SUPREME COURT
OF QUEENSLAND

Lucinda Lecture
Monash University
Melbourne
Monday 20 August 2018

Section 44 – The *other* subsections

The Hon Catherine Holmes
Chief Justice

Section 44 is now probably the best known of the Constitutional provisions. It appears today as it did when enacted:

> **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 sub-section (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.

I want to talk today about the origins of s 44 in the debates of the Constitutional Conventions which met in the 1890's to frame the Australian *Constitution*, the original draft of which was completed on the steamship Lucinda in March 1891. It seems an appropriate topic for a Lucinda lecture and a Melbourne audience, in light of what seems to me the disproportionate influence of Victorians in the debates. And it certainly has a contemporary relevance, given the High Court's reliance on those debates in construing s 44.[1] Then I'll turn to the section's interpretation and some continuing problems.

The Convention Debates

The first convention was convened on 2 March 1891.[2] The delegates were chosen by the States and consisted of current and past Ministers of the Crown, largely Premiers and ex-Premiers. In April 1891, the Lucinda draft of the Commonwealth of Australia Bill was first discussed. On the disqualification issue, there were two distinct areas of concern: the membership of Parliament and Parliament's independence of the Crown.

The first concern is reflected in what was then cl 46. It had three limbs of disqualification: allegiance to a foreign power being an undischarged bankrupt or insolvent or a public defaulter or being attainted of treason or convicted of a felony or an infamous crime. I am not in this lecture going to talk much about dual citizenship which has had plenty of attention already; hence the title of this talk. But I will point out that in its original formulation it required a positive act on the part of the person to express allegiance to, or seek the citizenship privileges of, a foreign power. How different things might have been!

The second concern, independence of the Crown, was manifested in the two remaining disqualification sections. Clause 48 provided that anyone who directly or indirectly entered or enjoyed an agreement on account of the public service of the Commonwealth was incapable of being chosen or sitting as a Senator or a Member of the House of Representatives as long as the agreement or any benefit from it lasted. Any sitting member who entered such an agreement was to have his place declared vacant by the

---

1 In, for example, *Sykes v Cleary* (1992) 176 CLR 77, 98 and *Re Day (No 2)* [2017] 91 ALJR 518, 526.

2 *Official record of the proceedings and the debates of the National Australasian Convention Debates*, Sydney, 2 March to 9 April 1891.

Senate or the House. There was an exception, though, for any agreement made for the general benefit of an incorporated company consisting of more than 20 persons. That clause was not the subject of any discussion, but it was amended to remove the requirement of a declaration, making vacation of the seat automatic.

Clause 49 precluded anyone who accepted an office of profit under the Crown or a pension payable during the pleasure of the Crown from being capable of being chosen or sitting as a member with the exception of officers of the Military or Naval Forces not in receipt of annual pay; which seems to be a reference to those in the equivalent of the reserve forces. There was argument about whether it was cast too broadly in excluding anyone on a pension. Sir Samuel Griffith agreed the clause needed work, so debate on it was postponed.

Any of those five circumstances made the prospective member incapable of being chosen as well as of sitting. I have searched in vain for the source of the expression "incapable of being chosen" which has caused so much angst. British legislation[3] used the expression "incapable of being elected or sitting and voting". None of the constitutions of the various colonies used the expression; some placed the bar on being elected, others simply on sitting.

The heated argument in the 1891 debate was reserved for the question of whether a person convicted of a felony ought ever to be allowed to sit in Parliament. Mr Munro, the Premier of Victoria, pointed out that permanent disqualification was the law of Victoria, of which Victorians were very proud, while Andrew Inglis Clark, the Attorney-General of Tasmania and a key player in the drafting process, accused him of thinking that because the provision was law in Victoria, that of itself was enough reason to put it in the Federal *Constitution*. All the wisdom of the world was not, he pointed out, concentrated in Victoria; an observation which, as a Queenslander, I recommend to you. The counter view was that someone who already paid the penalty for his offence should not be further punished, and it should be left to the electors, to whom, no doubt, the press would reveal all, to decide. Victorian righteousness did not prevail: the decision was made in favour of qualifying the provision by providing that the disability could be removed by a pardon, release or expiration of a sentence.

---

3 *House of Commons (Disqualifications) Act 1801* (UK) s 1, 2, 3.

There was delay: the Commonwealth Bill as settled during the 1891 debate met with resistance, particularly in New South Wales. But the push for Federation grew, and another convention was set up to debate the Bill in March-April 1897.[4] The participants were elected by voters in the various colonies, the exception being Queensland which could not get its act together, because it was still arguing about whether it should become one State or three.

In that debate, the three part clause 45 as it now was – foreign allegiance, bankruptcy and conviction – was agreed to without much in the way of discussion. The real focus was on the office of profit disqualification. The virtuous Victorians successfully proposed that there be a provision, like the one they had, preventing a legislator from accepting an office of profit under the Crown for six months after vacating his seat. The concern was that rewards might be given for political services to the Government. The clause did not in fact survive later debate, but what is interesting is that there was argument about whether disqualification questions ought to be left to Parliament either by keeping them out of the *Constitution* altogether, or by use of the formula "until the Parliament otherwise provides". That phrase was in fact inserted at the beginning of the six month exclusion clause; a unique use of it in the disqualification provisions.[5]

The debate really reflects the tension for the framers between achieving flexibility and ensuring Parliament's ability to control its membership, as against the need to maintain public confidence by inserting provisions to ensure integrity which could not be removed except by the public's will. In my view, in relation to s 44 at least, they were not very successful in getting the balance right.

And, in this session, Mr Patrick Glynn of South Australia moved that the words "of being chosen or" be removed from the clause, effectively making someone holding an office of profit eligible for election but incapable of sitting once elected. Someone in that position, he said, could give up either seat or salary; and voters could choose whether to elect someone who had received a salary under the Crown. Mr Glynn, known as "Paddy", was a lawyer, an Irish émigré. He later became Attorney-General for the Commonwealth, but at this stage of his career it is apparent from reading the debates that he did not have

---

4 *Official report of the National Australasian Convention Debates*, Adelaide, 22 March to 5 May 1897.

5 In contrast to the qualification provision in s 34 of the *Constitution*.

much clout. You can't tell from the transcript of this debate how the vote actually went; it simply shows that the result of his motion was "negative".

The pecuniary interest clause was also debated in this session and an additional paragraph was inserted to bring the provision in line with Victorian law, requiring any person accepting a fee or honorarium for work done on the Commonwealth's behalf to vacate his place. Ultimately, that paragraph was moved into today's s 45, which sets out a series of events, including disqualification under the present-day s 44, which result in a member or senator's place becoming vacant. Significantly, in this discussion Isaac Isaacs emphasised the need for the framers to do everything possible to separate the "personal interests of a public man from the exercise of his public duty".[6]

In the September 1897 debate,[7] what was still cl 45 still contained the three barriers, foreign allegiance, bankruptcy and conviction. Mr Glynn proposed that those disqualifications should be expressed to operate "until the Federal Parliament otherwise provided". He was an advocate for flexibility, pointing out that the meaning for example of "bankrupt" or "felony" might change with time. The disqualification should be a matter for the Parliament, not fixed in the *Constitution*. Edmund Barton, our first Prime Minister, vigorously opposed the amendment and it went down solidly, 26 votes to eight. Two Victorians who later became High Court judges, Isaac Isaacs and Henry Higgins, were amongst the "no" votes.

The Legislative Assembly of New South Wales proposed that subclause (ii), relating to bankruptcy, insolvency and public default be removed. It seems likely that the sympathy which this evoked in some quarters arose from the effects of the 1890's depression with its high rates of personal bankruptcy, including among the respectable classes. It was said that many who devoted themselves to politics had neglected their own affairs and become impoverished. Isaac Isaacs pointed out that this form of disqualification was in the Victorian *Constitution* and that the interests of public morality ought to prevail over the individual's convenience. Public morality and the Victorian view did prevail; the clause was retained.

---

6 Above n 4, 1037.

7 *Official record of the debates of the Australasian Federal Convention*, Sydney, 2 September to 24 September 1897.

In the September 1897 resumption of the debate, Sir Samuel Griffith's proposal to substitute for the words "felony or any infamous crime", any offence carrying a penalty of three years imprisonment or longer was discussed and accepted, although left to the drafting committee; for which we may all be grateful, because views might well differ as to which crimes are infamous. In 1898, a subsection was agreed to in that amended form.

Meanwhile the second part of the office of profit provision precluding acceptance of such an office for six months after leaving Parliament was omitted after further debate. The general view was that there would be a lot of positions to fill in the early days of the Commonwealth and a restriction of this kind was unwise; if it were to be imposed, it should be left to the Parliament.

Mr Glynn wanted the exception to the pecuniary interest disqualification broadened to prevent anyone holding more than 1/20th of the capital of a company which had an agreement with the Commonwealth from sitting or being chosen. His fellow South Australian, Sir John Downer, a former premier and nation-builder, said that he could not see any point in limiting the powers of the Government to make whatever contracts it thought beneficial. Again Mr Glynn's proposal was comprehensively defeated. Mr Isaacs proposed a change to the company exception to make it apply to any company consisting of more than 25 persons, and that ultimately occurred.

By the March 1898 debate,[8] all five limbs of disqualification had been brought together in cl 45. There were some changes not debated which were to assume considerable importance: sub-section (i) now took its passive form, while sub-section (v) now referred to a direct or an indirect pecuniary interest. The words "convicted and is under sentence or subject to be sentenced" were added to sub-section (ii). As a result, William Henry Groom, who had been transported for embezzlement at the age of 13 and also had done time in Australia for stealing gold was able to be elected at the first Federal election[9] and thus became the first convict to sit in the Federal Parliament. Mixed blessing: he also became the first Federal Parliamentarian to die, of heart failure, the first time the Parliament met.

---

8 *Official record of the debates of the Australasian Federal Convention*, Melbourne, 20 January to 17 March 1898.

9 He was elected as member for Darling Downs. There is now a Federal seat in that region named after him. He was given the privilege of speaking first in the address in reply to the Governor General on the first day of Parliament's sitting.

This debate saw the last push to remove the bankruptcy disqualification, with an impassioned speech by one of the New South Wales representatives who said that some of the "wisest and best men whoever guided public affairs in New South Wales"[10] would have been shut out of public life, had a similar provision operated in that State. The clause remained. Meanwhile, Sir John Forrest successfully pushed for the exception in subsection (iv) extending to State Ministers, the concern being that otherwise the Premiers would not be able to nominate to sit in Federal Parliament without resigning their offices. He was, as it happened, the Premier of Western Australia, who upon Federation went into federal politics.

On 16 March 1898, Mr Barton presented the drafting committee's final product, which included the amendment substituting one year for three years in the disqualification for conviction.

Sub-section 44(v) – pecuniary interest

For three quarters of a century thereafter, the early drafters would have been able to pat themselves on the back about s 44. It caused no controversy, and there was no serious challenge brought under it.[11] Even when a case which looked to have substance did arise in 1975, *Re Webster*,[12] nothing came of it. Chief Justice Barwick made a rather odd decision to sit alone as the Court of Disputed Returns to determine that Senator Webster had not fallen foul of s 44(v). He was a shareholder in a family company which tendered to the Commonwealth to supply timber. It quoted prices to the relevant department, which from time to time put in an order.

Barwick CJ characterised the purpose of the provision as identical to that of an 18th century English provision in similar terms: the protection of the independence of Parliament.[13] It was not, he said, addressed to general conflicts of interest and duty. Given that purpose, in order to attract the disqualification, it was necessary that the

---

10 Above n 8, 1932.

11 *Crittenden v Anderson* (Unreported, High Court of Australia, Fullagar J, 23 August 1950), in which the petitioner claimed that the successful Catholic candidate owed allegiance to a foreign power, namely the Papal State hardly qualifies. *Sarina v O'Connor* involved a similar argument in a petition lodged in 1946, but it was withdrawn.

12 *Re Reference to Court of Disputed Returns; Re Webster* (1975) 132 CLR 270.

13 Ibid 278-9.

agreement be in place over a substantial period of time and be one under which the Crown could conceivably influence the contractor as a member of Parliament through the possibility of financial gain.[14] Here, there was no continuing agreement, but merely separate casual and transient agreements each time an order was put in, not within the scope of s 44(v). Anyway, the Senator as a shareholder in a private company did not have a pecuniary interest in its agreement with the public service, by reason of his shareholding alone.[15]

Barwick CJ did refer to the Convention Debates in relation to the minimum number of shareholders in the company exception as designed to ensure that small private companies were not used as vehicles to defraud the community.[16] He did not otherwise advert to the debate on the provision.

Webster's effect lingered for 40 years,[17] but it was not followed in *Re Day (No 2)*.[18] You will recall that Mr Day, a Family First Party senator, was the sole director of a corporate trustee of a family trust of which he and other family members were beneficiaries. The family company owned some commercial premises over which it had given a mortgage, with Mr Day also guaranteeing the relevant loan. After his election, but before he took up his post, the company, providing vendor finance, sold the property to another company, Fullerton Investments Pty Ltd, whose sole director was an associate of Mr Day. What happened next was that Fullerton Investments leased the premises to the Commonwealth as office accommodation for Mr Day. Oddly, Fullerton Investments' invoices for rent were actually sent by Mr Day's executive assistant and the payments were directed to a bank account which was in fact Mr Day's. The question was whether he had a pecuniary interest in the lease.

It was urged for Mr Day that *Webster* should be followed and the conclusion reached that because the Commonwealth could not exert any influence on his Parliamentary affairs by anything it could do in relation to the lease the section did not apply, and anyway because he was not a party to the lease, he had no interest in it.

---

14 Ibid 279-280.

15 Ibid 285.

16 Ibid 279.

17 For example, it was used as justification for not referring a possible breach by Warren Entsch in 1999 in relation to his interests in a company with concreting contracts with the Department of Defence.

18 (2017) 91 ALJR 518.

The High Court considered that *Webster* had proceeded on a wrong view of the place of s 44(v) in the *Constitution* and of its purpose.[19] Its terminology was different from that of the 18th century legislation because of that reference to a "pecuniary interest", which focused attention on the possibility of a conflict of interest between the person's own business interests and that of the public whom she or he was representing. The Convention Debates were critical; the Court placed great emphasis, in particular, on Isaac's statement about the need for a parliamentarian's personal interests to be separated from the exercise of his public duties.[20] The sub-section's objects were not only to ensure that the public service of the Commonwealth could not exercise undue influence over members of Parliament, but also that the latter would not seek to benefit from such agreements or put themselves in a position of conflict between their duty to those they represented and their own personal interests.

In *Webster*, Barwick CJ had observed that s 44(v) should be strictly construed because it was penal in nature; s 46 provides for a penalty for breach.[21] But that did not mean that its operation should be limited in a way contrary to its purpose. It was to be remembered that it had a special status in protecting representative and responsible government.[22] The argument for Mr Day that it was necessary that he be in the position of a party to the lease before he could be said to have an interest in it did not give proper effect to the word "indirect".

By rejecting some scenarios argued on behalf of Mr Day, the Court gave further assistance as to what was entailed in an indirect pecuniary interest: it looked to the practical effect of the agreement on the person's pecuniary interest.[23] The provision would not apply merely because a parliamentarian supplied goods to someone who had an agreement with the Public Service, although it might be otherwise if there were some relationship between the supplier and the party to the agreement or if the supplier received some financial benefit from it. The Convention Debates made it clear that the phrase "indirect pecuniary interest" was chosen to ensure that its purpose was not defeated by the

---

19 Ibid [43]-[52].

20 Ibid [174], quoting *Official Report of the National Australasian Convention Debates* (Adelaide), 21 April 1897, 1037-1038.

21 *Re Reference to Court of Disputed Returns; Re Webster* (1975) 132 CLR 270, 279.

22 (2017) 91 ALJR 518, [71]-[72].

23 *Re Day (No 2)* (2018) 92 ALJR 373, [54].

interposition of other entities between the parliamentarian and the Commonwealth.[24] The inference from the exception to s 44(v) was that shareholders in a company could be regarded as having a pecuniary interest in its contracts; a similar approach was to be taken to beneficiaries of a discretionary trust. An example rejected was of a husband benefiting from loan repayments made by his wife, a public servant; the requirement that the interest be in an agreement implied some personal connection, albeit an indirect one.[25] Nor did the provision extend to ordinary day-to-day dealings which citizens had with government;[26] so it seems that the beneficiaries of government-funded student loans need not fret.

Gageler J in his separate judgment observed that the draconian effect of s 44(v) in disqualifying the citizen from being chosen as or sitting as a parliamentarian pointed in favour of an interpretation which gave the disqualification "the greatest certainty of operation that is consistent with language and purpose". Parliamentarians and their electors were, he said,

> "entitled to expect tolerably clear and workable standards by which to gauge the Constitutional propriety of their affairs". [27]

I am not sure that the parliamentarians who have been disqualified have been appropriately grateful for receiving their entitlement of clarity from the High Court. But at any rate, here we see clarity and certainty coming to the forefront as a guiding principle. The sentiment re-appears in *Re Canavan*,[28] the citizenship case. Uncertainty was "apt to undermine stable representative Government".[29] Stability required certainty as to whether a candidate was, from the date of nomination, capable of being chosen and of sitting.[30]

The tantalising prospect of some further resolution of the meaning of s 44(v) loomed in *Alley v Gillespie,*[31] in which Alley claimed the imposition of penalties on Dr Gillespie on the basis that he had a pecuniary interest in an agreement with the Public Service of the Commonwealth because he was a shareholder in a company which leased premises to

---

24 Ibid [61].

25 Ibid [65]-[66].

26 Ibid [69].

27 Ibid [97]

28 (2017) 91 ALJR 1209.

29 Ibid [54].

30 Ibid [48].

31 (2018) 92 ALJR 373.

Australia Post. But the High Court decided, again with substantial reference to the Convention Debates, that it did not have jurisdiction in a common informer action to determine disability questions.[32] There were only two means by which to challenge the validity of an election in the Court of Disputed Returns: in the case of an unsuccessful candidate, by petition within the time limited; otherwise, by reference by the Senate or House of Representatives.[33]

Sub-section 44(iv) – office of profit under the Crown

Now I come to the most concerning issue under s 44, because of what it means for representative democracy, which is what constitutes an "office of profit under the Crown" and the point at which such an office must be vacated in order to avoid disqualification. The question first arose in *Sykes v Cleary (No 2)*,[34] in which a Victorian teacher who had been on leave without pay was held, despite his resignation before the poll was declared, to have been incapable of being chosen as a member of the House of Representatives because he held an office of profit under the Crown, contrary to s 44(iv).

The majority noted that the section had its origin in a provision of the *Act of Settlement 1701* (UK) and it had generally been recognised in England that the position of officers of departments of Government was incompatible with membership of Parliament, for three reasons: the performance of public service duties would impair the public servant's capacity to attend to the duties of a member of Parliament; there was a risk that a public servant would share the political opinions of the relevant Minister of his or her Department and would not bring a free and independent judgement to bear; and membership of Parliament would detract from performance of the relevant public service duty.[35] Those considerations meant that the disqualification should be understood as embracing at least all those permanently employed by government, not merely those who held senior positions.[36] The express exclusion of State ministers made it clear that the sub-section was wide enough to include an office of profit under the Crown in right of a State.[37]

---

32 Ibid [51], [67]

33 Ibid [10]-[13].

34 (1992) 176 CLR 77.

35 Ibid 95.

36 Ibid 96.

37 Ibid 98.

But the major effect of *Sykes v Cleary* was the Court's conclusion as to when the disqualification began to operate; in other words, the effect of the phrase "incapable of being chosen". At the latest, the majority said, it was polling day, when the public exercised its choice by voting, rather the day on which the poll was declared.[38] There was a practical reason for that interpretation; otherwise a public servant who secured a voting majority would still have the option to resign before being declared elected. Including candidates who could actually opt for disqualification was an unnecessary complication in electors' decision making and it was not conducive to certainty and speed in determining election results that they should depend on candidates' decisions to be made after polling day.[39]

Deane J preferred a narrow construction. A disqualification provision of this kind ought to be construed as depriving a citizen of the right to seek election only to the extent that the words clearly and ambiguously required.[40] The purpose of the provision, he said, was that people with conflicting responsibilities and loyalties did not hold the position of Member of Parliament; which arose only after a person was declared elected. Generally in relation to some of the disqualifying provisions of s 44, the preferable approach would be to permit nomination or even participation in the poll where it was clear that the candidate could ensure that he or she was not disqualified at the time the polls were declared.[41] Deane J's construction in fact would have achieved the effect for which Paddy Glynn had argued.

20 years later,[42] *Re Nash (No 2)*[43] expanded on the majority's approach in *Sykes v Cleary* to the meaning of "incapable of being chosen" which had already been followed in *Re*

---

38 Ibid 99-101.

39 It doesn't seem, though, that had the words used been "incapable of being elected" it would have made a difference. The majority referred to *Harford v Linskey* [1899] 1 Q.B. 852 at 858 for the proposition that the words "shall be incapable of being chosen" referred to the process of being chosen, of which nomination was an essential part. The legislation in that case provided that a contractor "shall be disqualified for being elected"; which it was held meant also disqualification for nomination, essentially in the interests of certainty. Otherwise, they said, no one would know whether the persons nominated would be effective candidates and there would be confusion if the disqualification were to be removed at some point after the polling began; there would be questions of whether votes given before that point would be valid.

40 Ibid 120-121.

41 Ibid 122.

42 *Free v Kelly* (1996) 185 CLR 296 and *Re Patterson*; *Ex parte Taylor* (2001) 207 CLR 391, decided in the interim, warrant brief mention. Mrs Kelly, who was an officer of the Royal Australian Airforce, when she nominated for election for the House of Representatives accepted that she was incapable of being chosen as a member at the time she nominated, so Brennan CJ, sitting alone as the Court of Disputed Returns, made a declaration to that effect. In *Ex parte Taylor,* the High Court took the view that Parliamentary secretaries were ministers and thus fell within the exception to the disqualification in s 44(iv).

43 (2017) 92 ALJR 23.

Canavan. Fiona Nash was incapable of being chosen as a senator because of dual citizenship. Hollie Hughes was on a recount the next highest vote-getter and it was anticipated that she would be declared elected until she filed an affidavit raising an issue about her own eligibility. After she had failed in her attempt to be elected she was appointed as a part-time member of the Administrative Appeals Tribunal; not an uncommon phenomenon for unsuccessful candidates, but again, it turned out to be one of those mixed blessings. Although Ms Hughes resigned from the AAT position before the special count which determined that she was the next in line, she was held incapable of being chosen.

The Court held that the process of choice had not ended with the declaration of Mrs Nash's election; it was incomplete until a person who was qualified to be chosen was determined to be elected, which still hadn't happened.[44] The judgment concludes with a sort of "she brought it on herself" justification which is expressed to be "lest [the result] might seem harsh or unduly technical".[45] Miss Hughes had taken the voluntary step of accepting appointment to the tribunal in circumstances where a reference was a possibility. By doing so, she had forfeited the opportunity to benefit from a recount.

In *Re Lambie,*[46] the court reiterated that the process of "being chosen" began with nomination for election and continued until a candidate who was not subject to the s 44 disqualification at any time during the process was validly returned as elected.[47] In that case, s 44(iv) was considered again: the issue was whether Steven Martin could be elected for Tasmania on a special count after Ms Lambie's disqualification or was incapable of being chosen because he was Mayor and Councillor of a local government corporation. The question was whether those offices, which were clearly of profit, were "under" the executive Government of Tasmania.

The Court considered the purpose of the disqualification, which was to protect the Constitutional framework for responsible government by limiting the capacity of the Commonwealth executive to influence members in the performance of their Parliamentary duty by grant of an office of profit.[48] Despite what had been said in *Sykes v Cleary*, it was

---

44 Ibid [39], [44].

45 Ibid [45].

46 (2018) 92 ALJ 285.

47 Ibid [7].

48 Ibid [22]-[30].

not so concerned with the maintenance of a politically neutral public service or preservation of the efficient performance of Public Service duties. Consequently, an office of profit was "under" the Crown when its continued holding or the receipt of profit from it depended on the will of the Executive Government of the Commonwealth or a State. The security of tenure entailed and the mechanism for removal were irrelevant. Mr Martin was elected, not appointed by Executive Government. Such powers as the government had in relation to councillors' remuneration and dismissal were so constrained as not to amount to executive control over holding or profiting from the office of Mayor or councillor. Section 44(iv) was not engaged.[49] Edelman J took a more straightforward approach; in his view the holder of an office "under the Crown" was one who was appointed or employed by the Executive Government.[50]

Sub-sections (ii) and (iii) – bankruptcy and conviction

Sub-sections (ii) and (iii), the bankruptcy and conviction disqualifications were considered in *Nile v Wood,*[51] in which Mrs Elaine Nile presented a petition, founded on some optimistic grounds, for Mr Wood to be declared to have been disqualified for election.[52] Mr Wood, a member of the Nuclear Disarmament Party, had been convicted of obstructing shipping for paddling a kayak in front of an American warship and had spent one month in jail as a conscientious objector. What the petition didn't do was articulate that he was under sentence or subject to be sentenced, which was, the Court said, the proper construction of the language used in the subsection and also was the intention of the framers of the *Constitution*.[53] It was also alleged that he was insolvent; but as was apparent from the Convention Debates, the term was intended to mean adjudicated insolvent and not discharged.[54] It was not enough that a person as a matter of fact be unable to pay his debts.[55]

---

49 Ibid [36], [43]-[51].

50 Ibid [80]-[81].

51 (1988) 167 CLR 133.

52 The court was deeply unimpressed by the form of the petition which included no prayer for relief and, worse, did not set out any facts justifying relief.

53 *Nile v Wood* (1988) 167 CLR 133, 139.

54 Ibid 140.

55 Later, of course, it emerged that he was not an Australian citizen. See *Re Wood* (1988) 167 CLR 145.

And finally I come to *Re Culleton (No 2),*[56] in which s 44(ii) was again considered. Mr Culleton had been convicted of larceny, making him liable to two years imprisonment and a court had issued a warrant for his arrest for sentencing. Subsequently he nominated for election to the Senate and on the return of the writs was declared elected. After that occurred he was granted an annulment of his conviction and found guilty once more, but this time the charge was dismissed without a conviction recorded. The Court rejected his argument that in *Nile v Wood* the words "subject to be sentenced" had been treated as superfluous.[57] It was evident from the terms of the subsection that it was intended to ensure that not only a person who had been sentenced should be disqualified but so should a person who was able to be sentenced. A warrant having issued for his arrest, the process for Mr Culleton's sentencing was set in train and he was "subject to be sentenced".[58] The legislation enabling the annulment of his conviction had no retrospective effect. The disability in the form of the conviction persisted for the whole of the relevant period, from nomination to the return of the writs.[59]

Nettle J took a slightly different approach, while agreeing in the result. The subsection applied regardless of whether a conviction was subsequently annulled, even if it were with retrospective effect.[60] That result was preferable in the interests of certainty in the electoral process.

Problems which remain

Where are we now? Well, there are some areas of concern which might have been amended to reflect contemporary society had the framers leaned towards flexibility, say by use of the "until Parliament provides" option. Starting with this last sub-section, many of what we would regard as relatively minor offences carry maximum penalties of 12 months imprisonment. The disqualification will be effective even though the offender is at no risk of actual custody; and it may last for years if they are given a suspended sentence with a lengthy operational period. It is easy to envisage that both candidates and sitting members could fall foul of the section, through, say, acts of civil disobedience or even, possibly, through contempt of court. Another difficulty identified with the provision is its

---

56 (2017) 91 ALJR 311.

57 Ibid [16]-[22].

58 Ibid [36].

59 Ibid [13].

60 Ibid [57].

varying effect: differing State laws with differing maximum penalties will result in different circumstances of disqualification,[61] so conduct which renders a member from one State ineligible to sit may not affect another.

"Attainted of treason" is an archaism, the meaning of which is obscure. Does it just mean convicted? Another problem is that when the section was changed, the reference to removal of the disability by pardon was taken out, so that it would seem any conviction of treason, even if later removed in that way, will operate as a permanent disqualification; the only disability incapable of being removed. It is of some importance because this scope of what constitutes treason has expanded over the years: [62] it's treason, for example, to engage in conduct that assists with intent an organisation engaged in armed hostilities against the Australian Defence Force. It's also treason to cause harm to the Prime Minister.

There are areas of uncertainty which might have been cleared up if Parliament had the power of amendment. In the pecuniary interest provision, sub-section (v), what amounts to an "agreement"? In *Day*, the Attorney-General submitted that it included any arrangement or understanding. What is "the Public Service of the Commonwealth"? The majority in *Day* used the terms "the Commonwealth" and "the Public Service of the Commonwealth" interchangeably; Keane J[63] and Gageler J[64] said that there was a distinction to be drawn between the two and that the Public Service referred to officers of the administration; Nettle and Gordon JJ expressly rejected that distinction.[65]

But the real problem in practical terms is the phrase "incapable of being chosen" and the High Court's interpretation of it as extending from nomination to the return of a qualified candidate. That will have a bearing on all of the sub-sections' application. So, for example, a person convicted of a disqualifying offence who has his or her conviction quashed within the election period will presumably be caught.[66] Even if Nettle J's more stringent approach

---

61 See for example John Kalokerinos 'Who may sit? An examination of the Parliamentary disqualification provisions of the Commonwealth' (Honours Thesis, Faculty of Law, Australian National University, 2000) 17.

62 See *Criminal Code Act 1995* (Cth) s 80.1.

63 *Re Day (No 2)* (2017) 91 ALJR 518, [169]-[170].

64 Ibid [103]-[105].

65 Ibid [266]-[267].

66 Professor Anne Twomey raised this question, before the *Nash* decision was given, in her article, 'Section 44 of the Constitution – what have we learnt and what problems do we still face?' (2017) 32(2) *Australasian Parliamentary Review* 6.

isn't adopted, at common law, the quashing of a conviction doesn't mean that it has never existed. And on the logic in *Re Nash (No 2)*, it is irrelevant that both the disqualification and the removal of the cause of it occur during the critical period.

In relation to the pecuniary interest sub-section, is a business person wanting to enter politics to give up contracting with the Commonwealth in case a snap election is called and something hasn't settled by the time for nomination? And what of the office of profit sub-section? As many commentators have pointed out, it means that a large proportion of the population faces a serious career and financial disincentive to running for Parliament. Although the High Court in *Lambie* rejected the *Sykes v Cleary* justification of public service efficiency and neutrality for casting the net wide enough to include any employee, however junior, the spread of that net didn't become any narrower in consequence. The implications for such a wide construction, which embraces everyone from departmental directors-general to teachers' aides, are obvious. The *Public Service Act 1999* (Cth)[67] provides for reinstatement of a public servant who has unsuccessfully stood for Parliament, but the *Re Nash* effect is that not only must someone holding an office of profit give up his or her job to contest a Senate position, but they cannot afford to resume it if they want to remain eligible should it turn out that the winner is disqualified.

The *Sykes v Cleary* argument for certainty is not a cogent one. It is difficult to believe, for example, that someone who had taken the trouble to campaign for political office would not readily give up a public service position once elected. And what is achieved, as Deane J pointed out, by disqualifying from election people who have the power to remove the cause of disqualification, and thus the concern, before they ever come to sit? If the purpose of s 44 is, as was said in *Day*,[68] to protect representative and responsible government as fundamental to the *Constitution*, it's a little hard to see how this state of affairs is conducive to the representative part.

A large number of Parliamentary inquiries have recommended changes to s 44, but we all know the unlikelihood of achieving change by referendum. It is a great pity. We are left with an inflexible provision, incapable of accommodating social change; of recognising, for example, that half of the Australian population is foreign born or the size of the public service. To be fair, it is most unlikely that the debaters, when they elected for

---

67 *Public Service Act 1999* (Cth) s 32.

68 *Re Day (No 2)* (2017) 91 ALJR 518, [72].

entrenchment rather than flexibility, thought for a moment that their draft would go unchanged for a century.

If only they’d listened to Mr Glynn.