs of the body politic.<sup>72</sup> That ideal is tempered by considerations of fitness for office, probity of character, loyalty to country and the absence of conflicting interests.

#### *Eligibility to sit in Parliament under the Commonwealth Constitution*

In attempting to divine where the constitutional balance was struck between these egalitarian ideals and the legitimacy of the national institutions, just what the Framers did envision, “*must be divined from materials almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh*”.<sup>73</sup>

The Australian Framers created a two-tier system of regulation of membership of parliament. The Constitution stipulates qualifications for elected office<sup>74</sup>, as well as grounds of ineligibility and disqualification.<sup>75</sup>

Sections 16 and 34 of the Constitution stipulated age and nationality requirements for qualification, until the Parliament ‘otherwise provides’. Parliament did provide otherwise in 1918 by enacting the *Commonwealth Electoral Act 1918*. Section 163 of the Act now requires a candidate to be 18 years of age, an Australian citizen, and be entitled to vote.

The second tier of regulation is through the disqualifications contained in section 44 of the Constitution. The Framers decided to constitutionally entrench these provisions dealing with membership of the Parliament, disqualifying candidates and members who are foreign citizens or persons convicted of treason or offences punishable by more than 12 months imprisonment, and those denying bankrupts and holders of offices of profit under the Crown membership of either House.

#### *Section 44 – Modern Context, History and Content*

Section 44 of the Constitution, the text of which is set out in the annex to this Paper, is found in Chapter 1 of the Constitution, which provides for a system of representative government

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<sup>70</sup> Maskell, J., “*Qualifications of Members of Congress*” (CRS Report R41946) at p.9.

<sup>71</sup> U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 793-794 (1995).

<sup>72</sup> *Langer v The Commonwealth* [1996] HCA 43; (1996) 186 CLR 302 at 342 (McHugh J).

<sup>73</sup> Jackson J in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) at pp.634.

<sup>74</sup> Eg, sections 16 and 34.

<sup>75</sup> Eg, sections 43 to 46.

and vests the legislative power of the Commonwealth in a Parliament. Dealing as it does with the question of eligibility of members of Parliament, it is the only matter identified in the Constitution where “any person” is given an express right to sue to ensure constitutional compliance.<sup>76</sup>

Section 44 finds its place amongst a suite of other relevant provisions, including:

- Section 16 – which provides that the qualifications of a Senator shall be the same as those of a Member of the House of Representatives.
- Section 43 – which provides that a Member of either House of the Parliament shall be incapable of being chosen or of sitting as a Member of the other House.
- Section 45 – which provides, *inter alia*, that if a Senator or Member of the House of Representatives becomes subject to any of the disabilities mentioned in s.44, or takes the benefit of a law relating to bankruptcy or takes any fee for services rendered to the Commonwealth or for services rendered in the Parliament, the place shall become vacant.
- Section 46 – which provides that until the Parliament otherwise provides any person declared to be incapable of sitting shall be liable to pay a financial penalty to any person who sues for it.<sup>77</sup>
- Section 47 – which provides that until the Parliament otherwise provides, any question respecting qualification should be determined by the relevant House in which the question arises;<sup>78</sup> and
- Section 48 – Until Parliament otherwise provides, each Senator and Member of the House shall receive an allowance of a designated amount.<sup>79</sup>

As to s.47, s.51(xxxvi) of the Constitution confers legislative power on the Parliament in respect of “*matters in relation to which the constitution makes provision until the Parliament otherwise decides*”; and s.76(ii) provides that Parliament may make laws conferring original jurisdiction on the High Court in any matter arising under any laws made by Parliament.

In the exercise of its powers under s.51(xxxvi), the Parliament enacted provisions of the *Commonwealth Electoral Act 1918* which:

- (a) included ss.353 which provided that the validity of an election or return may be disputed by petition addressed to the Court of Disputed Returns and not otherwise; and

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<sup>76</sup> see s.46.

<sup>77</sup> Now replaced by the *Common Informers (Parliamentary Disqualifications) Act 1975* which provides in s.3 for a much reduced regime of penalties, and in s.4 that a person is not liable to pay any sum under s.46 and that no suit shall be instituted or heard in pursuant of that section.

<sup>78</sup> Now replaced by provisions in the *Commonwealth Electoral Act 1918* (Cth) providing for exclusive jurisdiction in the High Court sitting as the Court of Disputed Returns.

<sup>79</sup> Now replaced by the *Remuneration Tribunal Act 1973* (Cth) which provides for a procedure for determining the remuneration of Members of Parliament through the Commonwealth Remuneration Tribunal.

- (b) established the High Court as a Court of Disputed Returns: s.354;
- (c) included s.376 of the *Commonwealth Electoral Act 1918* where it was provided that the House may refer a question to the Court of Disputed Returns.

In addition to the disqualifications appearing in the Constitution, the *Commonwealth Electoral Act 1918* itself also provides for additional grounds of disqualification, or (at least) mandatory qualifications. Thus, s.163(1)(b) of the Act (enacted under s.51(xxxvi) replacing the effect of s.34 of the Constitution) provided, as a qualification of a member of the House of Representatives that the person must be an Australian citizen.<sup>80</sup>

The nature of the jurisdiction exercised in relation to matters regarding s.44 of the Constitution was discussed and analysed in *Sue v Hill* (1999) 199 CLR 462.

In circumstances where it is alleged, e.g. that a disqualifying feature answering the description in s.44 exists, the challenge is made under s.353(1) of the *Commonwealth Electoral Act* which, in conjunction with s.354, constitutes a law comparing original jurisdiction on the High Court in respect of a matter arising under the Constitution or involving its interpretation.

When the Court of Disputed Returns is considering disqualification under s.44, it is exercising the judicial power of the Commonwealth. This is so notwithstanding the fact that the Court is considering the same sort of question as could previously be determined by the legislative arm as an exercise of legislative power.

Section 48 of the Constitution is a reflection of the debate which took place in the US in the 19<sup>th</sup> century concerning the appropriateness of payment of Congressmen<sup>81</sup> – with a statutory provision for payment representing a balance between the “purist view” and “egalitarian considerations”.<sup>82</sup>

### *History of the Relevant Statutory Provisions*

#### *A. UK Legislation*

In the UK, legislation prior to the 1868 *Parliamentary Elections Act* (UK)<sup>83</sup> gave to the respective Houses of the UK Parliament jurisdiction analogous to that described in s.47 of the Australian Constitution.<sup>84</sup>

The *Parliamentary Elections Act 1868* (UK) conferred on the judges of the superior courts of common law exclusive jurisdiction to determine disputes as to the election and return of members – although (paradoxically) the House of Commons continued thereafter to

<sup>80</sup> and a Senator: s.163(2); These were the provisions ultimately relevant in *Re Wood* (1988) 167 CLR 145.

<sup>81</sup> see the discussion by Keane J in *Day (No 2)* [2017] HCA 14 at [181].

<sup>82</sup> Balance is seen in a variety of respects in s.44 itself, see e.g. in s.44(2), which provides for disqualification during a defined period and not a permanent disqualification – as originally proposed by the Framers: see *Re Culleton (No 2)* [2017] HCA 4 at [65] per Nettle J.

<sup>83</sup> as collected in *Bradlaugh v Clark* (1883) 8 App Cas 354 at 363-8.

<sup>84</sup> *Re Wood* (1988) 167 CLR 145 at p.157.

determine questions relating to the qualification of members.<sup>85</sup> Grounds for disqualification under the Act included bribery, undue influence and alienage.<sup>86</sup>

## **B. Australian Legislation**

In Australia some colonies (notably Tasmania and Western Australia) adopted legislation reflecting the 1868 UK Act.

Following the establishment of the Commonwealth, including the insertion of constitutional disqualifications rendering persons incapable of being chosen as Senators or Members of the House, the Commonwealth Parliament adopted the *Commonwealth Electoral Act 1902* establishing the High Court as a Court of Disputed Returns, replacing a situation which the Supreme Court of each State acted as a Court of Disputed Returns. The Act contained the statutory ancestor of the present s.353(1) providing that “the validity of any election or return may be disputed by petition addressed to the Court of Disputed Returns and not otherwise”.

Questions concerning qualifications and vacancies were first introduced into Federal Law by the *Disputed Elections and Qualifications Act 1907* (Cth). In *Sue v Hill* (1999) 199 CLR 462, a majority of the Court determined that the validity of an election could be disputed by petition under s.353(1) of the *Commonwealth Electoral Act 1918* on the ground of the incapacity of a Senator or Member based on s.44. That is, the matter did not have to be referred to the Court of Disputed Returns by the relevant House.

### *Some General Propositions Concerning Section 44*

Section 44 spells out different kinds of status which, while existing, render “any person incapable of being chosen or of sitting” as a Senator or Member. It has been held that these words refer to the process of being chosen – a process which starts with the date of nominations and ends with the issuing of the writs.<sup>87</sup>

As pointed out by Gageler J in *Re Day (No 2)* s.44 has potentially “automatic and draconian consequences”.<sup>88</sup> By force of s.45(i), if the person is a Senator or Member when the disqualification takes effect “his place shall thereupon become vacant”.

If a disqualified person is declared duly elected, he or she is nonetheless not “chosen” within the meaning of the Constitution and, accordingly, is not a Senator or Member. If disqualification is proved, a decision then needs to be made (originally by the relevant House and now by the Court of Disputed Returns) as to what is otherwise to happen as a result.

Although s.44 applies equally to candidates for election to the Senate and the House of Representatives, the consequences of a finding that grounds of disqualification exist are likely to be different. *Re Wood* (1988) 167 CLR 145 dealt with the ineligibility of a Senator who was not an Australian citizen, contrary to the requirements of the *Electoral Act*. The Court declined to declare the existence of a vacancy following a finding of ineligibility and accordingly declined an application for a fresh half-Senate election.

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<sup>85</sup> *Re Wood* (1988) 167 CLR 145 at pp.157-158.

<sup>86</sup> *Sue v Hill* (1999) 199 CLR 462 at [14].

<sup>87</sup> *Sykes v Cleary* (1992) 176 CLR 77 at page 100.

<sup>88</sup> at [95].

The Court determined that all votes were valid except those for the ineligible candidate.<sup>89</sup> The Court accepted that under the preferential proportional system of voting provided for in s.329 of the *Commonwealth Electoral Act 1918*, voters were entitled to indicate their preferences on a contingent basis, ensuring that votes expressing a preference would not be thrown away. The Court held that there was no reason for disregarding the other indications of the voters' preference and likened the position to that which arises where a candidate dies.<sup>90</sup>

The same will not normally apply in the case of a House of Representatives election, where a special count could result in a distortion of the voters' real intentions. The result is that, if a successful candidate for election to the House of Representatives is found to have fallen foul of s.44, there will be a declaration of the existence of a vacancy and the need for a new election.<sup>91</sup>

By force of legislation enacted by the Parliament under s.51(xxxvi) with respect to the matter for which provision is made in s.46, a person who is disqualified is liable to pay a pecuniary penalty for each day on which he sits while disqualified. As a result of the significant consequences, including the deprivation of the democratic right to seek to participate directly in the deliberations of Parliament, the view has been expressed more than once that s.44 should be construed as applicable only to the extent that its words clearly and unambiguously require.<sup>92</sup> Such considerations also underpin earlier and more restrictive approaches to s.44 than would be acceptable today.<sup>93</sup>

#### *Specific Disqualifying Provisions Within Section 44*

Section 44(i) – Disqualification if a person is **“under any acknowledgment of allegiance, obedience or adherence to a foreign power, or is a subject or citizen or entitled to the rights or privileges of a subject or a citizen of a foreign power”**.

When being debated in 1897, an early iteration of s.44(i) required the person to have *“done any act whereby he has become a subject or citizen or entitled to the rights or privileges of a subject or a citizen of a Foreign Power”*. Such words would have served to disqualify people who had taken a positive step to acquire the citizenship of another country.

However, the final form of s.44 was much wider, and seems to have been intended to disqualify persons with dual citizenship regardless of whether they acquire their other citizenship voluntarily or involuntarily.

In *Sue v Hill* (1999) 199 CLR 462, the Court decided that the question of whether a person is a citizen of a “foreign power” is to be decided by reference to the classification given to that

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<sup>89</sup> Thus votes Nuclear Disarmament Party above the line counted, as did votes for qualified individuals below the line.

<sup>90</sup> Citing *Reg. v Mayor of Tewkesbury* (1868) LR 3 QB 629 at p.634; see also *Free v Kelly* (1996) 185 CLR 296 at 302.

<sup>91</sup> *Sykes v Cleary* (1992) 176 CLR 77 at 102 and *Free v Kelly* (1996) 185 CLR 296 at 302-3.

<sup>92</sup> see (eg) *Sykes v Cleary* (1992) 176 CLR 77 at 116 and 121 (Deane J) and *Re Day (No 2)* [2017] HCA 14 at [96] (Gageler J).

<sup>93</sup> e.g. in *Re Webster* (1975) 132 CLR 270 at 280; cf *Re Day (No 2)* [2017] HCA 14 at [39] where three members of the Court found the conclusion that s.44(v) had a purpose wider than the protection of the freedom and independence of Parliamentarians from the influence of the Crown as inescapable.

person under the law of that country.<sup>94</sup> The status of being a subject or citizen is something that, as a matter of foreign law, may be able to be renounced.<sup>95</sup>

The status of being a subject or a citizen is something that can be achieved by descent. However, in *Nile v Wood* (1988) 167 CLR 133 at 140 the Court suggested (without deciding) that s.44(1) relates only to a person who has formally or informally acknowledged allegiance, obedience or adherence to a foreign power and who has not withdrawn or revoked that acknowledgment.

### *Sykes v Cleary*

*Sykes v Cleary* [1992] HCA 60; (1992) 176 CLR 77 was principally a case about whether Philip Ronald Cleary, who had been declared to be elected at a by-election for the Electoral Division of Wills in the House of Representatives, held an office of profit under the Crown for the purposes of s.44(iv) because he was an officer of the Education Department of Victoria.

However, the petitioner also alleged that two other candidates, John Delacretaz and Bill Kardamitsis, were ineligible for election as, although naturalised Australian citizens, each was a subject or citizen or entitled to the rights or privileges of a subject or citizen of a foreign power within the meaning of s. 44(i) of the Constitution.

Liberal candidate Delacretaz was born in Switzerland in 1923 and from birth was a Swiss citizen. He migrated to Australia in 1951 and became an Australian citizen in 1960. He had held an Australian passport since 1960 and held no other passport. On becoming a citizen, Delacretaz renounced all allegiance to any country or state of which he was a subject or citizen. Under Swiss law, Delacretaz could have made application to the Government of Switzerland to renounce or otherwise terminate his Swiss citizenship but he had not sought to do.

Labor candidate Kardamitsis was born in Greece in 1952 and was from birth a Greek citizen. He moved to Australia in 1969 as a migrant and lived in Australia from that date. In 1975 he became an Australian Citizen. At the time of becoming an Australian citizen he held an expired Greek passport which he relinquished. Like Delacretaz, he renounced all allegiance to any country of whom he was a subject or citizen at that time. He was first issued with an Australian passport in 1978 and three times had travelled to Greece on his Australian passport. He did not, however, specifically renounce his Greek citizenship by making application to the Greek government as permitted by the laws of that country. His position was that he did not know that was necessary or that such a procedure was available.

Mason CJ, Toohey and McHugh JJ noted that international law recognised that foreign citizenship is determined according to the law of the foreign state concerned.

However, they noted that (at p.107):

*“But, there is no reason why s.44(i) should be read as if it were intended to give unqualified effect to that rule of international law. To do so might well result in the disqualification of Australian citizens on whom there was imposed involuntarily by operation of foreign law a continuing foreign nationality, notwithstanding that they had taken reasonable steps to renounce that foreign nationality. It would be wrong to*

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<sup>94</sup> *Sue v Hill* at page 486-7, [47].

<sup>95</sup> *Naturalisation Act 1870* (UK).

*interpret the constitutional provision in such a way as to disbar an Australian citizen who had taken all reasonable steps to divest himself or herself of any conflicting allegiance”.*

They went on to say (at p.107):

*“... Section 44(1) finds its place in a Constitution which was enacted at a time, like the present, when a high proportion of Australians, though born overseas, had adopted this country as their home. In that setting, it could scarcely have been intended to disqualify an Australian citizen for election to Parliament on account of his or her continuing to possess a foreign nationality, notwithstanding that he or she had taken reasonable steps to renounce that nationality”.*

At p.108 they stated:

*“What amounts to the taking of reasonable steps to renounce foreign nationality must depend upon the circumstances of the particular case. What is reasonable will turn on the situation of the individual, the requirements of the foreign law and the extent of the connection between the individual and the foreign State of which he or she is alleged to be a subject or citizen. And it is relevant to bear in mind that a person who has participated in an Australian naturalization ceremony in which he or she has expressly renounced his or her foreign allegiance may well believe that, by becoming an Australian citizen, he or she has effectively renounced any foreign nationality”.*

Despite these concluding observations, neither were judged to have taken reasonable steps to renounce their previous citizenship, and so were held to be disqualified as candidates.

Brennan J considered that an Australian citizen who has done all that reasonably lies within his power to renounce foreign nationality is not disqualified by s.44(i), so a unilateral declaration is insufficient if a further step could reasonably have been taken. Gaudron J dissented, attaching importance to the renunciation of foreign citizenship required on acquisition of Australian citizenship as per the *Citizenship Act 1975 (Cth)*.<sup>96</sup>

The most pragmatic interpretation of s.44(i) is found in the judgment of Deane J. At p... his Honour stated:

*“Section 44(i)'s whole purpose is to prevent persons with foreign loyalties or obligations from being members of the Australian Parliament. The first limb of the sub-section (i.e. "is under any acknowledgment of allegiance, obedience, or adherence to a foreign power") involves an element of acceptance or at least acquiescence on the part of the relevant person. In conformity with the purpose of the sub-section, the second limb (i.e. "is a subject or a citizen or entitled to the rights or privileges of a subject or citizen of a foreign power") should, in my view, be construed as impliedly containing a similar mental element with the result that **it applies only to cases where the relevant status, rights or privileges have been sought, accepted, asserted or acquiesced in by the person concerned. The effect of that construction of the sub-section is that an Australian-born citizen is not disqualified by reason of the second limb of s.44(i) unless he or she has established, asserted, accepted, or acquiesced in, the relevant relationship with the foreign power.** The position is more difficult in a case such as the present where the relationship with the foreign power existed before the acquisition (or re-acquisition) of Australian citizenship. In such a case, what will be involved is not the*

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<sup>96</sup> pp.133-136.

*acquisition or establishment, for the purposes of s.44, of the relevant relationship with the foreign power but the relinquishment or extinguishment of it.”<sup>97</sup>*

On the basis of Deane J’s view, if the test is whether the “*rights or privileges have been sought, accepted, asserted or acquiesced in by the person concerned*” then a person who acquires foreign without knowledge may not be disqualified under this construction of s.44. However, against this view stands a number of considerations. In the first place, it is apparent that s.44(1) has two separate arms, the second of which refers to an entitlement to foreign citizenship or its benefits. The two individuals held disqualified in *Sykes* were persons who knew that they were originally dual citizens, although they believed that their previous citizenship had lapsed.

The upcoming cases in Australia involve persons who have claimed not to know that they were ever dual citizens at any relevant time. In *Sykes*, Delacretaz and Kardamitsis were held to be disqualified because they had not taken reasonable steps to renounce their citizenship. The Joyce and Canavan cases concern persons who did not know that there was anything to renounce – with the result that the High Court may be faced with the task of determining the reasonableness of their respective positions in this circumstance.

On at least one view, the two candidates in *Sykes* might be argued to have a better case than, at least, Barnaby Joyce, who, though he claims to have made enquiries, otherwise appears to have taken no active steps to address his situation under s.44(1) notwithstanding the fact that he would have known that one of his parents was born outside Australia.

On the other hand, it is arguable that the requirement for the taking of reasonable steps (though referred to in some of the judgments) is not the ultimate test and that the plurality, in rejecting the idea that disqualification of Australian citizens flowed from the involuntary imposition of foreign nationality by operation of foreign law, were expressing a view not dissimilar to that of the view of Deane J. This conclusion might however be difficult to substantiate bearing in mind the actual decision reached.

### *Sue v Hill*<sup>98</sup>

Mrs Hill was a citizen of the United Kingdom at the time of her election as a Senator in 1988. The substantive question for the Court was whether the United Kingdom answered the description of “*a foreign power*” in s 44(i). Such a question necessarily directed attention to Australia’s own development as a sovereign entity from the time of Federation.

The Court had previously decided that the United Kingdom was not a foreign power at Federation.<sup>99</sup> The covering clauses and text of the Commonwealth Constitution itself made it clear that the nation brought into being was “*one indissoluble Federal Commonwealth under the Crown of the United Kingdom of Great Britain and Ireland*”.<sup>100</sup>

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<sup>97</sup> Emphasis added.

<sup>98</sup> *Sue v Hill* [1999] HCA 30; 199 CLR 462.

<sup>99</sup> *Kirmani v Captain Cook Cruises Pty Ltd (No 1)* [1985] HCA 8; (1985) 159 CLR 351 at 437 (Deane J), 458 (Dawson J); *Nolan v Minister for Immigration and Ethnic Affairs* [1988] HCA 45; (1988) 165 CLR 178 at 183-184 (Mason CJ, Wilson, Brennan, Deane, Dawson and Toohey JJ).

<sup>100</sup> Preamble.



Yet this understanding was based on the notion of the indivisibility of the Crown, whereas by virtue of the existence of the States as separate bodies politic, the divisibility of the Crown is was found to be “implicit”.<sup>101</sup>

The gradual change in Australia’s relationship to the United Kingdom can be traced from the time of the Balfour Declaration in 1926<sup>102</sup>, to the adoption of the Statute of Westminster in 1942, to the enactment of the *Australian Citizenship Act 1948* (Cth), then to the *Royal Style and Titles Act 1973* (Cth)<sup>103</sup>, and finally to the passage of the *Australia Acts*.<sup>104</sup>

It appears that, “*at the very latest, the Commonwealth of Australia was transformed into a sovereign, independent nation with the enactment of the Australia Acts*”.<sup>105</sup> The consequence of that transformation is that the United Kingdom became a foreign power for the purposes of s 44(i) of the Constitution.

**Section 44(ii)** – A person is disqualified if he or she is “**attainted of treason, or has been convicted and is under sentence, or subject to be sentenced, for any offence punishable under the law of the Commonwealth or of a State by imprisonment for one year or longer**”.

It is only in the circumstance of attainder of treason that the disqualification provided for in s.44(ii) is permanent. It follows that a person who has completed a term of imprisonment for an offence described in s.44(ii) is therefore eligible to be chosen.<sup>106</sup>

It is also clear that the disqualification relating to conviction only operates on a person who has both been convicted of an offence punishable by imprisonment for one year or more *and* is under sentence or subject to be sentenced for that offence.<sup>107</sup>

The reach of s.44(ii) has most recently been discussed in *Re Culleton (No 2)* [2017] HCA 4.

In *Re Culleton (No 2)* [2017] HCA 4 the High Court considered the situation where a person nominating for election to the Senate had, at the date of nomination, been convicted of an offence punishable by a term of imprisonment for one year or longer and was liable to be

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<sup>101</sup> *Sue v Hill* (1999) 199 CLR 462 at [90] (Gleeson CJ, Gummow & Hayne JJ), [165]-[166] (Gaudron).

<sup>102</sup> The Declaration at the 1926 Imperial Conference of British Empire leaders in London confirmed that the Dominions were “*autonomous Communities within the British Empire, equal in status, in no way subordinate one to another in any aspect of their domestic or external affairs, though united by a common allegiance to the Crown, and freely associated as members of the British Commonwealth of Nations*”.

<sup>103</sup> Gibbs J in *Southern Centre of Theosophy Inc v South Australia* [1979] HCA 59; (1979) 145 CLR 246 stated that (at p.261): “[i]t is right to say that this alteration in Her Majesty's style and titles was a formal recognition of the changes that had occurred in the constitutional relations between the United Kingdom and Australia”.

<sup>104</sup> The effect of section 1 of the *Australia Act 1986* (Cth) was to deny the extension of the United Kingdom law to the Commonwealth, the States and the Territories: *Sue v Hill* (1999) 199 CLR 462 at [94] (Gleeson CJ, Gummow & Hayne JJ).

<sup>105</sup> *Sue v Hill* (1999) 199 CLR 462 at [96] (Gleeson CJ, Gummow & Hayne JJ), [173] (Gaudron); see also Kirby, M, “*Constitutional Interpretation and Original Intent: A Form of Ancestor Worship?*” (2000) 24(1) Melbourne University Law Review 1.

<sup>106</sup> The Court traced the development of the matter of voting rights and imprisonment within the British Empire in *Roach v Electoral Commissioner* [2007] HCA 43; (2007) 233 CLR 162 from [55] (Gummow, Kirby and Crennan JJ).

<sup>107</sup> That is, the references to “conviction” and “sentence” are conjunctive: *Nile v Wood* (1988) 167 CLR 133 at 139.

sentenced therefore – but where after election as a Senator the conviction was subsequently annulled.

In determining that the candidate was disqualified, the majority (Kiefel, Bell, Gageler and Keane JJ) followed *Nile v Wood* in deciding (at [16]-[22]) that the mere conviction of a designated offence was not enough in itself. In order to be disqualified the candidate had to be either under sentence, or, alternatively, subject to be sentenced from the described offence. The plurality held that the fact of annulment did not assist Culleton as it was retrospective in its effect. The fact remained that at the time of the 2016 election (i.e. the time of nomination through to declaration) Culleton was a person who had been convicted, and was subject to sentence within the terms of s.44(ii).

Nettle J considered that s.44(ii) should be construed as referring to a conviction regardless of whether subsequently annulled. His construction appealed to the need for certainty in the application of the constitutional provision.<sup>108</sup>

**Section 44(iii)** – A person is disqualified if he or she is “**an undischarged bankrupt or insolvent**”.

In *Nile v Wood* it was held that the adjective “undischarged” in paragraph (iii) attaches both to “bankrupt” and to “insolvent”, with the result that “insolvent” means “adjudicated insolvent” and that it is not sufficient to establish simply that a person cannot pay his or her debts.<sup>109</sup>

**Section 44(iv)** – A person is disqualified if he or she “**holds any office of profit under the Crown, or any pension payable during the pleasure of the Crown out of any of the revenues of the Commonwealth**”.

In *Sykes v Cleary* (1992) 176 CLR 77, the Court held that a candidate for election to the House of Representatives who, at the time of nomination and the conducting of the poll was an officer in the Teaching Service of the State of Victoria, was disqualified notwithstanding the fact that he was on leave without pay at all material times and had resigned his position before the declaration of the poll.

The Court determined, as a matter of construction, that s.44(iv) applies to State as well as Commonwealth service, a construction supported by the specific exclusion of State Ministers and the perceived risk of conflict between the obligations of State employees to their State and the duties of members of the relevant House.<sup>110</sup>

Finally, in identifying that the word “chosen” in s.44 related to the whole process commencing from nomination and flowing through to the poll declaration, the Court treated as inevitably irrelevant the fact that by the time of the declaration of the poll Cleary, the successful candidate, had resigned his position.<sup>111</sup>

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<sup>108</sup> At [58]-[59]; In this respect, Nettle J was appealing to considerations similar to that referred to by the majority in *Sykes*.

<sup>109</sup> *Nile v Wood* (1988) 167 CLR 133 at 139-140

<sup>110</sup> see (1992) 176 CLR 77 at 98.

<sup>111</sup> (1992) 176 CLR 77 at 99.

**Section 44(v)** – A person is disqualified if he or she “**has any direct or indirect pecuniary interest in any agreement with the public service of the Commonwealth otherwise than as a member and in common with the other members of an incorporated company consisting of more than 25 persons**”.

In the course of the Convention Debates, the issue of conflicting pecuniary interests was raised on a number of occasions. In Adelaide in April 1897, Isaac Isaacs said<sup>112</sup>:

*“The public are interested in seeing and ensuring, so far as it is possible to ensure it, that no member of Parliament shall for his own personal profit allow his judgment to be warped in the slightest when he is called upon to decide on questions of public moment.”*

In Sydney in September 1897, Mr Isaacs was even more forthright:

*“The object of the clause is to prevent individuals making a personal profit out of their public positions”*<sup>113</sup>

Section 44(v) thus serves to ensure that the conscientious discharge of a parliamentarian's duties is not affected by considerations of pecuniary benefit which might be made available to members of the legislative branch of government by reason of their position by officers of the executive government.<sup>114</sup>

*Day No.2*<sup>115</sup>

When elected in 2013, Bob Day owned a building that he wanted to use his electorate office.<sup>116</sup> The Government could not pay rent to him in his capacity as a Senator, and so he rearranged his affairs.

Fullarton Investments then purchased the property as trustee of the Fullarton Road Trust, of which the Day Family Trust was a beneficiary. Fullarton Investments was entitled, pursuant to a lease executed on 1 December 2015, to direct the Commonwealth to pay rent to any person. It nominated “Fullarton Nominees” and on 26 February 2016 directed payment to a bank account. Fullarton Nominees was a business name owned by Mr Day and the bank account was his.

The Commonwealth did not pay the monies, despite two arrears claims, and rescinded the lease after the Department of Finance expressed concerns that Day continued to have a financial interest in Fullarton Rd. Day resigned from the Senate on 1 November 2016.<sup>117</sup>

The question for determination was whether Day had a direct or indirect pecuniary interest arising from the lease with the Commonwealth. There had been one previous decision on

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<sup>112</sup> Official Report of the National Australasian Convention Debates, (Adelaide), 21 April 1897 at 1037-1038.

<sup>113</sup> *Official Record of the Debates of the Australasian Federal Convention*, (Sydney), 21 September 1897 at 1023.

<sup>114</sup> Keane J at [183].

<sup>115</sup> *Re Day (No 2)* [2017] HCA 14 (5 April 2017).

<sup>116</sup> Mr Day was the sole director and shareholder of B & B Day Pty Ltd, which was trustee of the Day Family Trust and owner of the property. Mr Day and his wife were amongst the beneficiaries of the trust.

<sup>117</sup> The facts were determined in the course of a trial conducted by Gordon J in trial: *Re Day* (2017) 91 ALJR 262; [2017] HCA 2.

section 44(v) of the Constitution, being a decision of Barwick CJ sitting alone as the Court of Disputed Returns in *In re Webster*.<sup>118</sup> Barwick CJ interpreted the section very narrowly basing his construction on the *House of Commons (Disqualification) Act 1782* (UK) which he considered was the ‘precise progenitor’ of s.44(v).<sup>119</sup> All seven Justices in *Re Day* agreed that *Re Webster* was wrongly decided and should be overruled. The concern of four judgments in *Re Day (No. 2)* was with “*the possibility of a conflict between a parliamentarian’s private interests and his or her public duty*”.<sup>120</sup>

The Court rejected Day’s contentions that section 44(v) ought to be narrowly construed due to the penal consequences in section 46.<sup>121</sup> It did so on the basis that section 44 held “*a special status, because it is protective of matters which are fundamental to the Constitution, namely representative and responsible government in a democracy*”.<sup>122</sup>

The Court also rejected the submission that Day had to be a named party to the lease to hold an ‘interest’. Such an interpretation would fail to account for the word “indirect” in section 44(v).<sup>123</sup> Day had argued, by apogee, for a narrower interpretation through use of scenarios including one involving a politician who owns a property with a spouse who is a public servant, and where both are jointly liable for the mortgage repayments.<sup>124</sup> In this example, the politician would not have an indirect pecuniary interest.

The “*automatic and draconian consequences*” of section 44 meant it needed to be interpreted in such a way to ensure the greatest certainty of operation that is consistent with its language and purpose.<sup>125</sup> To achieve this, section 44(v) must be read so that it does not extend to agreements by the Executive government involving laws of general application – such as the purchase of stamps or government bonds.<sup>126</sup>

The Court unanimously held that Day’s expected (though not guaranteed) financial benefit constituted an ‘indirect pecuniary interest’ within the meaning of s 44(v), that he was thus disqualified from being chosen or sitting as a Senator, and that the vacancy should be filled by a special count of ballot papers.

Four justices (Kiefel CJ, Bell and Edelman JJ and Keane J) held that the vacancy arose on 26 February 2016, the date on which the direction of payment to Day was made. The remainder (Gageler, Nettle and Gordon JJ) held that the vacancy arose on 1 December 2015, the date of the execution of the lease.

### ***Draft Conclusions***

At the time of writing this paper, the following politicians had been referred to the High Court for determination of their status under s.44(i) – with a question mark over many more members of parliament:

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<sup>118</sup> [1975] HCA 22; (1975) 132 CLR 270.

<sup>119</sup> [1975] HCA 22; (1975) 132 CLR 270 at 278.

<sup>120</sup> At [23].

<sup>121</sup> As Barwick CJ had done in *Re Webster* (1975) 132 CLR 270 at 279.

<sup>122</sup> For example, at [72] per Kiefel CJ, Bell and Edelman JJ.

<sup>123</sup> For example, at [75] per Kiefel CJ, Bell and Edelman JJ.

<sup>124</sup> At [107], [197].

<sup>125</sup> At [97] (Gageler J).

<sup>126</sup> Kiefel CJ, Bell and Edelman JJ at [69]; see also at [101], [107] (Gageler J); at [198]-[201] (Keane J).

- Deputy Prime Minister and Leader of the National Party, Barnaby Joyce.
- Nationals deputy leader, Senator Fiona Nash.
- Nationals Senator Matt Canavan.
- One Nation Senator Malcolm Roberts.
- Family first Senator Nick Xenophon
- Greens' Senator Scott Ludlam (resigned).
- Greens' Senator Larissa Waters (resigned).

There has also been a case commenced under s.44(v) in respect of Nationals MP Dr David Gillespie, who is a member of the House (where the Coalition Government enjoys a one seat majority). He owns a complex of shops in Port Macquarie, and leases one of the shops to a person who runs an outlet of Australia Post. The issue is whether this is an indirect pecuniary benefit for the purposes of s.44(v). The case has been brought by Peter Alley, the defeated ALP candidate for the seat of Lyne won by Gillespie at the 2016 federal election.

We do not make any prognostications at this stage. Based on existing authority, the answers do not appear to be straightforward.

As discussed above, a solution for s.44(i) might have been derived from the wording debated in 1897, which at one stage required the person to have *“done any act whereby he has become a subject or citizen or entitled to the rights or privileges of a subject or a citizen of a Foreign Power”*.

Such words would have served to disqualify people who had made a positive step to acquire the citizenship of another country. However, this was not the final iteration. The final form is s.44 was much wider, and seems to have been intended to disqualify persons with dual citizenship regardless of whether they acquire their other citizenship voluntarily or involuntarily. Was this deliberate?

Sir John Hannah Gordon, a South Australian delegate to the Federal Convention, wanted to add the words *“or who has not since been naturalised”* to Section 44. This idea was not taken up. *“You cannot have two allegiances”* said Patrick McMahon Glynn.

At the time the constitution was written, there were no Australian citizens. They were “British subjects”. Australian citizenship wasn't created until 1949. Pre *Sue v Hill*, it would have meant that English, Canadians and New Zealander citizens would not have been considered to be subject to the terms of s.44(i). Barnaby Joyce (New Zealand), Malcolm Roberts (UK), and former Greens senators Scott Ludlam (New Zealand) and Larissa Waters (Canada) would not have been affected by Section 44. Mr Canavan's Italian citizenship would have still been a problem.

We await determination of these matters with bated breath.

To be continued.

**RCK & TJD**

**25 August 2017**

## *Commonwealth Constitution*

### **44. Disqualification**

Any person who:

- (i) is under any acknowledgment of allegiance, obedience, or adherence to a foreign power, or is a subject or a citizen or entitled to the rights or privileges of a subject or a citizen of a foreign power; or
- (ii) is attainted of treason, or has been convicted and is under sentence, or subject to be sentenced, for any offence punishable under the law of the Commonwealth or of a State by imprisonment for one year or longer; or
- (iii) is an undischarged bankrupt or insolvent; or
- (iv) holds any office of profit under the Crown, or any pension payable during the pleasure of the Crown out of any of the revenues of the Commonwealth; or
- (v) has any direct or indirect pecuniary interest in any agreement with the Public Service of the Commonwealth otherwise than as a member and in common with the other members of an incorporated company consisting of more than twenty-five persons;

shall be incapable of being chosen or of sitting as a senator or a member of the House of Representatives.

But subsection (iv) does not apply to the office of any of the Queen's Ministers of State for the Commonwealth, or of any of the Queen's Ministers for a State, or to the receipt of pay, half pay, or a pension, by any person as an officer or member of the Queen's navy or army, or to the receipt of pay as an officer or member of the naval or military forces of the Commonwealth by any person whose services are not wholly employed by the Commonwealth.

### **45. Vacancy on happening of disqualification**

If a senator or member of the House of Representatives:

- (i) becomes subject to any of the disabilities mentioned in the last preceding section; or
- (ii) takes the benefit, whether by assignment, composition, or otherwise, of any law relating to bankrupt or insolvent debtors; or
- (iii) directly or indirectly takes or agrees to take any fee or honorarium for services rendered to the Commonwealth, or for services rendered in the Parliament to any person or State;

his place shall thereupon become vacant.