



### NO. 19—QUALIFICATIONS OF SENATORS AND CANDIDATES FOR SENATE ELECTIONS

Senators are chosen by the people of each State and Territory voting as one electorate at periodic elections. The term of a senator representing a State is 6 years, while Territory senators' terms coincide with that of the House of Representatives.

The provisions governing the qualifications of candidates for election and of senators, once elected, are contained in the Constitution and the *Commonwealth Electoral Act 1918* (CEA). The purpose of these provisions is to ensure that the people who stand for, and are members of, the national Parliament are beholden to no-one but the electors as a whole and may therefore perform their duties free from undue external influence, including from the executive government, foreign governments and commercial pressures.

#### ***Candidates***

To stand for either House, a person must be:

- at least 18 years old; and
- an Australian citizen; and
- an elector entitled to vote or a person qualified to become an elector.

In 1901, the requirements for qualification were different but the Constitution gave the Parliament power to change these requirements and it has done so on several occasions (see sections [16](#) and [34](#) of the Constitution and section 163 of the CEA).

A person who is a member of the House of Representatives or a State or Territory legislature must resign before being eligible to stand for the Senate (see section [43](#) of the Constitution and section 164 of the CEA). A person may not make multiple nominations (section 165 of the CEA).

Section 44 of the Constitution provides further limitations on eligibility. A person cannot be chosen as a senator if he or she:

- is a citizen or subject of a foreign power; or
- is attainted of treason; or
- has been convicted and is under sentence, or subject to be sentenced, for an offence under Commonwealth or State law punishable by a prison sentence of 12 months or more; or
- is an undischarged bankrupt; or
- holds an office of profit under the Crown; or
- has a pecuniary interest in any agreement with the Commonwealth Public Service (except as a member of an incorporated company of more than 25 people).

Furthermore, a person convicted of certain bribery or undue influence offences is disqualified from being chosen as a senator for 2 years after the conviction (see section 386 of the CEA).

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## ***Disqualification of senators***

The place of a senator who becomes subject to any of the grounds for disqualification in section 44 of the Constitution automatically becomes vacant. Disqualification also occurs if a senator becomes bankrupt or insolvent or if he or she takes, or agrees to take, any fee or honorarium for services to the Commonwealth or for services rendered in the Parliament on behalf of any person (see section 45 of the Constitution). A monetary penalty may apply if a person continues to sit as a senator while disqualified (see section 46 of the Constitution and section 3 of the *Common Informers (Parliamentary Disqualifications) Act 1975*).

## ***Determination of disqualifications***

There are three methods of challenging the qualifications of a senator. Under each method, challenges are determined by the High Court, sitting as the Court of Disputed Returns under the second and third methods.

Any person may bring an action under section 46 of the Constitution against a senator alleged to be disqualified.

Secondly, the Senate may at any time by resolution refer a question relating to the qualifications of a senator to the Court under section 376 of the CEA. The motion is categorised as Business of the Senate and therefore has priority over other types of business at most times (see [Brief Guide No. 8—Categories of Business](#)). The Court may declare that a senator is not qualified, or that a candidate was ineligible, and may declare that a vacancy exists.

The third method is under sections 353 to 357 of the CEA, which provide that the Australian Electoral Commission, or any candidate or person qualified to vote, may petition the Court within 40 days after the return of the writ (or, in the case of a casual vacancy, the notification of the choice or appointment) to examine the validity of the election, including the qualifications of candidates. The Court may examine the petition or refer it to a lower court. Possible outcomes include declarations that:

- a person returned as elected was not duly elected;
- a candidate not previously returned as elected is now duly elected; or
- the election is void.

## ***Grounds for disqualification***

Over the past century, the High Court has adjudicated on a number of aspects of section 44 of the Constitution as it applies to both candidates and members or senators. For a candidate, the critical point is nomination, which begins the process of being chosen (*Sykes v Cleary (No. 2)* (1992) 176 CLR 77). To be eligible for election, a candidate must be clear of any of the grounds for disqualification at the time of nomination (*Free v Kelly (No. 2)* (1996) 185 CLR 296).

### ***—owes allegiance to a foreign power etc.***

Paragraph 44(i) applies to a person who has formally or informally acknowledged allegiance, obedience or adherence to a foreign power and who has not withdrawn or revoked that allegiance (*Nile v Wood* (1988) 167 CLR 133).

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For the purposes of paragraph 44(i) of the Constitution, “foreign power” includes the United Kingdom (*Sue v Hill* (1999) 199 CLR 462). To qualify for election, it is not enough for a person to have become an Australian citizen unless that person has also taken reasonable steps to renounce foreign nationality (*Sue v Hill* (1999) 176 CLR 77). What amounts to reasonable steps will depend on the circumstances of the particular case (*Sykes v Cleary* (No. 2) (1992) 176 CLR 77).

**—has been convicted and is under sentence etc.**

For paragraph 44(ii) to apply, a person must have been convicted **and** either serving a sentence or subject to be sentenced in relation to an offence punishable by imprisonment for one year or longer (*Nile v Wood* (1988) 167 CLR 133). A person is subject to be sentenced if he or she is awaiting sentencing but also if he or she has been given a suspended sentence, subject to certain conditions being met.

**—is an undischarged bankrupt or insolvent**

Paragraph 44(iii) refers to a person who has been declared bankrupt or insolvent and who has not been discharged from that condition (*Nile v Wood* (1988) 167 CLR 133). A senator or member who **becomes** bankrupt or insolvent while serving is disqualified under paragraph 45(ii).

**—holds any office of profit under the Crown**

Paragraph 44(iv) refers “at least” to a person who is permanently employed by government, including at the State level. Taking leave without pay does not alter the character of that employment (*Sykes v Cleary* (1992) 176 CLR 77).

**—pecuniary interest in any agreement with the Commonwealth public service**

In a 1975 case, the High Court found that a senator who was a shareholder in a company that had an agreement with the Commonwealth Public Service was not disqualified. The Court held that an agreement needed to cover a substantial period of time and be one under which the Crown could conceivably influence the contractor in relation to parliamentary affairs (*Re Webster* (1975) 132 CLR 270) (see paragraph 44(v)).

While sections 44 and 45 refer specifically to candidates and members or senators, there are no safe grounds for concluding that they do not also apply to senators-elect (that is, senators who have been elected but whose terms have not begun).

For further information, see [Chapter 6](#) of Odgers’ *Australian Senate Practice*, 11<sup>th</sup> edition.

## **Loss of place for non-attendance**

The disqualification provisions in the Constitution and the CEA safeguard members of Parliament against undue influence. A person who succumbs to undue influence may be ruled ineligible to stand or may lose his or her place. Senators can also lose their places if they fail to attend the Senate for two consecutive months without permission. A parallel provision applies to members of the House of Representatives (see sections 20 and 38 of the Constitution). These provisions safeguard electors against absentee representatives but have applied only once since Federation (Senator Ferguson, QLD, 1903).

## **Need assistance?**

For advice on any of the matters covered by this guide, senators or their staff should contact the Clerk of the Senate on extension 3350.

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