DISQUALIFICATION OF MEMBERS OF THE AUSTRALIAN PARLIAMENT — RECENT DEVELOPMENTS AND THE CASE FOR REFORM

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ABSTRACT

This paper reviews the two most significant decisions of the High Court in 2017, which led to the disqualification of several members of the Commonwealth Parliament. Firstly, *Re Canavan* which applied the terms of s 44(i) strictly to disqualify dual citizens even when their foreign citizenship is acquired unknowingly. Secondly, *Re Day (No 2)* which revives the government contractor ground in s 44(v) by overturning the narrow approach in *In re Webster*. Both decisions affirm the important role of the grounds of disqualification to reinforce the obligation of members of parliament to act only in the interests of the nation, and not for their own personal interest. Yet, the disproportionate impact of *Re Canavan* on members who had no awareness of their foreign citizenship by descent indicates that at least the second limb of s 44(i) should be repealed. Not so s 44(v), the full implications of which have yet to be identified. This paper also urges the amendment of the *Common Informers (Parliamentary Disqualifications) Act 1975* (Cth) to give the Court of Disputed Returns the jurisdiction to determine the qualification of members in any common informer action.

I INTRODUCTION

The grounds of disqualification of members of the Commonwealth Parliament were settled over a century ago during the constitutional debates of the 1890s and then entrenched in ss 44 and 45 of the Commonwealth Constitution. Two recent decisions[1] of the High Court declaring the disqualification of one member of the House of Representatives and five Senators highlight the rigour of those constitutional provisions in protecting the independence and integrity of Parliament. Those decisions applied two specific grounds of disqualification in s 44: being a citizen of a foreign power within s 44(i)[2] and being a government contractor within s 44(v). Two other recent decisions of the High Court concerned with other grounds of disqualification in s 44(ii)[3] and s 44(iv)[4] are briefly referred to at the end of this paper. There is no doubt that ss 44 and 45 are finally prominent on the political stage.[5]

This paper explores the High Court's interpretation and application of the two grounds of disqualification in s 44(i) and (v), and whether they remain appropriate today. Comparison is drawn with the position at the State level. A comprehensive survey of all the grounds of disqualification of federal, state and territory members of parliament

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[1] *Re Day (No 2)* [2017] HCA 14; *Re Canavan* [2017] HCA 45.

[2] There were three further references from the Senate, in relation to Stephen Parry, Jacqui Lambie and Skye Kakoschke-Moore, all of whom had resigned as senators because of dual citizenship by descent.

[3] Being convicted of a criminal offence: *Re Culleton (No 2)* [2017] HCA 4.

[4] Holding an office of profit under the Crown: *Re Nash (No 2)* [2017] HCA 52.

[5] Why so many MPs were challenged in 2017, especially for dual citizenship, is puzzling. Media suggestions that for many years the major political parties deliberately refrained from challenging each other's members are very concerning.

is found elsewhere.[6] Unlike the requirements of *qualification* for election which can be changed by legislation under s 34 of the Constitution, the grounds of disqualification in ss 44 and 45 can only amended under s 128 with referendum approval.

This paper argues that reform of s 44(i) is highly desirable. Although its original purpose of ensuring against any split allegiance, may be justified for members of a national legislature, the recent controversy over the disqualification of members of the Commonwealth Parliament who were unaware of their dual citizenship by descent, suggests that any protection of political integrity intended to be derived is outweighed by the adverse impact on the legitimacy of those members and the consequent erosion of public confidence in the parliamentary system. Even if reform is resisted, a legislative mechanism appears available to alleviate the harshness of s 44(i).

There appears to be no equivalent need for reform of the disqualification of government contractors under s 44(v). While its application entails some level of uncertainty, *Re Day (No 2)*[7] has both revived its purpose of public integrity, as well as clarified its essential scope. Further clarification is needed but this is probably best achieved through the High Court itself in appropriate cases than by constitutional amendment.

A *Grounds of Disqualification*

The grounds of disqualification for Commonwealth members of parliament are found exclusively in ss 44 and 45 of the Commonwealth Constitution:

> **44 Disqualification**
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> 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.

[6] See eg Senate Standing Committee on Constitutional and Legal Affairs Report, *The Constitutional Qualifications of Members of Parliament*, 1981; Gerard Carney, *Members of Parliament: Law and Ethics* (Prospect 2001) chapters 2, 3 and 4 at 9-155.
[7] [2017] HCA 14.

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

The essential difference between the two provisions is that s 44 disqualifies persons from being validly elected in the first place, whereas s 45(i) vacates the seat of any validly elected member whose circumstances change so as to fall within any of the s 44 grounds of disqualification. Section 45 includes two additional grounds in paras (ii) and (iii) for the disqualification of sitting members. The critical date for applying s 44, according to the interpretation of a majority of the High Court in *Sykes v Cleary*[8], is the date of nomination as a candidate. This date is implied from s 44; it is not expressed. Unfortunately the majority rejected later options such as the date of the election or the return of the writ. Consequently, many candidates must renounce any foreign allegiance and withdraw from interests in government contracts before nominating, even though most are not elected. One can only speculate as to how far this dilemma contributed to the obvious lack of compliance with the Constitution in these recent cases.

B *Jurisdiction of each House and of the High Court*

All but one of the cases heard by the High Court in 2017 were referred to the Court, sitting as the Court of Disputed Returns, by the relevant House of Parliament pursuant to s 376 of the *Commonwealth Electoral Act 1918* (Cth). The exception, discussed below, is *Alley v Gillespie*[9] which was initiated as a common informer action in the High Court's original jurisdiction. Both of these forms of jurisdiction were originally provided for in ss 46 and 47 of the Constitution:

> **46 Penalty for sitting when disqualified**
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> Until the Parliament otherwise provides, any person declared by this Constitution to be incapable of sitting as a senator or as a member of the House of Representatives shall, for every day on which he so sits, be liable to pay the sum of one hundred pounds to any person who sues for it in any court of competent jurisdiction.
>
> **47 Disputed elections**
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> Until the Parliament otherwise provides, any question respecting the qualification of a senator or of a member of the House of Representatives, or respecting a vacancy in either House of the Parliament, and any question of a disputed election to either House, shall be determined by the House in which the question arises.

In each case, Parliament has otherwise provided. Pursuant to s 47, Divisions I and II of Part XXII of the *Commonwealth Electoral Act 1918* (Cth) were enacted. Division I vests in the High Court as the Court of Disputed Returns[10] exclusive jurisdiction to hear electoral petitions challenging the validity of an election.[11] Any challenge must be brought within 40 days of the return of the writ. This ended the power of each House

[8] (1992) 176 CLR 77.
[9] [2018] HCA 11.
[10] *Commonwealth Electoral Act 1918* (Cth) s 354
[11] Ibid, s 353(1)

to determine the validity of their respective elections. Division II addresses the earlier part of s 47, by enabling each House to refer by resolution any question concerning the qualification of a member or a vacancy to the Court of Disputed Returns.[12] Each House remains free, however, not to refer the status of challenged members to the Court and instead to determine their status itself. The House of Representatives did just that when it resolved on 10 June 1999 not to refer a challenge to the qualification of Mr Warren Entsch MP and instead resolved that he did not have any interest in a government contract to be disqualified under s 44(v).[13] So it was theoretically possible that each House in 2017 might have resolved that its members, who were dual citizens by descent, were not disqualified under s 44(i).[14]

Apart from the political storm that would have caused, each House faced the prospect of a common informer action being brought by any person to challenge those members for sitting while disqualified. This rare action has its origins in s 46 of the Constitution, pursuant to which Parliament has 'otherwise provide[d]' by enacting the *Common Informers (Parliamentary Disqualifications) Act 1975* (Cth). That Act passed both Houses in one day in response to a challenge brought against Senator Webster.[15] It limits a common informer action to a single $200 claim against a disqualified member who sits for any period before receipt of the originating process, but thereafter it is a claim of $200 for each day the member sits while disqualified.[16] The High Court has exclusive jurisdiction[17] to hear these claims. Only one claim[18] can be brought in relation to a member sitting while disqualified, and the period of such a claim can only begin 12 months before the institution of the proceedings.[19]

Recently, the High Court in *Alley v Gillespie*[20] decided unanimously that it does not have jurisdiction under the *Common Informers (Parliamentary Disqualifications) Act 1975* (Cth) to determine whether the member concerned is disqualified from sitting. Such a determination can only be made by the High Court in the two ways outlined above, that is, where the House concerned has referred the issue to the Court pursuant to s 376 of the *Commonwealth Electoral Act* (which in this case, the House of Representatives had so far not done), or by way of an electoral petition brought in the Court of Disputed Returns (ie the High Court) pursuant to s 353 of the *Commonwealth Electoral Act* within 40 days of the return of the writ (that period had expired in this case). Accordingly, the Court unanimously accepted the argument of the challenged member, Mr David Gillespie MP, that it did not have jurisdiction to hear a common informer action brought by a former Labor candidate for sitting while allegedly disqualified as a government contractor within s 44(v).

[12] Ibid, s 376

[13] See Gerard Carney, *Members of Parliament: Law and Ethics* (Prospect 2001) at 148 n 254.

[14] Kirby J in *Sue v Hill* (1999) 199 CLR 462 at 570 [282] suggested with great foresight that it might be preferable to leave to the House the issue of foreign allegiance, given the prospect that millions of Australians might be disqualified.

[15] On 22 April 1975: see B C Wright (ed), *House of Representatives Practice* (6th ed Department of the House of Representatives, Canberra 2012) House of Reps Debates at 1978-1986; Senate Debates at 1236-1239.

[16] *Common Informers (Parliamentary Disqualifications) Act 1975* (Cth) s 3(1)

[17] Ibid, s 5

[18] Ibid, s 3(3)

[19] Ibid, s 3(2)

[20] [2018] HCA 11.

Despite the apparent understanding of the Commonwealth Attorney-General[21] at the time the *Common Informers (Parliamentary Disqualifications) Act 1975* (Cth) was enacted that the Court of Disputed Returns could determine the qualification of a member sued in a common informer action, the Court unanimously found that the legislation failed to give effect to that intent. Gageler J explained this succintly:

> The consequence of the jurisdiction conferred on the High Court under s 76(i) and (ii) of the Constitution by s 5 of the Common Informers Act being circumscribed to the extent of the continuing exclusive operation of s 47 of the Constitution is that the element of the statutory cause of action spelt out in s 3 of the Act which requires that the person against whom suit is brought be 'a person declared by the Constitution to be incapable of so sitting' as a senator or member *can be established only by a separate determination of that question by the Senate or the House or by this Court sitting as the Court of Disputed Returns under Pt XXII of the Electoral Act*. The High Court cannot determine the question for itself in the exercise of the jurisdiction conferred by s 5 of the Common Informers Act. (emphasis added)[22]

This is a most unfortunate outcome which renders the common informer action virtually useless. It means that a member, who is clearly disqualified by the Constitution, can remain a member with impunity so long as the member's House decides on political grounds not to rule on the matter nor refer it to the Court of Disputed Returns. The only circumstances, in which a common informer action can be instigated without the cooperation of the House concerned, are now very confined: either when the disqualification of the member is apparent within 40 days of the return of the writ, to enable an electoral petition to challenge the member's election to be brought in the Court of Disputed Returns; or in the extremely unlikely event that a member continues to sit despite being found disqualified by the House or the Court.

It is obvious that the *Common Informers (Parliamentary Disqualifications) Act 1975* (Cth) needs to be amended to give effect to the original political intent that the Court of Disputed Returns also have jurisdiction in a common informer action to determine whether a challenged member is disqualified by the Constitution. Upon expiration of the electoral petition period, it is imperative for the integrity of Parliament that the qualification of its members is not left entirely to the House concerned but remains judicially reviewable by a common informer action.

II Disqualification for Foreign Allegiance

> Section 44 (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.

The High Court in *Re Canavan* adopted the view that s 44(i) has two limbs.[23] The first limb being 'under any acknowledgment of allegiance, obedience, or adherence to a foreign power'. The second limb prescribes two further grounds of disqualification: being 'a subject or citizen … of a foreign power'; and being 'entitled to the rights or privileges of a subject or citizen of a foreign power'. The references to the Court in *Re Canavan* only raised the first ground of the second limb, being 'a subject of a citizen … of a foreign power', except for the reference in relation to Senator Xenophon which

[21] See Australia, House of Representatives, Parliamentary Debates (Hansard), 22 April 1975 at 1985.
[22] Ibid [80].
[23] [2017] HCA 45, [23].

also raised the second ground of that limb. Consequently, little guidance was provided on the first limb of s 44(i) other than to highlight that it required 'a voluntary act of allegiance' by the person concerned, which was not required for the second limb.[24]

Essentially, the unanimous judgment rejected the key argument of the Commonwealth that, in order to be disqualified under s 44(i) for foreign citizenship by descent, the candidate or member had to be aware of or wilfully blind of their foreign citizenship. Variations on this were argued by the parties, including that the member had to have taken steps to acquire the foreign citizenship or to affirm that status. This was the position under the colonial constitutions at the time of federation where dual citizenship did not prevent the election of members of colonial Parliaments but they were liable to be disqualified if after their election, they did anything to acquire a foreign citizenship or to affirm their foreign allegiance. This continues today in all States except Victoria.[25] In Victoria, the Australian Capital Territory and the Northern Territory, there is no disqualification for members who hold any form of foreign allegiance.

Instead the Court accepted the approach of the amicus and of counsel for Mr Windsor that the state of mind or knowledge of the member under s 44(i) is irrelevant:

> [That approach] adheres most closely to the ordinary and natural meaning of the language of s 44(i). It also accords with the views of a majority of the Justices in *Sykes v Cleary*, the authority of which was accepted by all parties. A consideration of the drafting history of s 44(i) does not warrant a different conclusion. Further, that approach avoids the uncertainty and instability that attend the contending approaches.[26]

Each of these reasons is considered in turn.

The Court found no basis in the text or purpose of s 44 to justify an implied requirement of some level of knowledge which would have substantially altered the ordinary and natural meaning of the words of the Constitution. The Court observed at the outset 'the distinction expressly drawn in s 44(i) between a voluntary act of allegiance on the part of the person concerned on the one hand [in the first limb], and a state of affairs existing under foreign law … on the other [second limb].'[27] While accepting that the purpose of s 44(i) is to ensure 'that members of Parliament did not have a split allegiance',[28] the Court recognised that this purpose is achieved differently by its two limbs:

> It is evident that the first limb of s 44(i) pursues this purpose by looking to the conduct of the person concerned. The second limb of s 44(i) does not look to conduct manifesting an actual split in the allegiance of the person concerned or the person's subjective feelings of allegiance. On the contrary, it operates to disqualify the candidate whether or not the candidate is, in fact, minded to act upon his or her duty of allegiance.[29]

[24] Ibid [23]. On the first limb see: Gerard Carney, *Members of Parliament: Law and Ethics* (Prospect 2001) at 29.
[25] See *Constitution Act 1902* (NSW) s 13A(b); *Parliament of Queensland Act 2001* (Qld) s 72(1)(d); *Constitution Act 1934* (SA) s 17(1)(b)-(c) and s 31(1)(b)-(c); *Constitution Act 1934* (Tas) s 34(b)-(c); *Constitution Act Amendment Act 1899* (WA) s 38(f). Note that in Queensland and South Australia, the acquisition and renewal of a foreign passport are expressly permitted: *Parliament of Queensland Act 2001* (Qld) s 72(2); *Constitution Act 1934* (SA) s 17(2) and s 31(2).
[26] [2017] HCA 45, [19].
[27] Ibid [23].
[28] Ibid [24] citing Mason CJ, Toohey and McHugh JJ in *Sykes v Cleary* (1992) 176 CLR 77 at 107.
[29] Ibid [25].

The only qualification the Court accepted is that which was earlier implied from s 44(i) by the Court in *Sykes v Cleary*[30]:

> [T]he implicit qualification in s 44(i) that the foreign law conferring foreign citizenship must be consistent with the constitutional imperative underlying that provision, namely, that an Australian citizen not be prevented by foreign law from participation in representative government where it can be demonstrated that the person has taken all steps that are reasonably required by the foreign law to renounce his or her foreign citizenship.[31]

This means, for instance, that where the foreign state fails to give effect to a renunciation despite the candidate having taken all reasonable steps to renounce, the High Court is likely to accept that no disqualification arises. It also prevents disqualification where a foreign state imposes citizenship on a member without consent. Otherwise the Court accepted, as it did in *Sykes v Cleary*, that whether a person has foreign citizenship depends, according to the common law of Australia, on foreign law. So in relation to all the challenges, expert evidence of the relevant foreign citizenship law was submitted to and relied on by the Court.

In addition to the textual basis for the Court's rejection of the Commonwealth argument, the Court also relied on two further factors.

First, the absence of any support for the Commonwealth's argument from the drafting history of s 44. The Court was prepared to consider a narrower view of the text of s 44(i) if the drafting history revealed a narrower purpose. But in fact the drafting history is very meagre since there is no recorded discussion of this ground of disqualification in any of the debates. This is surprising given the change in the wording of the ground when it was submitted at the Melbourne session in March 1898. Until then the draft provision substantially followed the approach in the colonial constitutions which only disqualified a member, who after being elected, did some act by which to acquire, adopt or affirm their foreign allegiance. At the Melbourne session, this approach was replaced with the current wording of the second limb of s 44(i) which no longer required any act on the part of the member, merely being a foreign subject or citizen was sufficient.

There is no explanation in the drafting history for this change, which occurred as part of a large number of amendments prepared by the Convention's drafting committee between the Sydney session in September 1897 and the Melbourne session in March 1898. The only recorded comment by Mr Barton as chairman of the drafting committee is perplexing, as he described all the proposed changes as not intended to alter the 'sense' of the draft as previously approved at the Sydney session.[32] The substantially altered s 44(i) was then approved by the Convention without discussion.[33] The High Court noted in *Re Canavan*[34] in relation to s 44, almost as an understatement, that 'Disqualification from being chosen as a parliamentarian was an innovation.'[35]

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[30] (1992) 176 CLR 77.
[31] [2017] HCA 45, [13].
[32] *Official Record of the Debates of the Australasian Federal Convention (*Melbourne) 4 March 1898 at 1915
[33] Mainly discussed the grounds of being an undischarged bankrupt and the exceptions to holding an office of profit under the Crown: *Official Record of the Debates of the Australasian Federal Convention (*Melbourne) 7 March 1898 at 1931-1947.
[34] [2017] HCA 45.
[35] Ibid [35].

A further aspect of the drafting history relied on by the Court[36] was the relationship with s 34 of the Constitution, under which a person had to be a subject of the Queen to be qualified to be elected. That status was lost in 1901, under s 6 of the *Naturalization Act 1870* (Imp), if a British subject voluntarily adopted foreign citizenship. If the second limb of s 44(i) also required an act to be performed, this would have given it no effect as the person would have already been unable to be elected under s 34.

The final reason the Court gave for refusing to imply any element of knowledge in s 44(i) was the impracticality of focusing on the state of mind of the candidate or member and their credibility, which would lead to 'conceptual and practical uncertainties … apt to undermine stable representative government'.[37] If s 44(i) depended on the level of knowledge of the person concerned, the Court rightly observed:

> The state of a person's knowledge can be conceived of as a spectrum that ranges from the faintest inkling through to other states of mind such as suspicion, reasonable belief and moral certainty to absolute certainty. If one seeks to determine the point on this spectrum at which knowledge is sufficient for the purposes of s 44(i) and 45(i), one finds that those provisions offer no guidance in fixing this point.[38]

In view of those reasons, it is clear that the Court had no flexibility to imply any further qualification to the express terms of s 44(i). Even the serious impact their decision had on five current members of Parliament, and the prospect of other members being similarly disqualified for dual citizenship by descent, cannot justify the Court reaching any other result. Despite the Court acknowledging 'while it may be said that it is harsh to apply s 44(i)' in the way they did, there was no legitimate alternative open to it. Instead, s 44 casts the onus on all candidates and members to exercise due diligence to investigate their personal circumstances to ensure that they identify any foreign allegiance, and then to take all reasonable steps to formally renounce it. Nomination for election is, as the Court warned, 'an occasion for serious reflection'.[39] It is questionable though whether the Court is realistic in suggesting that '[a] candidate need show no greater diligence'[40] than a person who later challenges their qualification to remain a member.

Since the High Court felt unable to alleviate the harshness of s 44(i) in *Re Canavan,*[41] consideration is given below to the possibility of constitutional or statutory reform.

A *Determination of the seven members of Parliament*

After interpreting the first ground of disqualification in the second limb of s 44(i), being a citizen of a foreign power, the Court proceeded to resolve the status of each of the seven members of parliament separately in the order of their reference to the Court. Rather than repeat the circumstances and determination of each of these seven members, which are well outlined[42] in the Court's judgment, a comparative summary follows to reveal the diversity of foreign connections relied upon. Following that comparison, there is an analysis of the Court's findings that Senators Canavan and Xenophon were not disqualified.

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[36] Ibid [36].
[37] Ibid [54].
[38] Ibid [55].
[39] Ibid [60].
[40] Ibid.
[41] [2017] HCA 45.
[42] See [74]-[135].

As a preliminary comment on all seven members, all but the Deputy Prime Minister, Mr Joyce, were Senators, three of whom were from Queensland (Senators Canavan, Waters and Roberts), and one from each of New South Wales (Senator Nash), South Australia (Senator Xenophon) and Western Australia (Senator Ludlam). Only two members of the seven, Mr Ludlam and Ms Waters, resigned their seat before their cases were referred to the Court of Disputed Returns.

Four members were born in Australia of whom two were disqualified: Mr Joyce in Tamworth NSW in 1967 and Senator Nash in Sydney NSW in 1965.[43] All three born overseas were disqualified: Mr Ludlam in New Zealand in 1970; Ms Waters in Canada in 1977; and Senator Roberts in India in 1955.

The two Australian born members, Mr Joyce and Senator Nash, were disqualified because they acquired at birth a foreign citizenship by descent from their respective father who was born overseas, in New Zealand in the case of Mr Joyce, and the in United Kingdom in the case of Senator Nash. The two Australian born members, who were not disqualified, also acquired their respective foreign status (Italy in the case of Senator Canavan and the United Kingdom in the case of Senator Xenophon) by descent from one or both parents.

As for the three disqualified members who were born overseas, two underwent naturalization as an Australian citizen, while the other member acquired both Australian and foreign citizenship at birth. Each was disqualified, however, for different reasons.

Senator Roberts, who was born in India to a UK father and an Australian mother, was disqualified, like Mr Joyce and Senator Nash, for acquiring UK citizenship by descent through his father. He came to Australia with his parents around 1962, was naturalized as an Australian citizen in 1974, and had made an inadequate attempt to renounce his UK citizenship before nominating for election to the Senate.

Unlike the three members so far discussed, all of whom were disqualified for acquiring foreign citizenship by descent, the remaining two disqualified members, Mr Ludlam and Ms Waters, were each disqualified on a different basis. In fact, each can be viewed at the respective ends of the spectrum of probability of being disqualified. Mr Ludlam at the most obvious end; Ms Waters at the least obvious end.[44]

Mr Ludlam was obviously disqualified as a New Zealand citizen, having been born in New Zealand in 1970 to New Zealand parents, and never having renounced this citizenship. The family arrived in Australia in 1978 and he was naturalized in 1989.

Ms Waters, however, was born in Canada in 1977 to Australian parents who were merely resident there on student and working visas. They returned to Australia the following year. Waters acquired Canadian citizenship at birth simply by being born there. She also had Australian citizenship through her parents. One can argue that her case of all the five disqualified members is the one most deserving of sympathy. Not that this has any relevance to the veracity of the High Court's approach. It is, however, a relevant consideration in deciding whether s 44(i) needs to be amended.

One conclusion worth noting from this comparison of the five disqualified members is that only two acquired their foreign citizenship from being born overseas. The other

[43] The two members not disqualified were born in Australia: Senator Canavan in Southport Queensland in 1980; and Senator Xenophon in Toorak Gardens South Australia in 1959.
[44] The irony is that both were jointly represented.

three members acquired their foreign citizenship by descent through a parent's foreign citizenship.

The level of awareness of these circumstances also provides an interesting comparison. All challenged members testified that they believed they were *only* an Australian citizen at the time they stood for election. Yet the individual circumstances which led to the disqualification of five members were known to each of them. Of the two members whose overseas birth was determinative, Mr Ludlam knew that he was born in New Zealand and Ms Waters knew that she was born in Canada. Of the three disqualified by descent, all were fully aware of the foreign birth of their parent. The only member who contested the facts was Senator Roberts, whose circumstances were determined by a special hearing before Keane J.[45]

None of the disqualified members attempted to renounce their foreign citizenship until they became aware of their possible disqualification. Only Mr Ludlam refrained from doing so, instead resigning promptly from the Senate. Ms Waters was the only one to both renounce and resign before the High Court challenge was brought. As for the two members not disqualified, Senators Canavan and Xenophon both renounced their foreign status as soon as they became aware of their possible disqualification. Their individual cases are now considered.

1 *Senator Canavan*

At the time of his birth in 1980, Senator Canavan's parents and his formerly Italian maternal grandparents were all Australian citizens. The basis for disqualifying Senator Canavan was that by the time of his nomination for the Senate in 2016, his mother had become an Italian citizen by virtue of changes in Italian law in 1983, and that at the time she applied for this foreign citizenship for just herself in 2006, she had also applied for the registration of all her children with the Italian consulate. Senator Canavan had not consented to this. Accordingly, he and his siblings were listed on the Register of Italians Resident Abroad (AIRE). It was the nature of this status which was in question.

The finding that Senator Canavan was not an Italian citizen was made after detailed consideration of the evidence presented to the Court, in particular, the joint report of two practising Italian lawyers, Maurizio Delfino and Professor Beniamino Caravita di Toritto. Their opinion was not emphatic but concluded on balance that the Senator had not taken the necessary step as a condition precedent to become an Italian citizen, namely, to apply for a *declaration* of citizenship. The High Court accepted that stricter view of Italian law as a reasonable approach given the possibility of Italian citizenship being acquired by descent by unlimited generations.[46] This is the only occasion in which the judgment refers to the difficulty, raised by Keane J during the hearing, of the potential for foreign citizenship being acquired by descent across seven or more generations.[47]

It might be thought that the High Court's detailed assessment of the expert Italian legal testimony here casts some doubt on the capacity of candidates and members to exercise due diligence before nominating for an election. Yet the prudent and obvious course of action for a candidate faced with this dilemma is simply to take all reasonable steps to

[45] *Re Roberts* [2017] HCA 39.
[46] [2017] HCA 45, [86].
[47] [2017] HCATrans 199 on the afternoon of 10 October 2017.

renounce, rather than to expend further time and money in trying to reach a determinative finding. If in doubt, renounce!

Given the finding that Senator Canavan was not an Italian citizen, it is intriguing why the Commonwealth Attorney-General conceded at the outset of the hearing that he held foreign citizenship at the time of his nomination for the Senate.

2 *Senator Xenophon*

Senator Xenophon had shown the greatest care in ensuring his compliance with s 44(i) by previously renouncing both his Greek and Cypriot citizenship, acquired by descent respectively through his mother and father, before nominating for the Senate in 2007. He did not consider the possibility of UK citizenship by descent through his father's birth in Cyprus in 1931, then a British possession. While it seems that Senator Xenophon acquired the status of a UK citizen at birth in 1959, his status was later downgraded in 1983 to a 'British Overseas Citizen' (BOC) pursuant to the *British Nationality Act 1981*.[48]

So it was on the basis of his status as a BOC at the time of his nomination for the Senate that his case was referred to the High Court for possible disqualification. The High Court concluded, however, that the status of a BOC was not equivalent to that of holding UK citizenship because the former conferred no right of entry and abode in the UK nor entailed any pledge of loyalty to the UK. Both these rights were essential for foreign citizenship under s 44(i) and its alternative, having 'the rights and privileges of a citizen'.[49] In particular, the absence of any pledge of loyalty to a foreign state meant that there was no 'split allegiance', which s 44(i) was designed to prevent.[50] Accordingly, unlike the guarded finding made in relation to Senator Canavan, the Court had no difficulty in finding that Senator Xenophon was not disqualified under s 44(i).

B *Reform of s 44(i)*

This is not the first time the High Court has applied the Constitution in a way which may be seen as highly inconvenient and unwelcome. There is a parallel here with the *Incorporations Act Case*[51] in 1990 when a majority 6-1 of the High Court interpreted the ordinary and natural meaning of the text of the Commonwealth's corporations power in s 51 (xx) to find that it did not include the power to provide for the incorporation of para (xx) corporations. This decision provoked well-publicised outrage within the government and the commercial sector.

No doubt *Re Canavan* provoked a comparable reaction in some quarters, although thankfully, the politicians have on this occasion been muted. To their credit, they seem to recognise that this is a problem posed by the Constitution itself. The Court had no other option but to give effect to the terms of s 44(i). There was no other possible interpretation — the text is perfectly clear: foreign citizenship disqualifies - whether one is aware of it or not. The onus is on the candidate to undertake due diligence to ensure that they are not at the time of nomination for election a citizen of a foreign

[48] [2017] HCA 45, [129].
[49] Ibid [134].
[50] Ibid.
[51] *New South Wales v Commonwealth* (1990) 169 CLR 482: joint judgment of Mason CJ, Brennan, Dawson, Toohey, Gaudron and McHugh JJ; Deane J dissented.

power, and if they are, or suspect they are, should renounce that citizenship before nominating.

The critical issue now is whether s 44(i) should be amended or not? The key consideration is whether holding foreign citizenship should disqualify one from being a member of the Commonwealth Parliament. This was not an issue which the High Court considered, nor was it entitled to do so. While certain members of the High Court might be sympathetic toward those disqualified and so favour an amendment to s 44, there is nothing in the Court's joint judgment which even hints at such a course. The responsibility for making that assessment rests ultimately with the Australian people.

The options fall along a spectrum. At one end, there is the removal of all the grounds of disqualification in s 44(i) for both candidates and sitting members on the basis that they are no longer justified in a globalised world. One can point to many other democracies where holding foreign citizenship does not disqualify one from elected office at the national level, such as the United States, Canada, the UK, and New Zealand.[52] Further, there appear not to have been many instances in those countries where dual nationality has been raised to challenge the integrity or loyalty of elected members of the national legislature or executive. Nor has such a political controversy arisen within the Australian State or territory legislatures where dual citizenship is tolerated.

At the other end of the spectrum, the principal argument for the status quo is the need to avoid even the appearance of a conflict of interest on the part of those members who hold foreign citizenship. The High Court in *Re Canavan* accepted that this was the purpose of s 44(i) to prevent members having a split allegiance.[53] They must owe only one allegiance to Australia while serving in the Parliament and, by virtue of our Westminster system, as a Minister of State.

Even if dual citizenship is retained as a disqualification at the Commonwealth level, a subsidiary issue arises: whether this warrants the disqualification of those who are *unaware* of being a foreign citizen? How can such a member be affected in their role as legislator by an unknown status? That was the central argument put up by all seven members of parliament in *Re Canavan*. Moreover, how can even an *appearance* of a conflict of interest arise in such a case?

While these persuasive arguments indicate the need to amend s 44(i) to provide for an exception in the case of unknown foreign citizenship, there is a significant practical difficulty in drafting an effective and workable exception. A member's awareness in this context can vary enormously. The challenge is to define precisely at what point disqualification occurs along a spectrum of awareness. As Gageler J emphasised in *Re Day (No 2),* certainty, as far as possible, is essential for the stability of government.[54] These same difficulties, as noted earlier, are highlighted by the Court in *Re Canavan* in rejecting the Commonwealth's case.[55] They arise equally in any attempt to propose an appropriate amendment to the Constitution.

The analysis so far indicates that a blanket ban on dual citizenship is unfair; but any attempt to alleviate that unfairness by inserting an exception for unknown foreign

[52] This is at the time of election. Subsequent acquisition or acknowledgement of foreign citizenship may lead to disqualification: see eg s 55(1) *Election Act 1993* (NZ).
[53] [2017] HCA 45, [134].
[54] [2017] HCA 14, [97].
[55] Ibid [48, 54-56].

citizenship, is not legally feasible. How does one resolve this dilemma? It appears that the advantage sought to be derived from this ground of disqualification, of avoiding an actual or apparent split allegiance, is clearly outweighed by the draconian impact this ground is having, and will continue to have, on those who stand for election to the Commonwealth Parliament. On balance then, being a citizen of a foreign power or having the rights and privileges of such a citizen at the time of nomination for election should no longer be a ground of disqualification.

While this means removing the second limb of s 44(i), it does not necessarily justify removing the first limb. This limb does not catch a person unaware of their status. Being 'under an acknowledgment of allegiance, obedience or adherence to a foreign power', at the time of nominating for election seems to require the candidate to have taken some action amounting to 'an acknowledgment'. The Court in *Re Canavan* recognised this.[56] Yet, if a dual citizen is to be permitted to nominate, why should a candidate, who merely has made 'an acknowledgment' within the first limb, be disqualified? Logically, if the second limb is to be repealed, the first limb should also be repealed.

The next issue is whether sitting members should continue to be disqualified under s 45 because they have acquired, since being elected, some foreign status? Currently, they become disqualified if they acknowledge or acquire any of the forms of foreign status defined in s 44(i). Even if both limbs of s 44(i) are repealed, this does not necessarily mean that a sitting member should not be disqualified if they acquire a foreign status while serving as a member. Such an acquisition disqualifies members of certain State Parliaments. Disqualification in those circumstances can be justified on the basis that sitting members ought to be focused wholly on serving the interests of Australia. More so if a serving minister of state. Nor does s 45 seem to entail the difficulty of unknown foreign status, since it is most unlikely that any sitting member can become a foreign citizen after their election without their consent. Were such an extreme case to arise, the High Court would probably refuse to recognise the foreign law in order to protect Australia's democratic system.[57]

Whichever approach is adopted by the Australian people: whether s 44(i) is repealed in toto because it is an impractical ground of disqualification or because it is an unjustified disqualification in a globalised world, it seems highly desirable that members declare any foreign status. Obligations already exist under codes of conduct for members of parliament to disclose personal and professional interests which are capable of leading to both real and apparent conflicts of interest. These obligations include formal disclosure to a register of interests, ad hoc disclosure during deliberations, or withdrawal from the decision-making process altogether. If foreign citizenship is removed as a ground of disqualification, it must at least be replaced with an obligation on members to disclose any foreign status.

Finally, even if no attempt to repeal or reform s 44(i) occurs, the Commonwealth Parliament should consider enacting legislation to more easily facilitate the renunciation of foreign citizenship at the time of a candidate's nomination. The common law principle[58] applied by the High Court, whereby the status of citizenship of a foreign state is determined according to the law of that foreign state, is not expressly prescribed by s 44 of the Constitution. Therefore it might be capable of legislative

[56] Ibid [23, 25].
[57] Ibid [39, 44].
[58] Recognised in *Sykes v Cleary* (1992) 176 CLR 77 at 105-6, 109-112, 127-8, 131, 135; *Sue v Hill* (1999) 199 CLR 462 at 486-7, 529; *Re Canavan* [2017] HCA 45 at [37-8].

change. The Commonwealth Parliament could use its external affairs power in s 51(xxix) to enact legislation to deem a statutory declaration of renunciation of all foreign citizenship to be sufficient for purposes of Australian law. Such a law arguably falls within s 51(xxix) as a law, which on its face deals with an 'external affair', namely, the renunciation of foreign citizenship by Australian citizens.[59]

This approach, however, would not remove a candidate's foreign citizenship as a matter of international law. But if it is effective for purposes of Australian domestic law, it might be sufficient also for the purposes of s 44 of the Constitution. This approach runs the risk, however, of a constitutional challenge to the Commonwealth legislation on at least two grounds. First, that the common law principle adopted by the High Court to determine effective renunciation of foreign citizenship according to the law of the relevant state is itself constitutionally entrenched in s 44.

The other basis for a constitutional challenge is that such a Commonwealth enactment undermines the purpose of s 44(i) to prevent a split allegiance. Support for this ground might be derived from Brennan J in *Sykes v Cleary*:

> So long as that duty [of allegiance or obedience] remains under the foreign law, its enforcement … is a threatened impediment to the giving of unqualified allegiance to Australia.[60]

Yet, the counter-argument is that the High Court has already permitted such an inconsistency in so far as it exempts from s 44(i) those who have taken all reasonable steps to renounce foreign citizenship, even though that is not recognised by the foreign state. Further, this exemption was created by the High Court by manipulating the common law rule on public policy grounds to ensure that foreign law does not unduly impede the democratic system for the election of members of the Commonwealth Parliament. Why should the Parliament not be similarly empowered to alter that common law rule to facilitate the qualifications of its citizens to stand for election?

Some support for this approach can be gathered from the dissenting justices in *Sykes v Cleary* where Deane J[61] and Gaudron J[62] in separate judgments considered the general renunciation of all other allegiances by Mr Delacretaz and Mr Kardamitsis at their naturalisation ceremonies as sufficient for the purposes of s 44(i) to renounce, respectively, their Swiss and Greek citizenship. What is suggested here is a similar general renunciation of all foreign allegiance prior to nomination as an electoral candidate, but made pursuant to a Commonwealth statute which expressly gives that legal force within Australian law.[63] Gaudron J specifically supported such an approach, saying:

> Whatever limits on legislative power are imported by s. 44(i), it does not, in my view, limit the power of Parliament to provide to the effect that, if prior foreign citizenship has been renounced in compliance with Australian law, the law of the country concerned should not be applied for any purpose connected with Australian law, including the determination of any question arising under s. 44(i) itself, unless that prior citizenship has been reasserted.[64]

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[59] This aspect of s 51(xxix) is supported by *R v Sharkey* (1949) 79 CLR 121.
[60] (1992) 176 CLR 77 at 113-4.
[61] Ibid at 128-130.
[62] Ibid at 136-137 and 139-140.
[63] The naturalization renunciation was prescribed by statute but no provision appears to have given it any domestic legal effect ie no provision deemed it as an effective renunciation of all foreign citizenship for purposes of Australian law.
[64] (1992) 176 CLR 77 at 137.

It is hoped that the High Court might approve this dictum to partially relieve the obvious harshness of s 44(i). Fortunately, no similar urgency exists in relation to the 'government contractor' ground of disqualification in s 44(v), which has been revived by *Re Day (No 2)*.[65]

III Disqualification of Government Contractors

Section 44(v) disqualifies any candidate who:

> 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.

Members are liable to disqualification on this same ground under s 45(i) if they obtain such an interest after being elected. Section 45(iii) also disqualifies a member who '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'.

Like foreign citizenship, the disqualification of government contractors is not embraced by all parliaments. It was repealed in the United Kingdom in 1957 for apparent redundancy.[66] It has also been repealed in Queensland, South Australia and Western Australia. Only in Victoria[67] is there a comparable ground to s 44(v), while a limited form of it exists in New South Wales and Tasmania.[68]

Moreover, this ground imports some degree of uncertainty for candidates and members of parliament. It is clear that the constitutional text of s 44(v), unlike that of s 44(i), must be read down to avoid the absurdity of any contractual relationship with the Commonwealth incurring disqualification. The most obvious example is the purchase of a copy of the Constitution itself from a Commonwealth government agency!

The surest way to do this is to determine the purpose of this ground of disqualification. Its origin is the *House of Commons (Disqualification) Act 1782* (UK)[69] which disqualified members who became government contractors. The purpose of the 1782 Act has been generally regarded[70] as protecting the independence of members of parliament from royal patronage and executive influence. Section 1 was, however, in narrower terms than s 44(v):

> Any person who shall, directly or indirectly … undertake, execute, hold or enjoy … any contract , agreement or commission … with [the Crown] … for or on account of the publick service … shall be incapable of being elected, or of sitting or voting as a member of the house of commons ….

Under s 44(v) there is no need to be a party to the contract, merely having a direct or indirect pecuniary *interest in* the contract with the Commonwealth Public Service is sufficient for disqualification. It is clear from the Convention Debates that this extension in s 44(v) reflects a wider concern, beyond Executive influence of members,

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[65] [2017] HCA 14.
[66] *House of Commons (Disqualification) Act 1957* (UK).
[67] *Constitution Act 1975* (Vic) ss 54-55.
[68] *Constitution Act 1902* (NSW) s 13; *Constitution Act 1934* (Tas) s 33.
[69] 22 Geo III c 45.
[70] Cf Keane J in *Re Day (No 2)* at [163] suggests that it may have been wider, citing Edmund Burke's speech during the debates on the Bill; see n 112: House of Commons, 12 April 1782: *Parliamentary History of England*, (1814), vol 22 at 1334-1335.

to ensure the separation of members' personal interests from their public duties.[71] Mr Isaacs observed this at the Adelaide session on 21 April 1897:

> We should be careful to do all that is possible to separate the personal interests of a public man from the exercise of his public duty. We should bear in mind that it is not only important to secure that so far as we can in actual fact, but, in every way possible, we should prevent any appearance of the contrary being exercised.[72] … 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. [73]

This wider concern with the personal interests of elected officials and their avoidance of conflicts of interest gathered momentum in both colonial and imperial politics during the 19th century. The avoidance of pecuniary conflicts of interest was the subject of colonial local government legislation in Australia. It also was the focus of Mr Speaker Abbott's ruling in the UK House of Commons in 1811, which precluded members of the House from voting on matters in which they had a direct pecuniary interest. Further, the 1896 *Report of the House of Commons Select Committee on Members of Parliament (Personal Interest)* identified the potential for a conflict of interest arising between a member's personal interests and his public duty.

This wider purpose, reflected in the drafting history of s 44(v), was adopted by the High Court in *Re Day (No 2)* to guide its interpretation of s 44(v). In doing so, the Court rejected the narrower approach of Barwick CJ in *In re Webster* in 1975 — the only previous decision on s 44(v).

Barwick CJ, sitting alone as the Court of Disputed Returns in *In re Webster*,[74] relied entirely on s 1 of the *House of Commons (Disqualification) Act 1782* (UK) to hold that the purpose of s 44(v) was to prevent the possibility of Executive influence of members of Parliament. Accordingly, his Honour concluded that s 44(v) required a continuing contractual relationship which exposed the candidate or member to Crown or Executive influence. Applying this narrow test, Senator Webster was found not to be disqualified despite having a pecuniary interest in contracts between his family company JJ Webster Pty Ltd and two government departments whenever the company's tenders to supply timber were accepted. Since contracts only arose upon the acceptance of each tender, there was no opportunity to influence the Senator.

Barwick CJ's restrictive interpretation of s 44(v) was rightly criticised as unduly restrictive,[75] and in particular, in failing to recognise its wider purpose of preventing conflicts of interest. The High Court in *Re Day (No 2)* rejected his Honour's narrow interpretation of s 44(v) in favour of a somewhat wider view which gives effect to the broader purpose of this ground of disqualification, the avoidance of conflicts of interest on the part of members of parliament whether these arise from relationships with the Executive branch or otherwise.[76]

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[71] *Re Day (No 2)* [2017] HCA 14, [33].
[72] *Official Report of the Australasian National Convention Debates (Adelaide)*, 21 April 1897 at 1037.
[73] Ibid at 1038.
[74] (1975) 132 CLR 270.
[75] J D Hammond, 'Pecuniary Interest of Parliamentarians: A Comment on the *Webster Case*' (1973) 3 *Monash University Law Review* 91.
[76] [2017] HCA 14 per Kiefel CJ, Bell and Edelman JJ at [16], Gageler J at [98], Keane J at [161-184], Nettle and Gordon JJ at [272-276].

A *Re Day (No 2)*

In *Re Day (No 2)*[77] Senator Day had no direct contractual relationship with the Commonwealth but he was found to have an *indirect pecuniary* interest in a lease of an office building, granted to the Commonwealth Department of Finance[78] by the registered owner, Fullarton Investments Pty Ltd as trustee for the Fullarton Road Trust. A beneficiary of that trust was the Day Family Trust, of which Senator Day and his wife were beneficiaries. Further, under the terms of the lease, the lessor instructed the Commonwealth to pay the rent of $66,540 pa to a personal bank account of Senator Day.

The background to this legal arrangement was that the office building had originally been owned by B&B Day Pty Ltd as trustee of the Day Family Trust and that Senator Day and his wife had given an indemnity and guarantee to a bank to help secure a loan of $1.6M to B&B Day Pty Ltd secured by a mortgage over that property. This arrangement changed in April 2014, before Senator Day began his term as a senator on 1 July 2014, when the property was sold to Fullarton Investments Pty Ltd, from whom the above lease was obtained by the Commonwealth in 2015. This sale was arranged in order to distance the proposed lease from Senator Day.[79]

The joint judgment of Kiefel CJ, Bell and Edelman JJ easily concluded that, although Mr Day did not have a direct interest in the lease since he was not a party to it, he had an indirect pecuniary interest in the lease agreement simply on the basis that he was the owner of the bank account to which the Commonwealth had been duly directed to pay the rent under that agreement.[80] Accordingly, the plurality found that Mr Day was disqualified as from the date the Commonwealth was directed to pay the rent to Mr Day's personal bank account, namely, 26 February 2016. Keane J concurred, leaving open any earlier date.[81]

The other three Justices, Gageler J[82] and Nettle and Gordon JJ,[83] found that Mr Day was disqualified earlier, on 1 December 2015, being the date of the lease. They recognised that an indirect pecuniary interest arose then since Mr Day 'stood to gain financially' in at least three ways: as recipient of the rent; as guarantor of the bank loan; and as a beneficiary of a discretionary trust.[84]

The Court was unanimous in holding that the purpose of s 44(v) from both its text and drafting history[85] (outlined above) was wider than that recognised by Barwick CJ in *Webster*. For instance, the plurality observed:

> Its object is to ensure not only that the Public Service of the Commonwealth is not in a position to exercise undue influence over members of Parliament through the medium of agreements; but also that members of Parliament will not seek to benefit by such

[77] [2017] HCA 14.
[78] Ibid Gageler J at [86] identified that the Department in signing the lease exercised non-statutory executive power.
[79] Ibid Nettle & Gordon JJ at [241].
[80] Ibid [12]-[13].
[81] Ibid [195-6].
[82] Ibid [93].
[83] Ibid [277].
[84] Ibid [87-93].
[85] See joint judgment ibid [29-35].

> agreements or to put themselves in a position where their duty to the people they represent and their own personal interests may conflict.[86]

The plurality[87] felt justified to depart from Barwick CJ's reasoning on several grounds, many of which were cited by the other Justices,[88] namely: his Honour's failure to have sufficient regard to the purpose of the disqualification in s 44(v) revealed in the Convention Debates; his failure to acknowledge that the purpose of the 1782 UK Act was narrower, by a careful comparison of its different text; it was only a single justice decision, not necessarily acted upon by members of parliament; and even if acted on, 'the decision is of a special kind, involving as it does constitutional provisions respecting Parliament and its members.'[89] Accordingly, the decision in *Webster* was set aside as wrong.

Moreover, the plurality rejected Mr Day's principal argument that s 44(v) should be narrowly interpreted. The text and purpose of the provision precluded any choice between a narrow or wide view, as well as the provision having 'a special status, because it is protective of matters which are fundamental to the Constitution, namely representative and responsible government in a democracy'.[90] Their Honours had earlier affirmed the view of Isaacs and Rich JJ in *R v Boston* that every member of Parliament must have a 'single-mindedness for the welfare of the community',[91] that is, each has 'a duty as a representative of others to act in the public interest'.[92] This was necessary to enable Parliament to hold the Executive accountable.[93]

While the interpretation and test of Barwick CJ was set aside, no single test emerges as a ratio from the four judgments in *Re Day (No 2).* Although it seems likely that this ground of disqualification as a government contractor is now more likely to arise, uncertainty continues as to the category of government contracts that fall within the scope of s 44(v). Only Nettle and Gordon JJ proposed a specific test. Instead, Gageler J and Keane J in separate judgments exempted a category of ordinary government contracts; an approach rejected by Nettle and Gordon JJ.[94] The plurality side-stepped a general test, preferring to confine themselves to the application of s 44(v) to the facts of the case. They did accept, however, the exemption from s 44(v) of ordinary 'day-to-day' government contracts. In doing so, they align themselves more with the approaches of Gageler J and Keane J. As nothing in their reasoning seems to be contradicted by the other judgments, their joint judgment, as the lowest common denominator, constitutes the strict ratio of the case.

Nonetheless, it is possible to identify a level of unanimity from all the judgments in relation to the following points.

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[86] Ibid [48]. See also Gageler J at [98] (concurred with the rest of the Court); Keane J at [173]; Nettle and Gordon JJ at [270].
[87] Ibid [43-51].
[88] Ibid Gageler J at [98]; Keane J at [161-184]; Nettle and Gordon JJ at [272-276].
[89] Ibid [45].
[90] Ibid [72].
[91] (1923) 33 CLR 386 at 400.
[92] [2017] HCA 14, [49].
[93] Ibid [50].
[94] Ibid [265].

First, a 'pecuniary interest' is an interest 'sounding in money or money's worth,'[95] but that it need not be a legal interest; an 'indirect pecuniary interest looks to the "practical effect"[96] of the agreement on a person's pecuniary interests'.[97]

One example the plurality discussed was where a member of parliament is a supplier of goods to a manufacturer who contracts with the Commonwealth. No disqualification arises as the member has no indirect pecuniary interest in the Commonwealth contract because no financial benefit accrues to the supplier from the Commonwealth contract.[98] The plurality acknowledged that it may be otherwise if an interest in the Commonwealth agreement can be 'traced' to the supplier, 'for example, because of a relationship between the supplier and the party to the agreement with the Commonwealth, or because the supplier receives, indirectly, some financial benefit from that agreement'.[99] Also caught is the case where an entity or company is used to distance the member from the contract who still stands to benefit therefrom.[100] The plurality also observed that the beneficiaries of a discretionary trust can have an indirect pecuniary interest in an agreement where the trustee is a party or where the trust benefits from that agreement.[101] In the same way, as indicated by the s 44(v) exemption, a shareholder can have an indirect pecuniary interest in the company's agreement.[102]

Secondly, although the member need not be a party to the agreement, the member must still have an *interest in* the agreement. The plurality noted:

> [T]he requirement that the interest be 'in' an agreement implies some personal connection to it, albeit indirect. The mischief to which the provision is addressed has this connotation. It looks to the personal financial circumstances of a parliamentarian and the possibility of a conflict of duty and interest.[103]

Accordingly, the plurality rejected the suggestion of Mr Day that a husband would have an indirect pecuniary interest in his wife's employment contract with the Commonwealth Public Service, simply because her income goes towards their joint liability for a bank mortgage.[104]

Thirdly, the literal text of s 44(v) does need to be read down to avoid the absurdity of disqualification being incurred for a contractual relationship which in no way threatens the integrity of the parliamentary process. This was in response to Mr Day's submissions that if the approach in *Webster* were rejected, this would disqualify anyone who subscribes for a government bond, or who is a creditor of a person owed money under an agreement with the Commonwealth, or whose spouse is a senior public servant whose remuneration under an agreement with the Commonwealth contributes to repaying a mortgage for which both are jointly or severally liable.[105]

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[95] Citing *Webb v The Queen* (1994) 181 CLR 41, 75.
[96] Citing *Crump v New South Wales* (2012) 247 CLR 1, 26.
[97] [2017] HCA 14 per Kiefel CJ, Bell and Edelman JJ [54]. See also Gageler J [111]; Keane J [192]; Nettle and Gordon JJ [252].
[98] Ibid [59].
[99] Ibid [60].
[100] Ibid [61].
[101] Ibid [62], relying on *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337.
[102] Ibid [62].
[103] Ibid [66].
[104] Ibid [65-66].
[105] Ibid [197].

The Court rejected this line of argument, accepting that s 44(v) must be read down. It also rejected Mr Day's alternative submission to rely on this qualification.[106] The plurality, Gageler J and Keane J exempted those agreements which are commonly entered into between the government and its citizens. However, each of their judgments defined this category of exemption somewhat differently.

The plurality[107] referred, without disagreeing, to the approach of the Full Court of Queensland in *Hobler v Jones,*[108] which excluded from the government contractor disqualification in the *Constitution Act 1867* (Qld)[109] ordinary Crown leases granted pursuant to legislation. Their Honours described the exemption in terms of a 'day-to-day dealing':

> There can be no relevant interest if the agreement in question is one ordinarily made between government and a citizen. Were this otherwise, every day-to-day dealing which a citizen has with government could result in the disqualification of a citizen who happens to be a parliamentarian.[110]

While declining[111] to define the outer limits of this ground, Keane J adopted a similar view:

> Given the purpose that informs s 44(v), there is no reason to expand its disqualifying effect to any person who might obtain a pecuniary benefit conferred by the Commonwealth which is available generally to the community. Such a benefit does not fall within the spirit of s 44(v).[112]

Significantly, his Honour attempted to define this category with more precision by exempting agreements made under general Commonwealth laws:

> An agreement with the Commonwealth (for the creation of which the Constitution provides) or with the Crown in right of the Commonwealth (to which s 44(iv) expressly refers) made under a law of the Commonwealth *of general application* is not within the letter of s 44(v).[113] (emphasis added)

Gageler J expressly agreed[114] with Keane J that s 44(v) does not apply to 'an agreement entered into by the Executive Government of the Commonwealth in the execution of a law of general application enacted by the Parliament.'[115] No disqualification would therefore flow from having a postal note, a Treasury bond, or an agreement for compensation following a compulsory acquisition of property.[116]

Following the observation of Keane J that s 44(v) refers not to the 'Crown',[117] Gageler J similarly distinguished between the 'Public Service of the Commonwealth' in s 44(v) and the Commonwealth Executive Government to observe: '… not every agreement with the Commonwealth can properly be characterised as an agreement with the Public

[106] Ibid [70].
[107] Ibid [67].
[108] [1959] Qd R 609.
[109] Section 6(1) disqualified '[a]ny person who shall directly or indirectly personally … undertake, execute, hold or enjoy … any contract or agreement for or on account of the public service …'.
[110] [2017] HCA 14, [69].
[111] Ibid [201].
[112] Ibid [200].
[113] Ibid [199].
[114] Ibid [102].
[115] Ibid [102].
[116] Ibid [101].
[117] Ibid [170].

Service of the Commonwealth.'[118] While declining to explore the outer limits of the ground, his Honour highlighted in relation to s 44(v):

> At its core lie agreements for the procurement of services or property negotiated and entered into for or on behalf of the Commonwealth in the exercise of non-statutory executive authority by officers of the Executive Government of the Commonwealth within a Commonwealth department.[119]

Gageler J therefore excluded Commonwealth employment contracts as outside s 44(v), although these would be caught by s 44 (iv) as an office of profit under the Crown, or by s 45(iii) as receiving any fee or honorarium for services to the Commonwealth.[120]

Nettle and Gordon JJ did not accept Gageler J's exclusion of contracts entered into pursuant to general statutes.[121] Nor did they see any distinction between the Public Service of the Commonwealth and the executive branch or the Crown, since all were part of the legal entity of the Commonwealth.[122] Instead, their Honours adopted a general test which is discussed below.

Finally, Gageler J,[123] Keane J[124] and Nettle and Gordon JJ[125] did concur on one important point: they all adopted as directly applicable to s 44(v) the interpretation given by Gavan Duffy J in *Ford v Andrews*[126] in relation to s 70(j) of the *Local Government Act 1906* (NSW):

> A man is directly interested in a contract if he is a party to it, he is indirectly interested if he has the expectation of a benefit dependent on the performance of the contract, but in either case the interest must be in the contract, that is to say, the relation between the interest and the contract must be immediate and not merely connected by a mediate chain of possibilities.[127]

Gageler J required an expectation of receiving such a benefit to be determined objectively by reference to the 'practical commercial likelihood'.[128] On the basis of this test, his Honour concluded that even before the direction to pay the rent into Mr Day's account was made, he had an objective expectation of receiving a monetary benefit from the lease in terms of a reduction in his contingent liability to the bank and by way of a distribution as a beneficiary under the Day Family Trust.[129]

Keane J considered that 'a person has at least an 'indirect' interest of a pecuniary nature in an agreement if the agreement is such that it can give rise to an expectation of a monetary gain or loss if it is performed.'[130]

Nettle and Gordon JJ exemplified the distinction made by Gavan Duffy J in *Ford v Andrews* between an immediate interest in a government contract which incurs

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[118] Ibid [105].
[119] Ibid [106].
[120] Ibid [107].
[121] Ibid [265].
[122] Ibid [266-267].
[123] Ibid [108-110].
[124] Ibid [192].
[125] Ibid [254-255].
[126] (1916) 21 CLR 317.
[127] Ibid at 335. Section 70(j) disqualified an alderman if directly or indirectly engaged or interested in any contract with the Council.
[128] Ibid [118].
[129] Ibid [116].
[130] Ibid [192].

disqualification, and being merely 'connected by a chain of possibilities'. The former arises, in their view, where the member enters into a non-binding consultancy arrangement with an IT company whereby in return for advice on how to deal with the government, the company agrees to pay the member 5% of any profits derived from any contracts it achieves with the public service.[131] On the other hand, no immediate interest arises where the member's partner is a Commonwealth employee.[132]

As for the exemption in s 44(v) as a shareholder in a company of more than 25 members, Barwick CJ in *Webster* expressed the view that even if one were a shareholder in a company with less than 25 members, this alone was insufficient to find that a shareholder had the requisite pecuniary interest in any contract between the company and the Commonwealth.[133] This was so in that case where Senator Webster was one of only nine shareholders. Gageler J agreed in obiter with this view of Barwick CJ only in relation to the existence of a direct pecuniary interest, but disagreed in relation to an indirect interest.[134] In other words, a shareholder in a company of 25 or less members might well have an indirect pecuniary interest in a contract if the value of that shareholding or the receipt of expected dividends are likely to be enhanced by that contract.

B *General test?*

Significantly, no Justice adopted[135] the test submitted by the Attorney-General that s 44(v) should apply when 'objectively, there is a real risk that a person could be influenced, or be perceived to be influenced, in relation to parliamentary affairs by a direct or indirect financial interest'.[136] The plurality rejected this as purporting to alter the terms of s 44(v).[137] Gageler J criticised its impressionistic approach as failing to provide the certainty required of a ground of disqualification.[138] His Honour emphasised the need for the 'greatest certainty of operation' for candidates and members to determine whether or not their relationship with the Commonwealth might disqualify them from their 'democratic participation'.[139] The *Webster* interpretation, like that of the Attorney-General, failed this criterion as 'vague and unduly evaluative'.[140]

Nettle and Gordon JJ, however, *adapted* the Attorney-General's proposed test, to expound their own test in these terms:

> [Section] 44(v) does not extend to an 'agreement with the Public Service of the Commonwealth' in which a person has an 'interest' unless, by reason of the existence, performance or breach of that agreement, that person could conceivably be influenced by the potential conduct of the executive in performing or not performing the agreement or that person could conceivably prefer their private interests over their public duty.[141]

[131] Ibid [257].
[132] Ibid [256].
[133] (1975) 132 CLR 270 at 287.
[134] [2017] HCA 14, [112].
[135] Ibid [53].
[136] See ibid [99].
[137]Ibid [53].
[138] Ibid [100].
[139] Ibid [97].
[140] Ibid [98].
[141] Ibid [260], see also [252] and [258].

Rather than assessing a 'perceived' influence as per the Attorney-General's proposed test, their Honours preferred a more objective assessment of the *possibility* of being influenced, that is, could the candidate or member 'conceivably' be influenced.[142] Moreover, their test acknowledges that s 44(v) is not confined to the risk of only executive influence, but is also designed to avoid a member preferring their own private interests over their public interest.[143]

Nettle and Gordon JJ applied this test to Mr Day to conclude that by virtue of his indirect pecuniary interest in the lease: 'Mr Day could conceivably have been influenced in the exercise of his functions, powers and privileges, or in the performance of his duties, as a member of Parliament; because he could conceivably have been influenced by the potential conduct of the executive in performing or not performing the lease or because he could conceivably have preferred his private interests over his public duty'.[144]

Their Honours justified this conclusion by contemplating the scenario where amendments are proposed to the legislation pursuant to which members are given office accommodation in their electorates. Mr Day would need to resolve the conflict between his public duty and his private interest – precisely the scenario which s 44(v) intends to avoid.[145]

The difficulty with their approach is that it raises issues of degree before a determination of disqualification can be determined. It does not attempt to reduce to a minimum the level of uncertainty attendant on such an assessment. The advantage of the exemption category defined by Gageler J and Keane J respectively is that it is easier to apply. But does it risk either, exempting interests which ought to be caught, or catching interests which ought not to be caught?

Although the lack of endorsement by the other Justices of the test of Nettle and Gordon JJ does not bode well for the current Court adopting it in the future, their test does offer a measureable yardstick for the application of s 44(v) which seems to surpass the limited guidance by the other Justices. It could be that their general test combined with the exemption of day-to-day government contracts best describes the scope of s 44(v). Future hard cases are needed to assist the Court in this difficult task.

C *Comparison of States and Territories position*

A comparison of the position in the States and territories reveals the complexity of this 'government contractor' ground of disqualification. Only in Victoria are its candidates and members subject to a comparable regime to that under s 44(v): automatic disqualification for having a direct or indirect interest in a government contract.[146]

New South Wales[147] and Tasmania[148] follow the 1782 UK Act by disqualifying members who are party[149] to a government contract (subject to a list of exemptions), except that in New South Wales, members only lose their seat when their House so declares. In those two States, uncertainty exists as to how far the disqualification of

[142] Ibid [263-264].
[143] Ibid [261-262].
[144] Ibid [281].
[145] Ibid [283].
[146] *Constitution Act 1975* (Vic) ss 54 and 55.
[147] *Constitution Act 1902* (NSW) s 13.
[148] *Constitution Act 1934* (Tas) s 33.
[149] Both provisions extend to include those with indirect interests in such contracts.

candidates goes further to disqualify those persons who 'directly or indirectly himself, or by any other person whatsoever in trust for him or for his use or benefit or on his account, undertakes, executes, holds, or enjoys in the whole or in part, any contract'. Authority suggests that this is not equivalent to having a mere interest in a government contract.[150]

Queensland[151] also leaves to the Legislative Assembly whether to declare a member's seat vacant where a member has any direct or indirect interest in a government contract for the supply of goods or services to a public entity. Moreover, such a contract is invalid and the member is not entitled to any payment. New members are given six months after being elected to relinquish themselves of such contracts.

In the remaining States of South Australia and Western Australia, as well as in the ACT and the Northern Territory, no member loses their seat for being a government contractor. Both South Australia and Western Australia repealed this ground of disqualification, relying instead on their obligation to disclose such an interest.[152] Members of both territory legislatures are only precluded from discussing and voting on matters related to contracts in which they are a party or have a direct or indirect interest.[153]

D *Reform of s 44(v)*

Before the decision in *Re Day (No 2),* at least three reform options were canvassed: (i) to amend s 44(v) to clarify the government contracts within its scope and the requisite nature of the interest therein; (ii) to replace s 44(v) with a provision which leaves to Parliament the prescription of this ground of disqualification; and (iii) to follow the UK lead by repealing this ground of disqualification altogether.[154]

All three approaches are evident from the above comparison of the State and territory position. They provide a rich field of comparative research. But the urgency to address any reform of s 44(v) has now lost its momentum following the rejection of the *Webster* approach. *Re Day (No 2)* has rejuvenated s 44(v) as a protector of public integrity. Further decisions may in time contribute to a better understanding of its scope. This may prove a more reliable approach than to adopt any of the options above. Certainly, repealing the ground altogether or leaving it to the Parliament to define, are not desirable options. What remains to see is how many members are vulnerable to challenge under this rejuvenated ground. Is it possible that this ground might be as fertile a field as s 44(i)?

IV Conclusion

Once again the High Court has applied the Commonwealth Constitution in a way faithful to the purpose of its provisions – in relation to the grounds of disqualification in s 44: the protection of the independence and integrity of the Parliament itself. In *Re Canavan*,[155] the Court's approach to dual citizenship in s 44(i) was driven by both the

[150] Gerard Carney, *Members of Parliament: Law and Ethics* (Prospect 2001) at 122-125.
[151] *Parliament of Queensland Act 2001* (Qld) ss 70, 71 and 72(1)(h).
[152] See eg *Members of Parliament (Register of Interests) Act 1983* (SA) s 4(3)(g); *Members of Parliament (Financial Interests) Act 1992* (WA) s 7(1).
[153] *Australian Capital Territory (Self-Government) Act 1988* (Cth) s 15(1); *Northern Territory (Self Government) Act 1978* (Cth) s 21(3).
[154] Gerard Carney, *Members of Parliament: Law and Ethics* (Prospect 2001) at 111-113.
[155] [2017] HCA 45.

Constitution's unambiguous text and purpose. Little flexibility is possible. On the other hand, the Court's approach in *Re Day (No 2)*[156] to the government contractor ground in s 44(v) requires a more nuanced interpretation to ensure that its wide text is confined to its purpose. Considerable flexibility exists here. The High Court rejuvenated this ground by rejecting Barwick CJ's narrow interpretation in *Webster*.[157] But it has not yet provided a general test. More clarification is needed. Nonetheless, *Re Day (No 2)* affirms constitutional recognition in ss 44 and 45 of the duty of all members of the Australian Parliament to act solely in the best interests of the nation, rather than in their own personal interest.[158] Reform is needed only for s 44(i), preferably by constitutional amendment. If this is not feasible, then statutory reform to facilitate a general renunciation of all foreign citizenship by candidates before nominating should be tried. Most significant is the outcome in *Alley v Gillespie,*[159] which restricts the standing of every Australian voter to challenge any member of the Commonwealth Parliament for being disqualified under ss 44 and 45 of the Constitution.

[156] [2017] HCA 14.
[157] *In re Webster* (1975) 132 CLR 270
[158] [2017] HCA 14 per Kiefel CJ, Bell and Edelman JJ [49], Nettle and Gordon JJ [269]
[159] [2017] HCA 14