

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

**THE CONSTITUTIONAL QUALIFICATIONS OF MEMBERS OF
PARLIAMENT**

Report by the Senate Standing Committee on Constitutional and Legal Affairs

**Australian Government Publishing Service
Canberra 1981**

- whether Senator Webster was incapable of being chosen or of sitting as a Senator; and
- whether Senator Webster had become incapable of sitting as a Senator.³³

The two questions referred to the Court by the Senate were answered in the negative.³⁴ The Chief Justice in his judgment said that the facts refuted any suggestion of any lack of integrity on the part of Senator Webster, or of any intention on his part to allow the Crown to influence him in the performance of his obligations as a member of the Senate and further that there was at no time any agreement of any kind between Senator Webster and the Public Service of the Commonwealth.³⁵

On 10 June 1999 a motion was moved in the House—

That the following question be referred to the Court of Disputed Returns for determination, pursuant to section 376 of the *Commonwealth Electoral Act 1918*: Whether the place of the honourable Member for Leichhardt (Mr Entsch) has become vacant pursuant to the provisions of section 44(v) of the Constitution.

The Attorney-General moved, as an amendment—

That all words after ‘That’ be omitted with a view to substituting the following words: ‘the House determines that the Member for Leichhardt does not have any direct or indirect pecuniary interest with the Public Service of the Commonwealth within the meaning of section 44(v) of the Constitution by reason of any contract entered into by Cape York Concrete Pty Ltd since 3 October 1998 and the Member for Leichhardt is therefore not incapable of sitting as a Member of this House’.

The amendment and amended motion were carried. Attempts to rescind them and to censure the Attorney-General for ‘usurping the role of the High Court in its capacity to act as the Court of Disputed Returns’ were negated.³⁶

Section 45(ii) of the Constitution

The interpretation and application of section 45(ii) arose in the House in 1977 in connection with Mr M. Baume, MP, who, before entering Parliament, had been a member of a stockbroking firm which had collapsed. On 5 May 1977 a motion was moved:

... that the question whether the place of the Honourable Member for Macarthur [Mr Baume] has become vacant pursuant to the provisions of section 45(ii) of the Constitution of the Commonwealth of Australia be referred for determination to the Court of Disputed Returns pursuant to section 203 of the Commonwealth Electoral Act.³⁷

It was argued that an agreement made by Mr Baume with the appointed trustee of the firm constituted a deed of arrangement or, alternatively, that he received benefits as a consequence of arrangements made by other members of the firm under Part X of the Bankruptcy Act. Speaking against the motion the Attorney-General presented three legal opinions, including a joint opinion by himself and the Solicitor-General, to the effect that the matters in question did not come within the scope of section 45(ii) and stated that the deed executed by Mr Baume was not a deed of arrangement within the meaning of the Bankruptcy Act, not being a deed executed by him as a debtor under the Act as a deed of arrangement. On the question of whether Mr Baume had received benefits under the Bankruptcy Act as a result of deeds executed by other members of the firm, the opinions were to the effect that while benefits had been conferred, these were not the benefits to

³³ J 1974–75/628–9.

³⁴ J 1974–75/821.

³⁵ *In re Webster* (1975) 132 CLR 270.

³⁶ VP 1998–2001/594–607. H.R. Deb. (10.6.1999) 6720–35. See also ‘Interpretation of the Constitution or the law’ in Ch. on ‘The Speaker, Deputy Speakers and officers’ for note of Speaker’s decision on the validity of the amendment.

³⁷ H.R. Deb. (5.5.1977) 1598–1610; VP 1977/108–12.

however, as was suggested above, is that those individuals who might be most likely to bring suit for proper, public interest, motives are those who will be most dissuaded by the 'greedy informer' label still attaching to such suits. With the passage of the 1975 Act, the ironic result seems likely to follow that the amounts recoverable will now be too low to attract the genuinely greedy, but still high enough to embarrass the potential suitor who does not want to be thought greedy at all. For one reason or another, it seems to be the experience of all those jurisdictions retaining common informer provisions here that they work capriciously, fitfully or not at all.¹¹

8.7 There are a number of differing views on this question. Professor Campbell suggests that suits for penalties under s. 46 be abolished entirely.¹² The Western Australian Law Reform Committee in considering the equivalent Western Australian constitutional provision suggests that it be recast providing simply for an action for a declaration at the suit of any person, as to whether or not a member of Parliament is disqualified.¹³ They further suggest that 'to discourage needless harrassment, the applicant could be required to give security for costs.'¹⁴

DECLARATION UNDER s. 47

*s. 203 of Electoral Act
is now s. 376.*

8.8 Section 47 of the Constitution provided the other means of challenging the qualifications of a member of Parliament before a court of law. In 1907, in the absence of any legislation on the subject, the High Court refused to determine whether a senator had been validly appointed under s. 15 of the Constitution because this was, among other things, a question respecting a vacancy within the meaning of s. 47 and therefore a matter for the Senate itself to decide.¹⁵ Arising out of that case, the Australian Parliament passed an Act pursuant to s. 47 enabling such questions to be referred to the High Court of Australia sitting as a Court of Disputed Returns: this Act was the *Disputed Elections and Qualifications Act 1907*. The present provision for referring such questions to the High Court sitting as a Court of Disputed Returns is s. 203 of the *Commonwealth Electoral Act 1918*, which is enacted pursuant to s. 47 and s. 51 (xxxvi) of the Constitution. This provision faithfully mirrors the language of s. 47 as follows:

203. Any question respecting the qualifications of a senator or of a member of the House of Representatives or respecting a vacancy in either House of the Parliament may be referred by resolution to the Court of Disputed Returns by the House in which the question arises and the Court of Disputed Returns shall thereupon have jurisdiction to hear and determine the question.

8.9 An important question for consideration arises here as to whether the enactment of s. 203 has had the effect of ousting the jurisdiction of both Houses of Parliament given to them by s. 47 of the Constitution. If s. 203 does not have that effect, both Houses retain the jurisdiction to determine questions of vacancies themselves, instead of referring them to the Court for its determination. In 1974, it was argued by the then Attorney-General, Senator Murphy, that the enactment of s. 203 had exhausted any power which either House of Parliament might have had to determine any question respecting a member's qualifications or a vacancy, just as s. 183 of that Act had removed the Houses' power to determine any question of a disputed election.¹⁶ That argument, which was supported by a 1952 opinion of Garfield Barwick QC, was rejected by the Senate on party lines.

8.10 The Senate's rejection of this argument has been supported in a number of articles since that time¹⁷ and we also are of the same opinion. First, Parliament has not, in enacting s. 203, declared unequivocally that the House shall not determine questions

High Court of Australia

LIST OF BUSINESS FOR SITTINGS AT CANBERRA

BEFORE THE FULL COURT

COMMENCING ON TUESDAY, 6 DECEMBER 2016

No.	Appellant	Respondent	Court appealed from
1.	Prior	Mole (D5/2016)	Supreme Court of the Northern Territory (Court of Appeal) [2016] NTCA 2
2.	In the matter of questions referred to the Court of Disputed Returns pursuant to section 376 of the <i>Commonwealth Electoral Act 1918</i> (Cth) concerning Senator Rodney Norman Culleton (C15/2016)		Questions referred by the Senate
3.	Minister for Immigration and Border Protection	Kumar & Ors (P49/2016)	Federal Court of Australia [2016] FCA 177
4.	Bondelmonte	Bondelmonte & Anor (S247/2016)	Full Court of the Family Court of Australia
5.	Ecosse Property Holdings Pty Ltd	Gee Dee Nominees Pty Ltd (M143/2016)	Supreme Court of Victoria (Court of Appeal) [2016] VSCA 23

It is requested that notice be given to Carolyn Rogers, Senior Registrar, of any cases which may be discontinued.

ANDREW PHELAN
CHIEF EXECUTIVE AND PRINCIPAL REGISTRAR

IN THE HIGH COURT OF AUSTRALIA
SITTING AS THE COURT OF DISPUTED RETURNS
CANBERRA REGISTRY

No C15 OF 2016

Re Senator Rodney Norman Culleton

Reference under s 376

Commonwealth Electoral Act 1918 (Cth)

10

AFFIDAVIT OF RODNEY NORMAN CULLETON

I Affidavit of: Rodney Norman Culleton
Address: Unit 5, 162 Colin Street, West Perth, Western Australia
Occupation: Senator
Date affirmed: 28 November 2016

I, **Rodney Norman Culleton** of Unit 5, 162 Colin Street, West Perth, Western Australia
farmer and Senator for Western Australia **MAKE OATH AND SAY** as follows:

1. I am the respondent in this proceeding. I make this affidavit from facts within my own knowledge and belief save when I say otherwise.
2. On or about 11 April 2014 at Guyra NSW I was involved in an argument with the owner of a truck during which the truck keys were lost. I was subsequently charged under s 117 *Crimes Act* 1900 NSW. I had a good defence to the charge.
3. The matter was heard in my absence and on 2 March 2016 I was convicted in my absence by the Local Court of NSW at Armidale for an offence of Larceny property value less \$2,000. Exhibited and marked RC-1 is a copy of the Court order notice for the orders made on 2 March 2016 in the Local Court of Armidale.

20

Filed on behalf of Rodney Culleton by:
Maitland Lawyers
Suite 1005/530 Little Collins Street
Melbourne Vic 3000

Contact: John Maitland

File Ref: 80332

Tel: (03) 9909 7166

E: admin@maitlandlawyers.com.au

4. On 2 March 2016, the Local Court issued a warrant for my arrest under s 25(2) of the *Crimes (Sentencing Procedure) Act 1999* (NSW), however I was not served with a copy of the warrant until 8 August 2016 and I was unaware of its existence at the time of its issue. Exhibited and marked RC-2 is a copy of the warrant issued on 2 March 2016.
5. On 16 May 2016, the Governor of Western Australia issued a writ for the election of Senators for Western Australia. The writ specified, among other things, that nominations of candidates for the Senate would close on 9 June 2016. Exhibited and marked RC-3 is a copy of the writ for the election of senators for Western Australia dated 16 May 2016.
6. On 7 June 2016, the Australian Electoral officer for Western Australia received a group nomination for Pauline Hanson's One Nation party which included a nomination by myself as a Senate candidate. Exhibited and marked RC-4 is a copy of the Group Nomination of Senators.
7. The polling day for the election was 2 July 2016.
8. On 2 August 2016, the poll for the Senate for Western Australia was declared and the writ returned. I was certified as duly elected as the eleventh out of twelve senators for Western Australia.
9. On 8 August 2016 I appeared at the Local Court at Armidale where the warrant referred to in paragraph [4] above was executed, and at which the Local Court granted an annulment of the conviction made in my absence on 2 March 2016 referred to in paragraph [3] above and pursuant to s 8 *Crimes (Appeal and Review) Act 2001* (NSW). Exhibited and marked RC-5 is a copy of the Court Order Notice for the orders made by the Local Court at Armidale on 8 August 2016.
10. At no time was I sentenced in respect of the conviction made on 2 March 2016 in my absence.

11. As a result on the annulment made granted 8 August 2016 referred t in paragraph [9] above, the Local Court proceeded to deal with the charge afresh in accordance with s 9 Crimes (Appeal and Review) Act 2001 (NSW).

12. On 25 October 2016 I pleaded guilty to the charge in the Local Court at Armidale. Without proceeding to conviction, the Court dismissed the matter pursuant to s 10(1)(a) Crimes (Appeal and Review) Act 2001 (NSW). Exhibited and marked RC-6 is a copy of the Court Order Notice regarding the orders made on 25 October 2016 in the Local Court at Armidale.

10

SWORN AT ~~Canberra~~ in the Australian Capital Territory

This
November 2016

Rodney Norman Culleton

Before me:



20

**IN THE HIGH COURT OF AUSTRALIA
SITTING AS THE COURT OF DISPUTED RETURNS
CANBERRA REGISTRY**

No C15 OF 2016

Re Senator Rodney Norman Culleton
Reference under s 376
Commonwealth Electoral Act 1918 (Cth)

**AFFIDAVIT OF RODNEY NORMAN CULLETON
SWORN NOVEMBER 2016**

INDEX OF EXHIBITS

Exhibit	Description	Paragraph	Page
RC-1	Copy of the Court Order Notice for the Notice for the Orders made on 2 March 2016 in the Local Court at Armidale.	3	6
RC-2	Copy of the warrant issued on 2 March 2016	4	9
RC-3	Copy of the writ for the election of the senators For Western Australia 16 May 2016	5	11
RC-4	Copy of the Group Nomination of senators	6	16
RC-5	Copy of the Court order Notice for the Orders made by the local Court at Armidale On 8 August 2016	9	24
RC-6	Copy of the Court order Notice regarding the orders made on 25 October 2016 in the Local Court at Armidale.	12	27

**IN THE HIGH COURT OF AUSTRALIA
SITTING AS THE COURT OF DISPUTED RETURNS
CANBERRA REGISTRY**

No C15 OF 2016

Re Senator Rodney Norman Culleton
Reference under s 376
Commonwealth Electoral Act 1918 (Cth)

EXHIBIT RC-1

The following 2 pages is the Exhibit marked "RC-1" referred to in the affidavit of Rodney Norman Culleton affirmed on November 2016 before me:



.....
Lawyer




COURT ORDER NOTICE

Local Court of NSW
at Armidale
2015/00207643



Details	Case title	R v RODNEY NORMAN CULLETON
	Accused DOB	5 June 1964
	Accused CNI	
	H Number	58561419
Court	Order date	2 March 2016
	Place of order	Armidale
	Judicial officer	Local Court Magistrate M Holmes
Order	2015/00207643-001 / Larceny value <=\$2000-T2 Heard and Determined in the absence of the Accused pursuant to s 196 Criminal Procedure Act	
	2015/00207643-001 / Larceny value <=\$2000-T2 Convicted	
	2015/00207643-001 / Larceny value <=\$2000-T2 Section 25(2) Warrant to Issue - Convicted in Absence APPLICATION FOR ADJOURNMENT REFUSED	
Additional Information	OFFENCE DETAILS: Crimes Act 1900 Section 117 Larceny between 8.00am and 10.00am on 11th April, 2014 at Guyra did steal certain property of the value of \$322.85, to wit, Keys for Peterbilt Heavy haulage tow truck the property of John Charles DUNN	
	HEARINGS AND SENTENCING IN ABSENCE OF ACCUSED If accused is not present a matter made be heard in their absence: Criminal Procedure Act 1986 No 209 Chapter 4, Part 2, Division 3 Section 196 If accused is not present a sentence may be imposed:	



	Crimes (Sentencing Procedure) Act 1999 Part 3, Division 1, Section 25(2) I, Rhonda Breneger, Registrar, Armidale Local Court, being the person who normally has control of the records of this court hereby certify this order to be a true copy of the order made at the Armidale Local Court on the 2nd March, 2016.
Signed	 R.M. Breneger  Registrar
Date	15 November 2016
Copy to	Australian Government Solicitor 4 National Circuit BARTON ACT 2600

**IN THE HIGH COURT OF AUSTRALIA
SITTING AS THE COURT OF DISPUTED RETURNS
CANBERRA REGISTRY**

No C15 OF 2016

Re Senator Rodney Norman Culleton
Reference under s 376
Commonwealth Electoral Act 1918 (Cth)

EXHIBIT RC-2

The following 1 pages is the Exhibit marked "RC-2" referred to in the affidavit of Rodney Norman Culleton affirmed on November 2016 before me:



.....
Lawyer



WARRANT
Section 25(2) Crimes (Sentencing Procedure) Act 1999

Local Court of NSW
† Armidale
2015/00207643



To	All police officers. This is your warrant to arrest RODNEY NORMAN CULLETON.
Order(s)	Name RODNEY NORMAN CULLETON Address 13061 MCKENZIE Road WILLIAMS WA 6391 DOB 5 June 1964 CNI MIN Arrest and bring RODNEY NORMAN CULLETON to the court to be dealt with according to law.
Reason	On 2 March 2016 RODNEY NORMAN CULLETON failed to appear and has been convicted in respect of the following charges: 2015/00207643-001 Offence : Larceny value <=\$2000-T2 Act & section : Crimes Act 1900 40/1900 (117) Lawpart Code: 620 H Number - sequence: 58561419 1, 6492283 Date and Place of Offence: 11 April 2014, GUYRA.
Signed	 Debbie Gilby Authorised officer
Date	2 March 2016

Rhonda Breteger, Registrar, Armidale Local Court, being the person who normally
personally verify this Warrant, to be a true copy of the Original Warrant, issued at the Armidale
2016

DG0013022102

IN THE HIGH COURT OF AUSTRALIA
SITTING AS THE COURT OF DISPUTED RETURNS
CANBERRA REGISTRY

No C15 OF 2016

Re Senator Rodney Norman Culleton
Reference under s 376
Commonwealth Electoral Act 1918 (Cth)

EXHIBIT RC-3

The following 3 pages is the Exhibit marked "RC-3" referred to in the affidavit of Rodney Norman Culleton affirmed on November 2016 before me:



.....

Lawyer

*The Constitution of the Commonwealth
Commonwealth Electoral Act 1918*

Writ for the election of Senators for
Western Australia

To: Marie Neilson
The Australian Electoral Officer for the State of Western Australia:

GREETING

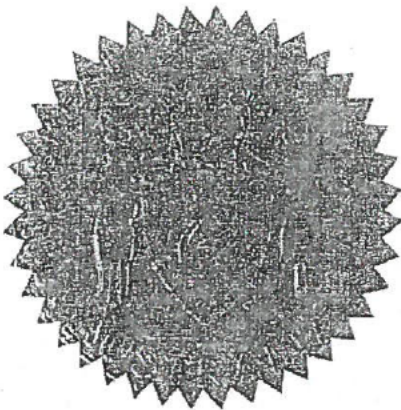
I command you to cause election to be made according to law of 12 Senators for the State of Western Australia to serve in the Senate of the Parliament of the Commonwealth of Australia.

I appoint 23 May 2016 to be the day for the close of the rolls.

I appoint 9 June 2016 at 12 noon to be the day and time before which nominations of Senators at and for that election are to be made.

I appoint 2 July 2016 to be the day on which the poll is to be taken in the event of that election being contested.

I command you to certify the names of the Senators elected and to return this writ with the certificate attached to the Governor of the State of Western Australia on or before 8 August 2016.



— ✓
Deputy of the Governor
16 May 2016

CERTIFICATE OF ELECTION OF SENATORS
FOR WESTERN AUSTRALIA

Commonwealth Electoral Act 1918 section 283

I, Marie Neilson, certify, in accordance with paragraph 283(1)(b) of the *Commonwealth Electoral Act 1918*, that the following candidates have been duly elected in the order respectively set out below to serve in the Senate of the Parliament of the Commonwealth of Australia as Senators for Western Australia.

Names of Senators (in order of election)

1. Matthias Hubert Paul CORMANN
 2. Susan LINES
 3. Scott LUDLAM
 4. Michaelia Clare CASH
 5. Glenn STERLE
 6. Dean Anthony SMITH
 7. Patrick Lionel DODSON
 8. Linda Karen REYNOLDS
 9. Christopher John BACK
 10. Louise Clare PRATT
 11. Rodney Norman CULLETON
 12. Rachel Mary SIEWERT
-

Marie Neilson
Australian Electoral Officer
for Western Australia

Dated this second day of August 2016

The writ and this certificate were returned to Her Excellency the Honourable Kerry Sanderson AC, Governor of the State of Western Australia on this second day of August 2016.

Marie Neilson
Australian Electoral Officer
for Western Australia

I certify that this writ has been duly returned as required by paragraph 283(1)(c) of the *Commonwealth Electoral Act 1918*.

Her Excellency the Honourable Kerry Sanderson AC
Governor of the State of Western Australia

Dated this second day of August 2016

IN THE HIGH COURT OF AUSTRALIA
SITTING AS THE COURT OF DISPUTED RETURNS
CANBERRA REGISTRY

No C15 OF 2016

Re Senator Rodney Norman Culleton
Reference under s 376
Commonwealth Electoral Act 1918 (Cth)

EXHIBIT RC-4

The following 8 pages is the Exhibit marked "RC-4" referred to in the affidavit of Rodney Norman Culleton affirmed on November 2016 before me:



2

.....
Lawyer

Nomination of a Senator Group nomination by Registered Officer

This form should be used where two or more candidates are nominated as a group by the Registered Officer of a political party.

Additional information is available in the *Candidates Handbook* and the *Nomination Guide*.

PART A – Nomination/Endorsement by registered political party
To the Australian Electoral Officer for the State/Territory of
WESTERN AUSTRALIA

I am the: Registered Officer or Deputy Registered Officer

Name of Registered Officer/Deputy Registered Officer

IAN JOHN NELSON

Name of Registered political party

PAULINE HANSON'S ONE NATION

Number of candidates being nominated **3**

I request that printed on the ballot paper adjacent to the name of each candidate appears:

The registered party name or The registered abbreviation of the party name

I request the logo of the party entered in the Register to appear on the ballot papers

I hereby nominate the candidates listed in PART B as Senators for the above State/Territory to serve in the Senate of the Parliament of the Commonwealth

Signature of Registered Officer/Deputy Registered Officer Date

02/06/16

CHECKLIST

- Nomination of a Senator form (form 59) correctly filled in for each candidate with all relevant questions answered
- All nomination forms signed and dated.
- Candidate's deposit (\$2000 in cash or a cheque drawn by a bank or other financial institution on itself) is enclosed
- Appointment of Candidate Agent form included for each candidate (if applicable)

AEC Use Only

Receipt No

A038560

A038559

AEO received name

M. NELSON

AEO Signature

Date

07/06/16

Time received (24 hours)

11:00

PART B – Order of candidates

- | | | |
|---|--------------------------------|---------------------------------------|
| 1 | Family name
CULLETON | Given name(s)
RODNEY NORMAN |
| 2 | Family name
GEORGIU | Given name(s)
PANAGIOTIS |
| 3 | Family name
CULLETON | Given name(s)
IOANNA |
| 4 | Family name | Given name(s) |
| 5 | Family name | Given name(s) |
| 6 | Family name | Given name(s) |
| 7 | Family name | Given name(s) |

Nomination of a Senator

Group nomination by Registered Officer

PART B – Order of candidates cont.

- | | | |
|----|-------------|---------------|
| 8 | Family name | Given name(s) |
| 9 | Family name | Given name(s) |
| 10 | Family name | Given name(s) |
| 11 | Family name | Given name(s) |
| 12 | Family name | Given name(s) |

PART C – Contact details for the group

During the course of the election, representatives of the AEC may need to contact candidates or their representatives on official matters relating to their candidacy. Accordingly it is essential that a clear communication channel is established between the AEC and candidates. Please provide sufficient detail to ensure this can be done. You should indicate by ticking the appropriate boxes which of these details you authorise the AEC to release publicly.

Family name **CULLETON**
 Given name(s) **RODNEY NORMAN**
 Postal address **47A CAMDEN ST**
DIANELLA State **WA** Postcode **6059**

Which contact details do you authorise the AEC to release to the public?
 Please indicate by ticking either the Yes or No box on each line.

		Yes	No
Phone (H)	(0 7) 3 2 6 2 1 0 8 8	<input checked="" type="checkbox"/>	<input type="checkbox"/>
AH	()	<input type="checkbox"/>	<input type="checkbox"/>
Fax	()	<input type="checkbox"/>	<input type="checkbox"/>
Mobile	0 4 1 8 9 0 3 3 7 6	<input type="checkbox"/>	<input checked="" type="checkbox"/>
Email	wa.senate@onation.com.au	<input checked="" type="checkbox"/>	<input type="checkbox"/>

Information on this form is collected under the provisions of the Commonwealth Electoral Act 1918 (CEA)

The nomination form will be publicly produced at the time of the declaration of nominations, which takes place 24 hours after nominations close, and may be inspected at any time following the declaration of nominations by members of the public in accordance with the Commonwealth Electoral Act 1918.

No responsibility will be taken for faxed nominations and no acknowledgement of receipt of faxes will be advised. The form may be sent by fax to the relevant Australian Electoral Officer (AEO). No other form of electronic communication will be accepted. The time of receipt for faxed forms is the time when the message enters the relevant Australian Electoral Commission (AEC) fax machine memory, and it is agreed that the AEC is not responsible for any deadline missed or losses incurred. The deposit cannot be lodged electronically, and it is the responsibility of the candidate to ensure that both the fax and the required deposit are received by the AEO before the close of nominations.

If your party has a logo entered in the Register of Political Parties at the time of nomination, you may request to have that logo printed adjacent to the party name above the line on the Senate ballot paper.

For further information please refer to the AEC website at www.aec.gov.au or call 13 00 26

Giving false or misleading information is a serious offence.

Nomination of a Senator

Information on this form is collected under the provisions of the *Commonwealth Electoral Act 1918*

If completing by hand please write clearly and use BLOCK LETTERS and black or blue ink

Please read the notes on page 3 before completing this form

To the Australian Electoral Officer for the State/Territory of

WESTERN AUSTRALIA Candidate 1 of 3 If applicable

1. Your name(s) as they appear on the Commonwealth Electoral Roll

or, if not enrolled, the name(s) under which you are qualified to enrol

Family name CULLETON

Given name(s) RODNEY NORMAN

2. Given name(s) as you want them to appear on the ballot paper, if same as above, tick the box

or

3. Do you have silent enrolment on the Commonwealth electoral roll?

Yes ▶ You are not required to disclose your residential address ▶ Go to Question 4
 No ▶ Please complete your residential address details

13061 MCKENZIE RD

WILLIAMS State WA Postcode 6391

Do you authorise the AEC to release this address to the public? Yes No

4. Postal address

If same as residential address provided above, tick the box or

47A CAMDEN ST

DIANELLA State WA Postcode 6059

Do you authorise the AEC to release this address to the public? Yes No

5. Contact details

The nomination form will be displayed publicly at the declaration of nominations

Which contact details do you authorise the AEC to release to the public? Please indicate by ticking either the Yes or No box on each line.

BH (0 7) 3 2 6 2 1 0 8 8 Yes No

AH () () () () () () () () Yes No

Fax () () () () () () () () Yes No

Mobile 0 4 1 8 9 0 3 3 7 6 Yes No

Email wa.senate@onenation.com.au Yes No

6. Occupation and Gender

Occupation PRIMARY PRODUCER Gender M

7. I have been endorsed by a registered political party

Yes ▶ Name of registered political party PAULINE HANSON'S ONE NATION

No ▶ I request that the word 'Independent' be printed on the ballot paper adjacent to my name Yes

8. I request my name be included in a Senate group

Yes

Nomination of a Senator

Candidate statement and declaration - Please read the statement on page 3 carefully before signing the nomination form.

I, the candidate named above state that I am an Australian citizen by:

Birth Date of birth 05/06/64 Place of birth NARROGIN, WA

Naturalisation Date citizenship granted / /

Other means Details

I am at least 18 years of age

Yes No

I am an elector or qualified to be an elector

Yes No

I am not, by virtue of section 44 of the Constitution, incapable of being chosen or of sitting as a Senator



Yes No

and I declare that:

- I am qualified under the Constitution and the laws of the Commonwealth to be elected as a Senator.
- I am not, and do not intend to be, a candidate in any other election to be held on the same day as the election to which the above nomination relates.
- I consent to act as a Senator for the State/Territory named above if elected.
- I hereby give my consent to appear on the ballot paper in the form shown at Question 2 on previous page.

Signature of candidate  Date 16/05/06/64

AEC Use Only - Received AEO

Rec. AEO	Date	Time	Initials	Agent form received?
	07/06/16	11:00		<input type="checkbox"/> Yes <input checked="" type="checkbox"/> No
Entered in ELMS	07/06/16	18:50		Sent to EAO / /

AEO Signature

Nomination of a Senator

Information on this form is collected under the provisions of the *Commonwealth Electoral Act 1918*
 If completing by hand please write clearly and use BLOCK LETTERS and black or blue ink

For the address of the AEC contact details see page 2 of this form.

To the Australian Electoral Officer for the State/Territory of
WESTERN AUSTRALIA

candidate **2** of **3** if applicable

1. Your name(s) as they appear on the Commonwealth Electoral Roll
Print name(s) as they appear on the Commonwealth Electoral Roll
 Family name: **GEORGIU I.G.**
Given name(s) **PANAGIOTIS**

2. Given name(s) as you want them to appear on the ballot paper, if different to above
 or **PETER**

3. Do you have silent enrolment on the Commonwealth electoral roll?
 Yes If Yes you are not required to disclose your residential address in Section 4
 No If No please complete your residential address details:
10 CROWHURST WAY

MORLEY **WA** **6062**
State Postcode

Do you authorise the AEC to release this address to the public? Yes No

4. Postal address
Print name(s) as they appear on the Commonwealth Electoral Roll
 or

Do you authorise the AEC to release this address to the public? Yes No

5. Contact details
Print name(s) as they appear on the Commonwealth Electoral Roll

Do you authorise the AEC to release this address to the public? Yes No

Which contact details do you authorise the AEC to release to the public? These details may be requested by the media or the public.

SH (0 7) 3 2 6 2 1 0 8 8
 AM ()
 Fax ()
 Mobile 0 4 1 9 9 5 0 7 8 2
 Email wa.senate@onenation.com.au

6. Occupation and Gender
 Occupation: **ELECTRICAL CONTRACTOR** Gender: **M**

7. I have been endorsed by a registered political party
 Yes If Yes Name of registered political party:
PAULINE HANSON'S ONE NATION

No If No request that the word 'Independent' be printed on the ballot paper adjacent to my name Yes

8. I request my name be included in a Senate group Yes

Electoral Commission Form 059 2004-10-01

Nomination of a Senator

Candidate statement and declaration – Please read the statement on page 3 carefully before signing the nomination form
I, the candidate named above state that I am an Australian citizen by:

Birth Date of birth 13 / 01 / 74 Place of birth PERTH, WA

Naturalisation Date citizenship granted / /

Other means Details

I am at least 18 years of age

I am an elector or qualified to be an elector

Yes No

I am not, by virtue of section 44 of the Constitution, incapable of being chosen or of sitting as a Senator (see page 2)

Yes No

Yes No

and I declare that:

- I am qualified under the Constitution and the laws of the Commonwealth to be elected as a Senator
- I am not, and do not intend to be, a candidate in any other election to be held on the same day as the election to which the above nomination relates
- I consent to act as a Senator for the State/Territory named above if elected.
- I wish my given name(s) to appear on the ballot paper in the form shown at Question 2 on previous page

Signature of candidate

Date

07/06/16

AEC Use Only - Received AEO

Rec AEO	Date	Time (24 hour)	Initials	Agent form received?
	07/06/16	11:00	[Signature]	<input type="checkbox"/> Yes <input checked="" type="checkbox"/> No

Entered in ELMS	Date	Time (24 hour)	Initials	Sent to FAD
	07/06/16	18:50	[Signature]	/ /

AEO Signature

Nomination of a Senator

Information on this form is collected under the provisions of the *Commonwealth Electoral Act 1918*

If completing by hand please write clearly and use BLOCK LETTERS and black or blue ink

Please read the notes on page 3 before completing this form

To the Australian Electoral Officer for the State/Territory of
WESTERN AUSTRALIA

Candidate **3** of **3** if applicable

1. Your name(s) as they appear on the Commonwealth Electoral Roll or, if not enrolled, the name(s) under which you are qualified to enrol
 Family name **CULLETON**
 Given name(s) **IOANNA**

2. Given name(s) as you want them to appear on the ballot paper. If same as above, tick the box or

3. Do you have silent enrolment on the Commonwealth electoral roll?
 Yes ▶ You are not required to disclose your residential address ▶ Go to Question 4
 No ▶ Please complete your residential address details

13061 MCKENZIE RD

WILLIAMS State **WA** Postcode **6391**

Do you authorise the AEC to release this address to the public? Yes No

47A CAMDEN ST

4. Postal address If same as residential address provided above, tick the box or

DIANELLA State **WA** Postcode **6059**

Do you authorise the AEC to release this address to the public? Yes No

5. Contact details The nomination form will be displayed publicly at the declaration of nominations

Which contact details do you authorise the AEC to release to the public? Please indicate by ticking either the Yes or No box on each line.

BH (0 7) 3 2 6 2 1 0 8 8 Yes No

AH () Yes No

Fax () Yes No

Mobile 0 4 1 8 9 0 3 3 7 6 Yes No

Email **wa.senate@onenation.com.au** Yes No

6. Occupation and Gender Occupation **PSYCHOLOGIST** Gender **F**

7. I have been endorsed by a registered political party Yes ▶ Name of registered political party **PAULINE HANSON'S ONE NATION**

No ▶ I request that the word 'Independent' be printed on the ballot paper adjacent to my name Yes

8. I request my name be included in a Senate group Yes

Nomination of a Senator

Candidate statement and declaration – Please read the statement on page 3 carefully before signing this nomination form.

I, the candidate named above state that I am an Australian citizen by:

Birth Date of birth / / Place of birth

Naturalisation Date citizenship granted 21/06/76

Other means Details

I am at least 19 years of age

Yes No

I am an elector or qualified to be an elector

Yes No

I am not, by virtue of section 44 of the Constitution, incapable of being chosen or of sitting as a Senator or a member of the Senate

Yes No

and I declare that:

- I am qualified under the Constitution and the laws of the Commonwealth to be elected as a Senator
- I am not, and do not intend to be, a candidate in any other election to be held on the same day as the election to which the above nomination relates.
- I consent to act as a Senator for the State/Territory named above if elected.
- I wish my given name(s) to appear on the ballot paper in the form shown at Question 2 on previous page.

Signature of candidate

Date

07/06/16

AEC Use Only - Received AEO

Rec. AEO	Date	Time	Initials	Agent form received?
	07/06/16	11:00	[Signature]	<input type="checkbox"/> Yes <input checked="" type="checkbox"/> No

Entered in EIMS	Date	Time	Initials	Sent to FAD
	07/06/16	18:50	[Signature]	/ /

AEO signatee

IN THE HIGH COURT OF AUSTRALIA
SITTING AS THE COURT OF DISPUTED RETURNS
CANBERRA REGISTRY

No C15 OF 2016

Re Senator Rodney Norman Culleton
Reference under s 376
Commonwealth Electoral Act 1918 (Cth)

EXHIBIT RC-5

The following 2 pages is the Exhibit marked "RC-5" referred to in the affidavit of Rodney Norman Culleton affirmed on November 2016 before me:



.....

Lawyer



COURT ORDER NOTICE

Local Court of NSW
at Armidale
2015/00207643



Details	Case title	R v RODNEY NORMAN CULLETON
	Accused DOB	5 June 1964
	Accused CNI	
	H Number	58561419
Court	Order date	8 August 2016
	Place of order	Armidale
	Judicial officer	Local Court Magistrate M Holmes
Order	2015/00207643-001 / Larceny value <=\$2000-T2 Annulment Granted	
Additional Information	<p>OFFENCE DETAILS: Crimes Act 1900 Section 117 Larceny between 8.00am and 10.00am on 11th April, 2014 at Guyra did steal certain property of the value of \$322.85, to wit, Keys for Peterbilt Heavy haulage tow truck the property of John Charles DUNN</p> <p>LOCAL COURT REVIEW OF LOCAL COURT DECISIONS: Applications are made pursuant to: Crimes (Appeal and Review) Act 2001 No 120, Part 2, Section 4. Annulments are granted pursuant to: Crimes (Appeal and Review) Act 2001 No 120 Part 2, Section 8</p> <p>I, Rhonda Breneger, Registrar, Armidale Local Court, being the person who normally has control of the records of this court hereby certify this order to be a true copy of the order made at the Armidale Local Court on the 8th August, 2016.</p>	



Signed	R.M. Breneger Registrar
Date	15 November 2016

Copy to	Australian Government Solicitor 4 National Circuit BARTON ACT 2600
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IN THE HIGH COURT OF AUSTRALIA
SITTING AS THE COURT OF DISPUTED RETURNS
CANBERRA REGISTRY

No C15 OF 2016

Re Senator Rodney Norman Culleton
Reference under s 376
Commonwealth Electoral Act 1918 (Cth)

✓
EXHIBIT RC-6

The following 2 pages is the Exhibit marked "RC-6" referred to in the affidavit of Rodney Norman Culleton affirmed on November 2016 before me:



.....
Lawyer




COURT ORDER NOTICE

Local Court of NSW
at Armidale
2015/00207643



Details	Case title	R v RODNEY NORMAN CULLETON
	Accused DOB	5 June 1964
	Accused CNI	
	H Number	58561419
Court	Order date	25 October 2016
	Place of order	Armidale
	Judicial officer	Local Court Magistrate M Holmes
Order	2015/00207643-001 / Larceny value <=\$2000-T2 A plea of guilty is accepted.	
	2015/00207643-001 / Larceny value <=\$2000-T2 The offender, RODNEY NORMAN CULLETON is found guilty but without proceeding to conviction the matter is dismissed pursuant to Section 10(1)(a) of the Crimes (Sentencing Procedure) Act 1999. Upon a finding of guilt the offence is dismissed pursuant to Section 10(1)(a) of the Crimes (Sentencing Procedure) Act 1999.	
	2015/00207643-001 / Larceny value <=\$2000-T2 The offender, RODNEY NORMAN CULLETON, is ordered to pay the following: Compensation \$322.85 payable to John DUNN .	
	2015/00207643-002 / Notice of Motion Crime - RODNEY NORMAN CULLETON v NSW Police Notice of Motion Withdrawn	
2015/00207643-003 / Notice of Motion Crime - RODNEY NORMAN CULLETON v NSW Police Notice of Motion Withdrawn		



Additional Information	<p>OFFENCE DETAILS: Crimes Act 1900 Section 117 Larceny between 8.00am and 10.00am on 11th April, 2014 at Guyra did steal certain property of the value of \$322.85, to wit, Keysfor Peterbilt Heavy haulage tow truck the property of John Charles DUNN</p> <p>I, Rhonda Breneger, Registrar, Armidale Local Court, being the person who normally has control of the records of this court hereby certify this order to be a true copy of the order made at the Armidale Local Court on the 25th October, 2016.</p>
Signed	<p>R.M.Breneger Registrar</p> 
Date	15 November 2016

Copy to	<p>Australian Government Solicitor 4 National Circuit BARTON ACT 2600</p>
---------	---

12/11/16

BETWEEN:

Re Rodney Norman Culleton
Reference under s376
Commonwealth Electoral Act 1918 (Cth)

10

AFFIDAVIT OF RODNEY NORMAN CULLETON.

I, Rodney Norman Culleton of Unit 5 , 162 Colin Street West Perth 6005 farmer
and Senator for Western Australia MAKE OATH AND SAY as follows:

1. I am the respondent in this proceeding and I make this Affidavit from facts
agreed between myself and the prosecution, dated 25th November 2016.
2. Before I engaged the Solicitors of the Record in this matter I was
representing myself, and obtained from the Solicitors representing the
prosecuting authority a Statement of Agreed Facts in which they Admit,
(a) Paragraph 1. On 2nd March 2016, Senator Rodney Norman Culleton
was convicted in his absence by the Local Court of New South Wales at
Armidale ("Local Court") for an offence of larceny , property value less
than \$2000. However the Magistrate was precluded by s 25 of the *Crimes*
(*Sentencing Procedure*) *Act 1999* from making an Order for a sentence of
imprisonment.
(b) Paragraph 12 states: On 25th October 2016, Senator Culleton pleade
guilty in the Local Court to the Offence of Larceny. Without proceeding to
conviction , the Court dismissed the matter pursuant to s 10 (1) (a) of the
Crimes (Sentencing Procedure) Act 1999.
3. A Signed copy of this Statement of Agreed Facts with the signature of
Gavin Loughton Solicitor for the Attorney-General and myself is **Exhibit**
RC1 to this my Affidavit.

20

30

40

SWORN / AFFIRMED* by the deponent
at Canberra in Australian Capital Territory
on 30th November 2016 .

Before me:



Signature

Signature of deponent

Filed on behalf of Rodney Culleton by:
Maitland Lawyers
Suite 1005/530 Little Collins Street
Melbourne Vic 3000

Contact: John Maitland
File Ref: 80332
Tel: (03) 9909 7166
E: admin@maitlandlawyers.com.au

IN THE HIGH COURT OF AUSTRALIA
SITTING AS THE COURT OF DISPUTED RETURNS
CANBERRA REGISTRY

No. C15 of 2016

BETWEEN:

Re Rodney Norman Culleton
Reference under s376
Commonwealth Electoral act 1918 (Cth)

10

Affidavit of RODNEY NORMAN CULLETON sworn/affirmed* on 30th November
2016

INDEX OF EXHIBITS

EXHIBIT	DESCRIPTION	PARAGRAPH	PAGE*
RC1	Agreed Statement of Facts	1 and 12	1 and 2

20

30

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IN THE HIGH COURT OF AUSTRALIA
SITTING AS THE COURT OF DISPUTED RETURNS
CANBERRA REGISTRY

No. C15 of 2016

BETWEEN:

Re Rodney Norman Culleton
Reference under s376
Commonwealth Electoral act 1918 (Cth)

10



EXHIBIT "RC1 "

This is the exhibit marked Exhibit RC1 produced and shown to Rodney Norman Culleton at the time of swearing / affirming his affidavit this 30th day of November 2016

Agreed Statement of Facts
Filed by consent

20

Before me

.....
Solicitor/Justice of the Peace



RE RODNEY NORMAN CULLETON
Reference under s 376 *Commonwealth Electoral Act 1918* (Cth)

STATEMENT OF AGREED FACTS

The following facts are agreed between the parties:

- 10 1. On 2 March 2016, Senator Rodney Norman Culleton ("Senator Culleton") was convicted in his absence by the Local Court of New South Wales at Armidale ("Local Court") for an offence of larceny, property value less than \$2,000. However the Magistrate in convicting Senator Culleton as an absent offender was precluded by s 25 of the *Crimes (Sentencing Procedure) Act 1999* (NSW) from making an order for a sentence of imprisonment.
2. The offence of larceny of which Senator Culleton was convicted was punishable under s 117 of the *Crimes Act 1900* (NSW) as affected by s 268(1A) and (2)(b)(ii) and item 3 of Pt 2 of Table 2 in Sched 1 of the *Criminal Procedure Act 1986* (NSW).
- 20 3. On 2 March 2016, the Local Court issued a warrant for Senator Culleton's arrest under s 25(2) of the *Crimes (Sentencing Procedure) Act 1999* (NSW).
4. On 16 May 2016, the Governor of Western Australia issued a writ for the election of Senators for Western Australia. The writ specified, among other things, that nominations of candidates for the Senate election would close on 9 June 2016.
5. On 7 June 2016, the Australian Electoral Officer for Western Australia received a group nomination for Pauline Hanson's One Nation party which included a nomination by Senator Culleton as a Senate candidate. A copy of the nomination is annexed.
- 30 6. The polling day for the election was 2 July 2016.
7. On 2 August 2016, the poll for the Senate for Western Australia was declared and the writ returned. Senator Culleton was certified as duly elected as the eleventh out of twelve senators for Western Australia.
8. On 8 August 2016, the warrant referred to at [3] above was executed.

Filed on behalf of the Attorney-General by:

Australian Government Solicitor
4 National Circuit
Barton ACT 2600
DX 5678 Canberra

Contact: Nerissa Schwarz / Gavin Loughton

File ref: 16007118
Telephone: 02 6253 7078 / 02 6253 7023
E-mail: nerissa.schwarz@ags.gov.au /
gavin.loughton@ags.gov.au
Facsimile: 02 6253 7303

9. On 8 August 2016, the Local Court granted an annulment of the conviction referred to above at [1] pursuant to s 8 of the *Crimes (Appeal and Review) Act 2001* (NSW).
10. At no time was Senator Culleton sentenced in respect of the conviction referred to above at [1].
11. As a result of the annulment referred to in [9] above, the Local Court proceeded to deal with the matter afresh in accordance with s 9 of the *Crimes (Appeal and Review) Act 2001* (NSW).
- 10 12. On 25 October 2016, Senator Culleton pleaded guilty in the Local Court to the offence of larceny. Without proceeding to conviction, the Court dismissed the matter pursuant to s 10(1)(a) of the *Crimes (Sentencing Procedure) Act 1999* (NSW).

Date: 25th November 2016

.....
Gavin Loughton
A solicitor employed by the
Australian Government Solicitor
Solicitor for the Attorney-General

.....
Senator Rodney Culleton



**IN THE HIGH COURT OF AUSTRALIA
SITTING AS THE COURT OF DISPUTED RETURNS
CANBERRA REGISTRY**

No. C15 of 2016

RE RODNEY NORMAN CULLETON
Reference under s 376 *Commonwealth Electoral Act 1918* (Cth)

STATEMENT OF AGREED FACTS

The following facts are agreed between the parties:

- 10 1. On 2 March 2016, Senator Rodney Norman Culleton ("Senator Culleton") was convicted in his absence by the Local Court of New South Wales at Armidale ("Local Court") for an offence of larceny, property value less than \$2,000. However the Magistrate in convicting Senator Culleton as an absent offender was precluded by s 25 of the *Crimes (Sentencing Procedure) Act 1999* (NSW) from making an order for a sentence of imprisonment.
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Filed on behalf of the Attorney-General by:

Australian Government Solicitor
4 National Circuit
Barton ACT 2600
DX 5678 Canberra

Contact: Nerissa Schwarz / Gavin Loughton

File ref: 16007118
Telephone: 02 6253 7078 / 02 6253 7023
E-mail: nerissa.schwarz@ags.gov.au /
gavin.loughton@ags.gov.au
Facsimile: 02 6253 7303

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- 10 12. On 25 October 2016, Senator Culleton pleaded guilty in the Local Court to the offence of larceny. Without proceeding to conviction, the Court dismissed the matter pursuant to s 10(1)(a) of the *Crimes (Sentencing Procedure) Act 1999* (NSW).

Date: 25th November 2016

.....
Gavin Loughton
A solicitor employed by the
Australian Government Solicitor
Solicitor for the Attorney-General


.....
Senator Rodney Culleton



ATTORNEY-GENERAL

9/11/16

Dear Rod-

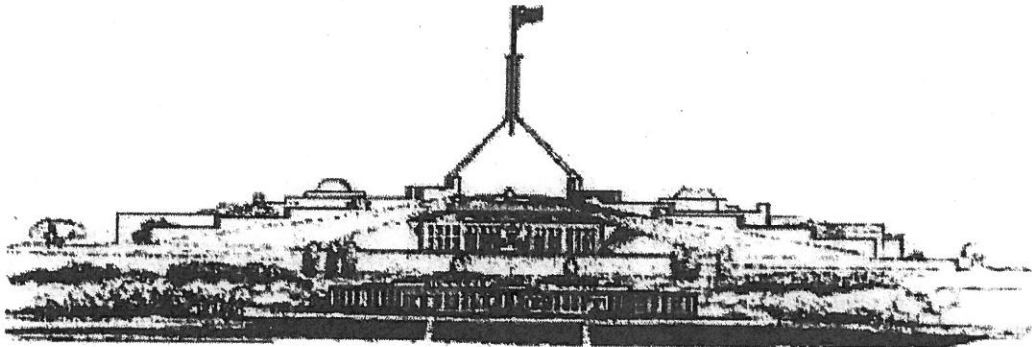
Here is the message
from the High Court.
Congratulations - You
appointed it & nobody
else did!

Amey



COMMONWEALTH OF AUSTRALIA

PARLIAMENTARY DEBATES



THE SENATE
QUESTIONS WITHOUT NOTICE

High Court of Australia

QUESTION

Monday, 12 September 2016

BY AUTHORITY OF THE SENATE

QUESTION

Date Monday, 12 September 2016
Page 544
Questioner Culleton, Sen Rodney
Speaker

Source Senate
Proof No
Responder Brandis, Sen George
Question No.

High Court of Australia

High Court of Australia

Senator CULLETON (Western Australia) (14:24): Mr President, I have just one question for Senator the Hon. George Brandis—

Honourable senators interjecting—

The PRESIDENT: Order on both sides. Senator Culleton, start again.

Senator CULLETON: Thank you, Mr President. One question for Senator the Hon. George Brandis QC Attorney-General and Leader of the Government in the Senate. Since Senate school, it has come to my attention that there is a discrepancy between section 33 of the High Court Act 1979—which states that all process shall, which means must, be issued in the name of the Queen—and the High Court Rules 2004. If this appears to be the case, why has the High Court felt free to defy the parliament for 12 years?

Senator BRANDIS (Queensland—Attorney-General, Vice-President of the Executive Council and Leader of the Government in the Senate) (14:25): Thank you, Senator Culleton. Congratulations on your inaugural question in this chamber. I must confess, Senator Culleton, I was not expecting to be asked about the High Court rules, an object of some fascination to me, I might say. I will have a look at section 33 of the High Court Act and whether or not it is apparent that there is an inconsistency, as you say, between section 33 of the act and the rules made under the High Court Act.

As you would be aware, Senator Culleton, the rules of the court are procedural rules. They attach forms, usually, that are used in the process of the court and the various procedural steps in proceedings before the court. I must confess it has never been drawn to my attention before that there may be an issue about the consistency between the High Court rules and section 33 of the act, but, as I say, I will look at the matter.

An exposure draft of the High Court Rules 2004 was circulated in April 2004. The exposure draft was the subject of detailed comments by the Law Council of Australia, the Australian Bar Association and the Special Committee of Solicitors-General. After considering those comments, the Justices made the High Court Rules 2004 on 5 October 2004. They were tabled in the Parliament on 16 November 2004 and came into effect on 1 January 2005.

No issue was raised in the process of drafting or consultation concerning the consistency of the Rules with s 33 of the *High Court of Australia Act 1979* (Cth).

The Rules Committee of the High Court considered that issue on 12 October 2016. The Committee proposes a number of amendments to the Rules to address the issue. The proposed amendments will be drafted by the Office of Parliamentary Counsel and will be the subject of consultation with professional bodies before being finalised by the Court.



SENATOR THE HON GEORGE BRANDIS, QC

Attorney-General
Leader of the Government in the Senate
Vice-President of the Executive Council

29 October 2016

Senator Rodney Culleton
Parliament House
CANBERRA ACT 2600

By email

Dear Senator Culleton

Pod

On 13 October 2016, I referred to the Solicitor-General certain questions of law relating to the proceedings *Bell v Culleton*, commenced in the High Court on 7 September 2016, concerning your election to the Commonwealth Parliament as a senator for Western Australia.

Late yesterday, I received the Opinion of the Solicitor-General on these questions. The Solicitor-General is of the opinion that, for reasons which he sets out in paragraphs 18-33 and which arise from section 44(ii) of the Constitution, you were "not duly elected as a senator" (paragraph 2).

I thought it was important to draw the advice to your attention as soon as possible; a copy is attached.

Of course, this is legal advice on an issue which is by no means certain. You may wish to seek your own advice on the matter, including legal advice and advice from the Clerk of the Senate.

I have also today forwarded this advice to the President of the Senate, the Hon. Stephen Parry, for his consideration since it potentially affects the composition of the Senate and I thought the President was entitled to be made aware of it.

Where the matter goes from here is largely in the hands of the President of the Senate, and I suggest you speak to him about it.

Yours faithfully

George Brandis

Electorate Office
GPO Box 143
ALBION DC Qld 4010
Tel: (07) 3862 4044
Fax: (07) 3862 4244

Parliament House
Suite MG 68
CANBERRA ACT 2600
Tel: (02) 6277 7300
Fax: (02) 62773 4102



SG No. 23 of 2016

IN THE MATTER OF *BELL v CULLETON*

OPINION

Introduction

1. On 18 October 2016 I was briefed to advise on four questions referred by the Attorney-General. Those questions relate to two proceedings concerning the election of Senator Rodney Culleton to the Commonwealth Parliament as a senator for Western Australia. The first proceeding, *Bell v Culleton* (High

Court Proceeding P43 of 2016), was commenced by way of an election petition in the High Court sitting as the Court of Disputed Returns (**Election Petition Proceeding**). The second proceeding, *Bell v Culleton* (High Court Proceeding P44 of 2016), is a claim brought in the High Court under the *Common Informers (Parliamentary Disqualifications) Act 1975* (Cth) (**Common Informers Act**) (**Common Informers Proceeding**). Both the election petition and the writ of summons in the Common Informers Proceeding were filed on 7 September 2016.

Questions and Short Answers

2. The particular questions upon which my advice is sought, and my short answers to them, are as follows:

Question (1): What are the prospects of the Court of Disputed Returns holding in the Election Petition Proceeding that Senator Culleton was not duly elected as a senator?

Answer (1): For reasons of form, the petition should be held to be deficient and incurable and as such should not be considered by the Court of Disputed Returns.

However, if the petition could be cured, the better view is that Senator Culleton was not duly elected as a senator.

Question (2): In the event that Senator Culleton is found not to have been duly elected as senator, what relief is the Court of Disputed Returns likely to grant in the Election Petition Proceeding? For instance, is the Court likely to declare the whole of the Senate election for Western Australia void such that a fresh election must be held? Alternatively, is the Court likely to order that there be some form of special count of the ballot papers?

Answer (2): If Senator Culleton were found not to have been duly elected as a senator, the most likely outcome is that the Court would order that there be a special count of the ballot papers.

Question (3): Aside from the petitioner, the respondent, and any person who becomes a party to the proceedings under r 31.01 of the *High Court Rules 2004* (Cth), who (if anyone) would be the appropriate Commonwealth person or entity to intervene or be joined as a party to put submissions with respect to the appropriate form of relief in the Election Petition Proceeding? In answering this question, please have regard to (without being confined to) s 359 of the *Commonwealth Electoral Act 1918* (Cth) (**CEA**) and s 78A of the *Judiciary Act 1903* (Cth) (**Judiciary Act**).

Answer (3): The Attorney-General of the Commonwealth would be an appropriate party to intervene to make submissions on the validity of the election petition, the operation of s 44(ii) of the Constitution and relief. Alternatively, it would be possible, but not strictly necessary, for the Electoral Commissioner to intervene on the issue of the validity of the petition and relief (and the Attorney-General of the Commonwealth to intervene and focus solely on the constitutional questions).

Question (4): Can a collateral challenge to the validity of a candidate's election be brought and authoritatively decided in the course of a proceeding under the Common Informers Act? Or (alternatively), must a candidate have first been found in some other appropriate forum (for example, the Court of Disputed Returns) to have been incapable of being elected before a claim under the Common Informers Act can be

determined by the High Court? (See *Sue v Hill* (1999) 199 CLR 462 (*Sue v Hill*) at 555-557 [241]-[245] (McHugh J)).

Answer (4): It is unlikely a collateral challenge to Senator Culleton's election could be successfully brought under the Common Informers Act. The High Court will only have jurisdiction to hear a suit under s 3 of the Common Informers Act after a candidate has first been found in some other forum (for example, the Court of Disputed Returns) to have been "incapable of sitting".

3. I deal with certain practical considerations on the way forward at paragraphs [67]-[68] below.

Consideration

The Election Petition Proceeding: the form of the petition

4. It is first necessary to identify the underlying facts on which the constitutional questions arise and set out the key constitutional provisions.
5. The petition states broadly that Senator Culleton completed and lodged a nomination which was false in a material particular, being that he was eligible to nominate when pursuant to s 44(ii) of the Constitution he was not.
6. Section 44(ii) of the Constitution relevantly provides that:

[a]ny person who ... 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; ... shall be incapable of being chosen or of sitting as a senator.

7. The petition does not particularise the reason for Senator Culleton's purported disqualification under s 44(ii). It does not identify the relevant facts. Based on what can be gleaned publicly, the facts may well be:
- (a) on 2 March 2016 Senator Culleton was convicted of larceny pursuant to s 117 of the *Crimes Act 1900* (NSW), which carries a maximum sentence of five years' imprisonment, in his absence in the NSW Local Court;
 - (b) on 10 June 2016 Senator Culleton nominated as a Senate candidate in the Commonwealth Parliament for the State of Western Australia;
 - (c) The polling day for the election was 2 July 2016;
 - (d) on 2 August 2016 the poll for the Senate in the Commonwealth Parliament for the State of Western Australia was declared and the writ returned. Senator Culleton was certified as duly elected as the eleventh out of twelve senators for Western Australia;
 - (e) on 8 August 2016 Senator Culleton's conviction for larceny was "annulled" under the *Crimes (Appeal and Review) Act 2001* (NSW) (**NSW Appeal and Review Act**); and
 - (f) on 30 August 2016 the Forty-Fifth Parliament sat for the first time.
8. The election petition and writ of summons in both proceedings allude to possible bankruptcy of Senator Culleton and I understand that there may also be separate pending charges against Senator Culleton. However there is not sufficient information to advise in relation to those matters.

Prospects in the Election Petition Proceeding

9. The challenge is brought under s 353(1) of the CEA, which provides that “[t]he validity of any election or return may be disputed by petition addressed to the Court of Disputed Returns and not otherwise”.
10. Section 358(1) of the CEA provides that “no proceedings shall be had on [a] petition unless the requirements of ss 355, 356 and 357 are complied with”. Sections 356 and 357 are not relevant to this proceeding.
11. Section 355 of the CEA sets out the requirements of a petition disputing an election or return. Specifically, the petition must:
 - (a) set out the facts relied on to invalidate the election or return;
 - (aa) subject to subsection 358(2), set out those facts with sufficient particularity to identify the specific matter or matters on which the petitioner relies as justifying the grant of relief;
 - (b) contain a prayer asking for the relief the petitioner claims to be entitled to;
 - (c) be signed by a candidate at the election in dispute or by a person who was qualified to vote thereat, or, in the case of the choice or the appointment of a person to hold the place of a Senator under section 15 of the Constitution or section 44 of this Act, by a person qualified to vote at Senate elections in the relevant State or Territory at the date of the choice or appointment;
 - (d) be attested by 2 witnesses whose occupations and addresses are stated;
 - (e) be filed in the Registry of the High Court within 40 days after;

- (i) if the polling day for the election in dispute is not the polling day for any other election--the return of the writ for the election; ...
12. In my opinion, the election petition fails in at least two key respects.
13. *First*, it fails to set out the facts relied on to invalidate the election or return and so does not satisfy s 355(a) of the CEA. The petition is similar to the petition in *In re Berrill's Petition* (1978) 19 ALR 254 (*In re Berrill's Petition*) which merely identified relevant provisions that had purportedly been breached, but did not set out the facts relied upon to invalidate the election. If this view were adopted by the Court of Disputed Returns, it would be fatal to the election petition.
14. *Second*, it fails to set out those facts with sufficient particularity to identify the specific matters on which the petitioner relies and so does not satisfy s 355(aa) of the CEA. This, by itself, is not fatal. That is because s 358(2) provides that the Court may relieve the petitioner wholly or in part from compliance with s 355(aa). However, s 358(3) provides that it may only do so if it is satisfied that:
- (a) in spite of the failure of the petition to comply with s 355(aa), the petition sufficiently identifies the specific matters on which the petitioner relies; and
 - (b) the grant of relief would not unreasonably prejudice the interests of another party to the petition.
15. On the basis of the petition as filed, it seems unlikely that the Court would be satisfied that the petition sufficiently identifies the specific matters on which the petitioner relies so as to relieve the petitioner of compliance with s 355(aa).
16. For completeness, I note that at the time the petition was filed on 7 September 2016, it was less than 40 days since the return of the writ. At the time of providing this Opinion, it has been more than 40 days. In these

circumstances, it is unlikely that the Court of Disputed Returns would grant leave to the petitioner to amend the petition so that it might meet the requirements of ss 355(a) and 355(aa) (see *Cameron v Fysh* (1904) 1 CLR 314 at 316 (Griffith CJ); *In re Berrill's Petition*).

The substantive argument

17. If, contrary to my preferred view, the Court granted leave to the petitioner to amend the petition, then the Court would need to consider the substantive arguments the petition seeks to raise. I have already noted above (at paragraph [8]) that the current facts do not enable me to advise on the substantive argument concerning the possible bankruptcy of Senator Culleton or separate pending charges against Senator Culleton.
18. That leaves the question of whether Senator Culleton is “incapable of being chosen or of sitting as a senator” by virtue of s 44(ii) because he “has been convicted and is under sentence, or subject to be sentenced, for any offence punishable under the law of ... a State by imprisonment for one year or longer”.
19. On the basis of the publicly available facts (as set out at paragraph [7] above), Senator Culleton may argue that his conviction has been annulled under Pt 2 of the NSW Appeal and Review Act and is therefore of no effect. This raises an anterior question of the effect of the annulment of Senator Culleton’s conviction. There are two competing interpretations of the effect of an annulment under the NSW Appeal and Review Act.
20. The *first* interpretation is that the annulment means that in law there was never a conviction. This is supported by s 9(3) of the NSW Appeal and Review Act, which provides that following an annulment the relevant Court is to deal with the matter afresh as if no conviction or sentence had been imposed. This is consistent with the concept that a judgment reversed on appeal is usually treated as no judgment at all (see, for example, *R v Drury* (1849) 175 ER 516

at 520; *Commissioner for Railways (NSW) v Cavanough* (1935) 53 CLR 220 at 225 (Rich, Dixon, Evatt and McTiernan JJ)).

21. The *second* interpretation is that the conviction or sentence only “ceases to have effect” following the annulment (see s 10(1) of the NSW Appeal and Review Act), and so the effect of the annulment is purely prospective.
22. If the Court adopts the first interpretation (which I consider to be the better interpretation), consistent with the ordinary operation of the criminal law, then the key question for the Court will be whether s 44(ii) of the Constitution requires a person to have been convicted as a matter of historical fact at a given date (**reading one**), or whether it refers to the position as it ultimately appears correctly at law (**reading two**).
23. The question in truth arises not just for convictions under s 44(ii) but for a number of disqualifying provisions in s 44. For example, a person disqualified in fact on the grounds of bankruptcy under s 44(iii) of the Constitution may later seek and obtain an order from a Court annulling that bankruptcy (see s 153B of the *Bankruptcy Act 1966* (Cth)).
24. Accordingly, the question turns on the construction of s 44(ii) of the Constitution, and its intersection with the order annulling Senator Culleton’s conviction.
25. There is no authority directly on the question.
26. In favour of reading one is that it would promote certainty and speed in the ascertainment of the result of an election. These are factors that members of the High Court have previously considered in their approach to s 44 of the Constitution (albeit in different circumstances). In *Sykes v Cleary (No 2)* (1992) 176 CLR 77 (*Sykes v Cleary*), for example, the Court considered whether a candidate for the House of Representatives, who at the time of lodging his nomination and at the date of the poll was a public servant on

leave without pay, but who resigned his position before the declaration of the poll, was incapable of being chosen by operation of s 44(iv) of the Constitution. That section provides that any person who “[h]olds any office of profit under the Crown ... shall be incapable of being chosen or of sitting as ... a member of the House of Representatives”. A 6:1 majority of the High Court held that the candidate held an “office of profit under the Crown” within s 44(iv) and hence was incapable of being chosen as a member of the House of Representatives. In reaching their conclusion, Mason CJ, Toohey and McHugh JJ reasoned that the inclusion on the list of candidates on polling day of a candidate who may opt for disqualification was “an additional and unnecessary complication in the making by the electors of their choice” and was “hardly conducive to certainty and speed in the ascertainment of the result of the election” (at 100).

27. Also in favour of reading one is that the electoral scheme generally favours certainty in the identification of whether a person is eligible for election at the point of nomination. For example, s 170 of the CEA requires a candidate, at nomination, to declare that they are qualified under the Constitution to be elected.
28. On the other hand, if reading two were adopted, a candidate may not necessarily know, at the point of nomination, whether they are ineligible by reason of s 44(ii). If s 44(ii) does not operate upon a conviction that is later quashed or set aside, the practical consequence may be that an election petition may need to be deferred until a challenge to the conviction has been finally determined. This would result in a period of uncertainty in which the person’s election remains in doubt.
29. If reading one is preferred, then Senator Culleton, who at all dates during the election process (that is, the nomination date, the date of polling and the date of the declaration of the writ) was “convicted”, was incapable of being chosen or of sitting as a senator.

30. I should note that there are three possible arguments in favour of reading two even though I find them ultimately unpersuasive. The first is that it is arguably inconsistent with direct choice by the people, as mandated by s 7 of the Constitution, for a person who has otherwise been duly elected, to be disqualified on the basis of a conviction that has no effect in law. This argument can be readily disposed of: s 7 must be read together with other provisions of the Constitution, including s 44, which sets parameters on who can be chosen by the people.
31. The second is that it is inconsistent with the notion that an annulled conviction has no effect in law to give it an effect as significant as disqualifying a Senator from Parliamentary office. However, reading two tends towards uncertainty in the make-up of the Parliament, in that a person may be “conditionally” disqualified for a significant period before seeking to have their disqualification cured or the outcome of that challenge judicially determined.
32. The third is that considerations of fairness to the individual candidate would tend to favour the second construction. For the purposes of the criminal law, when a conviction is annulled, it is generally treated as if it had never existed. The criminal process recommences and proceeds in the same way as if the conviction had never been made. In light of this general effect as a matter of criminal law, considerations of fairness to the candidate may tend to favour a construction of s 44(ii) that would not disqualify a person whose conviction is subsequently annulled. Considerations of fairness, however, cannot displace the language of the Constitution nor displace the need for certainty.
33. Overall, I prefer reading one. The better view is that an annulment under the NSW Appeal and Review Act means that there is not, and have never been, any conviction for the purposes of the criminal law, but not for the purposes of s 44(ii) of the Constitution. In determining whether someone is convicted for the purposes of s 44(ii), I consider that the Court of Disputed Returns would be guided by the certainty of make-up of the Parliament which is offered by reading one.

Relief in the Election Petition Proceeding

34. There are at least three possible forms of relief which the Court of Disputed Returns could grant if it found that Senator Culleton had been “incapable of being chosen” as a senator.
35. *First*, the Court could order a special count of ballot papers disregarding primary or preferential votes for Senator Culleton. *Second*, the Court could order that the election for the Commonwealth Parliament for senators for Western Australia was absolutely void and order a new election. *Third*, the Court could order a supplementary election for the unfilled place in the Senate.
36. It is most likely that a Court will order a special count of ballot papers for three reasons.
37. The *first* reason is that a Court is likely to regard the reasoning and conclusion in *In re Wood* (1988) 167 CLR 145 (*In re Wood*) as binding or highly persuasive. In that case Mr Wood was declared elected as a senator for the Commonwealth Parliament for New South Wales. However, Mr Wood was not an Australian citizen at the time he nominated. As such, the Full Court of the Court of Disputed Returns found that Mr Wood was disqualified, a vacancy had arisen and that the vacancy could be filled by the further counting and recounting of ballot papers cast at the relevant election.
38. The Full Court reasoned that a valid result of the polling could be ascertained by scrutiny of the ballot papers under Pt XVIII of the CEA. It said (at 166):

The provision which applies when a deceased candidate’s name is on the ballot paper is s. 273(27): a vote indicated on a ballot paper opposite the name of a deceased candidate is counted to the candidate next in the order of the voter’s preference and the numbers indicating subsequent preferences are treated as altered accordingly. For the purposes of the scrutiny which may now be conducted, a vote for an unqualified candidate is in the same position as a vote for a candidate

who has died, and the votes should be treated accordingly. By construing Pt XVIII in this way, the true result of the polling - that is to say, the true legal intent of the voters so far as it is consistent with the Constitution and the Act - can be ascertained.

39. It relevantly continued (at 166):

in the present case, there is no blemish affecting the taking of the poll and the ballot papers are available to be recounted if the valid choice of the electors can lawfully be ascertained by recounting. It is unnecessary to take a further poll. The full number of qualified senators required can be returned in accordance with the Act after a recount of the ballot papers. There will be no partial failure of the election and therefore no need to issue a new writ for a supplementary election: see s. 181 of the Act.

40. In *Sue v Hill*, the Court followed *In re Wood* without reservation in finding that the election should not be held to be absolutely void (see, for example, 530 [178] (Gaudron J)). In *Sue v Hill*, a majority of the Court held that Ms Hill had not been duly elected as the third Senator for Queensland to serve in the Commonwealth Parliament. It determined that the election was not absolutely void but held that it was inappropriate to decide whether there should be a recount of the ballot papers. Rather it considered that the matter was better left to determination by a single Justice after receiving submissions from the persons elected in the fourth, fifth and sixth positions. Sitting as a single justice, Gleeson CJ ordered a recount and, after receiving evidence from the Electoral Commissioner of the outcome of that recount, ordered that a Mr Harris be declared elected (see *Sue v Hill* [1999] HCA Trans 225 (2 July 1999)).

41. The *second* reason that the Court of Disputed Returns is likely to order a fresh count is that it would be pragmatic to do so. While concerns about pragmatism cannot displace the language of the Constitution, they are likely to

influence the Court's approach. A new election should be avoided unless absolutely compelled by the Constitutional text, object and history.

42. The *third* reason is that the circumstances of the current matter can be distinguished from matters in which a new election has been ordered, such as *Sykes v Cleary* and *Australian Electoral Commission v Johnston* (2014) 251 CLR 463 (**Western Australian Senate Case**) and from *Vardon v O'Loughlin* (1907) 5 CLR 201 (*Vardon v O'Loughlin*) in which a supplementary election for a vacancy was ordered.
43. In *Sykes v Cleary*, the Court ordered a new election for the candidacy of a member of the House of Representatives in circumstances where the candidate was incapable of sitting by reason of s 44(iv). The Court considered that the different considerations that arose in relation to the House of Representatives meant that the reasoning in *In re Wood* did not apply. In their joint judgment, Mason CJ, Toohey and McHugh JJ explained that this was for two key reasons.
44. The *first* reason concerned the differences between the methods of voting for a candidate in the House of Representatives and a candidate for the Senate. Their Honours said (at 102):

[f]urthermore, in the light of the group system of voting which applies in Senate elections, it was highly probable, if not virtually certain, that a person who voted for Mr. Wood would have voted for another member of his group, had the voter known that Mr. Wood was ineligible. The same comment cannot be made in the present case. Here a special count could result in a distortion of the voters' real intentions because the voters' preferences were expressed within the framework of a larger field of candidates presented to the voters by reason of the inclusion of the first respondent.
45. The *second* reason was that the reasoning in *In re Wood* rested on analogies the Court had drawn between the disqualification of a Senator and the death of

candidate for the Senate after the nominations have been declared but before polling day. Their Honours said (at 101-102):

[t]he Court (in *In re Wood*) likened the position to that which arises when the candidate dies. Then, pursuant to s. 273(27) of the [CEA], a vote indicated on the ballot paper for the deceased candidate is counted to the candidate next in the voter's indicated order of preference and the numbers indicating subsequent preferences are treated as altered accordingly. In these circumstances, the situation in *In re Wood* was such as to warrant the conclusion that the special count would reflect the voters' "true legal intent".

...

[T]he [CEA] draws a distinction between House of Representatives and Senate elections in the case of the death of a candidate. Section 180(2) provides that, if a candidate in a House of Representatives election dies between the declaration of the nominations and polling day, the election wholly fails, whereas, in the case of the death of a candidate in a Senate election between those days, s. 273(27) provides that the votes should be counted with the preferences adjusted accordingly. The reasons which lie behind the drawing of that distinction have equal application to the drawing of a like distinction between the election to the House of Representatives and to the Senate of candidates who are disqualified under s. 44.

46. In the *Western Australian Senate Case*, Hayne J, sitting as a single member of the Court Disputed Returns, ordered the election of six senators for the Commonwealth Parliament for the State of Western Australia was absolutely void and ordered a new election. In that case, 1,370 of the ballot papers cast at an election for the six senators had been lost in circumstances where the election for the fifth and sixth places was very close and a recount of ballot papers had been directed. Justice Hayne held that the electors who had submitted the lost ballot papers had been prevented from voting for the purposes of s 365 of the CEA and that the number of lost ballot papers far exceeded the margin between the relevant candidates at a point in the count

determinative of who were the successful candidates for the fifth and sixth Senate places. It inevitably followed that the loss of the ballot papers had been likely to have affected the declared result and that a new election was necessary. In contrast, in this case, there has not been a loss of ballot papers such that a valid result could be ascertained by scrutiny of the ballot papers.

47. In *Vardon v O’Loghlin*, the Court of Disputed Returns determined that the Parliament of South Australia had wrongly assumed it had the power to fill a casual vacancy under s 15 of the Constitution, such that its choice of a senator to fill a vacancy was void. The Parliament had sought to exercise the power under s 15 following a previous declaration by the Court that the election of a Senator was void owing to defects in the electoral process. In the unique circumstances of that case, the Court held that there was no alternative but for there to be a fresh election.
48. Further instructions would be required from the Electoral Commissioner before one could advise on the precise form of order for the special count. Specifically, the Electoral Commissioner should be able to ascertain from the retained ballot paper whether there is any prospect that disregarding the primary or preferential votes for Senator Culleton could affect the preceding ten elected candidates or subsequent one elected candidate so as to require a recount for any other, and if so which other, positions.
49. For completeness, I note that the 2016 changes to the method of Senate voting by the *Commonwealth Electoral Amendment Act 2016* (Cth) should not alter the applicability of the *In re Wood* approach to the present case.

The appropriate Commonwealth person to be joined as a party

50. In the context of the circumstances of the Election Petition Proceeding, it is highly likely that the Court of Disputed Returns would grant the Attorney-General leave to intervene under s 78A of the Judiciary Act to make submissions in relation to each and all of the questions on the construction of

s 44(ii) of the Constitution, the question of relief and the issue of the competency of the petition. This is partly because those issues are inseparably bound up. It is also because the concept in s 7 of the Constitution of “directly chosen by the people of the State” may be relevant to the form of relief that is ordered. Indeed in the *Western Australian Senate Case* Hayne J considered it was important to interpret the key provisions of the CEA through the prism of s 7 of the Constitution (see, for example, at [82] 490).

51. It is also possible that the Electoral Commissioner could seek to intervene under s 359 of the CEA and make submissions on the relief and the competency of the election petition to complement the Attorney-General’s submissions (if those submissions were) confined solely to Constitutional matters. I do not regard this as strictly necessary, but it is an available alternative. If this alternative approach were taken, it would be appropriate to have a single representation of the Attorney-General and the Electoral Commission by the Solicitor-General and junior counsel and the Australian Government Solicitor.

Collateral challenge to the validity of the election of Senator Culleton

52. Whether a person may challenge the validity of a candidate’s election by a collateral challenge under the Common Informers Act raises questions concerning the Constitution and relating to statutory interpretation.

The Common Informers Act and the Court of Disputed Returns

53. Sections 46 and 47 of the Constitution deal with the qualification and the validity of the election of members of Parliament.
54. Section 46 of the Constitution relevantly provides:

Penalty for sitting when disqualified

Until the Parliament otherwise provides, any person declared by this Constitution to be incapable of sitting as a senator ... 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.

55. The circumstances in which a person shall be incapable of sitting as a senator is set out in s 44 of the Constitution. It is notable that s 46 of the Constitution refers to a person being “*declared* by this Constitution to be incapable of sitting as a senator” but does not set out how a determination of incapability is to be made. Indeed, it may not always be clear, or it may open to dispute, (such as in this case) when a person’s circumstances come within s 44 of the Constitution.
56. One way in which that determination may be sought is set out in s 47 of the Constitution. Section 47 allows the Senate to determine a question concerning the qualification of a senator and relevantly provides:

Disputed elections

Until the Parliament otherwise provides, any question respecting the qualification of a senator ... and any question of a disputed election to either House, shall be determined by the House in which the question arises.

57. Section 47 (together with s 51(xxxvi) of the Constitution) also gives the Parliament power to provide for another means for determining a question respecting the qualification of a senator. The Parliament has done that through the CEA in at least two ways.
58. It has done that, *first*, by enacting s 376, which is in Div 2 of Pt XXII of the CEA. That section provides that:

... any question respecting the qualification of a Senator ... may be referred by resolution to the Court of Disputed Returns by the House in which the question arises and the Court of Disputed Returns shall thereupon have jurisdiction to hear and determine the question.

59. It has done that, *second*, through s 353(1) of the CEA, which provides that “[t]he validity of any election or return may be disputed by petition addressed to the Court of Disputed Returns and not otherwise”. In *Sue v Hill*, a (4:3) majority of the Court of Disputed Returns accepted that the validity of an election or return could be disputed by petition under s 353(1) on the ground of incapacity of the senator returned to be elected.
60. The Parliament has also enacted the Common Informers Act. That Act contains only five provisions. Section 3 picks up the language in s 46 of the Constitution and relevantly provides:

Penalty for sitting when disqualified

- (1) Any person who, whether before or after the commencement of this Act, has sat as a senator or as a member of the House of Representatives while he or she was a person declared by the Constitution to be incapable of so sitting shall be liable to pay to any person who sues for it in the High Court a sum equal to the total of:
- (a) \$200 in respect of his or her having so sat on or before the day on which the originating process in the suit is served on him or her; and
- (b) \$200 for every day, subsequent to that day, on which he or she is proved in the suit to have so sat.
61. There has never been a successful suit under either s 46 of the Constitution or the Common Informers Act.

Issue with the challenge to Senator Culleton under the Common Informers Act

62. The issue of whether a collateral challenge to the validity of a candidate's election could be brought and authoritatively decided in the course of a proceeding under s 3 of the Common Informers Act was considered, in obiter, by McHugh J in *Sue v Hill*. His Honour put forward two competing views.
63. The *first* was that, by s 3 of the Common Informers Act, "Parliament has otherwise provided within the meaning of s 47 of the Constitution so that, notwithstanding the restrictive terms of Div 2 of Pt XXII of the [CEA], the High Court can determine at any time the eligibility of a member of Parliament" (at 555 [242]).
64. The *second* was that s 3 does not otherwise provide for the determination of a "question respecting the qualification of a senator or of a member of the House of Representatives". Rather, a determination must first be made by the relevant House of Parliament or by a reference to the Court of Disputed Returns under Div 2 of Pt XXII of the CEA, and the function of s 3 is to authorise a suit for the recovery of a penalty once a declaration of incapacity has been made (at 555-556 [243]). His Honour noted that in favour of this construction is that it "avoids potential and unseemly conflicts between the Court and a House of Parliament over the qualifications of a member of that House" (at 556 [243]). His Honour added that it "might also seem surprising that Parliament, in enacting the Common Informers Act, had intended, so to speak, to allow a person to bypass the restrictively worded provisions of Div 2 of Pt XXII of the [CEA]" (at 556 [243]).
65. Justice McHugh noted that the Second Reading speech to the Common Informers (Parliamentary Disqualifications) Bill 1975 provided support for both constructions. That is because it assumed that the High Court could deal with the question of qualification by suit brought under s 3, but it also proceeded on the basis that the Bill was otherwise providing for the purpose of

s 46 of the Constitution (at 556 [244]). Ultimately his Honour did not consider it necessary to state which of the two competing views he preferred.

66. I favour the second construction advanced by McHugh J for the reasons his Honour gives. Of great significance is that s 353 of the CEA provides that “[t]he validity of any election or return may be disputed by petition addressed to the Court of Disputed Returns and not otherwise”. By this provision, the Parliament sought to give exclusive jurisdiction to the Court of Disputed Returns to determine the validity of an election or return on petition. It would be inconsistent with s 353 of the CEA if an implication were read into s 3 allowing a person to bring a suit in the High Court to determine the validity of the election of a candidate. Indeed, the making of a collateral attack under the Common Informers Act would enable a person to bypass the detailed scheme that the CEA has established to enable persons to challenge disputes relating to disqualification. Such a significant step would require an express legislative statement from the Parliament that was what it was intending to do.

Concluding observations

67. The current pleadings in the Election Petition Proceeding are deficient and in my view should be incurable. The Court of Disputed Returns may be prepared, via a single Justice as occurred in the *Western Australian Senate Case*, to determine separately and in advance the question of whether the petition is deficient and incurable. Subject to any appeal to the Full Court, this may bring the matter to the earliest possible conclusion. Against the possibility that the Court allows the challenge to proceed, the Electoral Commissioner should be preserving all ballot papers and carrying out the factual enquiries listed at paragraph [48] above.
68. The Commonwealth has a strong interest in having both the Election Petition Proceeding and the Common Informers Proceeding determined as expeditiously as possible. If the Commonwealth is to intervene in any guise in either proceeding, it should do so as soon as possible, preferably before the

first directions hearing. The Commonwealth of necessity will probably need to take a leading role in case management leading to an early hearing.

69. I am indebted to Counsels Assisting Jonathon Hutton and Megan Caristo for substantial assistance in the preparation of this Opinion.

70. I advise accordingly.

Dated: 28 October 2016

JUSTIN GLEESON SC

Solicitor-General

IN THE MATTER OF *BELL v*

CULLETON

OPINION

Attention:
Gavin Loughton
Australian Government Solicitor

SG No. 23 of 2016

