SECTION 44 OF THE CONSTITUTION –

WHAT HAVE WE LEARNT AND WHAT PROBLEMS DO WE STILL FACE?

by Anne Twomey*

The year 2017 was a bumper one when it came to cases about s 44 of the Constitution. Six Senators have were found to have been invalidly elected at the 2016 election, being Senators Day,[1] Culleton,[2] Ludlam, Waters, Nash and Roberts and in the lower House, the Deputy Prime Minister, Barnaby Joyce,[3] was also found to have been invalidly elected. In the wake of the High Court's judgment, the President of the Senate, Senator Stephen Parry, Senator Jacqui Lambie and Senator Skye Kakoschke-Moore, along with John Alexander in the lower House, all 'resigned'[4] due to holding British citizenship by descent. More may follow.

So far this year the High Court has given judgments on three of the five different grounds for disqualification under s 44, being pecuniary interest in an agreement with the Public Service, conviction of an offence and being a citizen of a foreign power. A fourth ground, office of profit under the Crown, was briefly addressed when the High Court found that Hollie Hughes, who would have otherwise been chosen to fill the seat of Fiona Nash, was also disqualified from doing so because she acquired an office of profit under the Crown, being part-time membership of the Administrative Appeals Tribunal, after polling day but before the recount of the Senate vote. The fact that she had also resigned from that office before the recount was held was not enough to save her from disqualification.[5]

Disqualification on the ground of pecuniary interest in an agreement with the Public Service may also be further addressed in the common informers action in *Alley v Gillespie*.[6] The only part of s 44 that is missing from judicial scrutiny is the bankruptcy ground, although this has been lurking in the background, with one replacement Senator narrowly escaping disqualification on this ground.

This paper addresses what we have learnt so far from these cases and what we have yet to learn concerning the application of s 44 of the Constitution. While more is known now about how s 44 will be interpreted than was known a year ago, there continue to be ambiguities and uncertainties that will have to be dealt with by the courts before a reasonably certain set of rules can be developed concerning its application. The merry-go-round has not yet stopped.

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[1] *Re Day [No 2]* [2017] HCA 14.

[2] *Re Culleton [No 2]* [2017] HCA 4

[3] *Re Canavan; Re Ludlam; Re Waters; Re Roberts [No 2]; Re Joyce; Re Nash; Re Xenophon* [2017] HCA 45 (hereafter '*Re Canavan*').

[4] Technically, one cannot resign from an office that one did not hold due to disqualification. The Court of Disputed Returns will determine the disqualification of the Senators and order a recount. The vacancy in the House of Representatives will be filled by a by-election on 16 December 2017.

[5] At the time of writing, reasons in relation to the disqualification of Ms Hughes had not yet been given.

[6] *Alley v Gillsepie* (Case S190/2017). Note that the case will first address issues concerning the role of the Court under the *Common Informers (Parliamentary Disqualifications) Act* 1975 (Cth), which may mean that the substantive constitutional issue is not reached.

Timing

The most difficult issue remains timing. Section 44 of the Commonwealth Constitution says that anyone who breaches one of its five grounds of disqualification is 'incapable of being chosen or of sitting as a senator or a member of the House of Representatives'. What the Constitution does not explain is what is meant by 'chosen'. Tying the provision to the point of being 'chosen' was an innovation when the Constitution was enacted, as the precedents from Canada, New Zealand and the Australian colonies (now the States) all focused upon acts done *after* a person had become a member of Parliament.[7] There was therefore nothing to draw upon to explain what was meant by 'chosen'.

Was a person chosen on polling day, or upon the declaration of the polls or the return of the writs? The most logical answer is the return of the writs, as the inscribing of a person's name on the writ and its return is the formal act which entitles a person to be sworn in as a Member of Parliament. While the people do the *choosing,* it is the return of the writ that makes the person *chosen.* Such an interpretation would have allowed a person to stand for Parliament, even though he or she held a disqualifying factor, such as an office of profit under the Crown, but would allow them to divest themselves of that disqualifying factor after polling day, when it looked likely that they had won, but before the writ was returned. It has been argued against such an interpretation that this would mean that people could not be confident that the candidate they elect could ever take up the office – but that seems also to be the case under the current position anyway.

In any case, the High Court has not taken this approach. In 1992 the High Court held in *Sykes v Cleary* that the relevant date for being 'chosen' was not a particular date, but the entire electoral process starting from the date of nomination.[8] The period in which a person is 'chosen' concludes at the time the election is completed,[9] which is normally indicated by the return of the writs for the election.[10] The High Court in *Re Canavan,* confirmed this interpretation, stating that it is settled authority that the 'temporal focus for the purposes of s 44(i) is upon the date of nomination as the date on and after which s 44(i) applies until the completion of the electoral process'.[11]

The fact that it is a period, not a date, and one that may extend for a long time if the election is not properly completed, leads to problems. What happens if during this period a disqualifying event occurs and is then removed? For example, what if a person is convicted of an offence that would trigger s 44(ii), but that conviction is later quashed, still within the election period? Is it enough that the candidate has become disqualified at any time during this period, or does that not matter if the disqualification has been removed by the time the election period is completed and the process of being chosen is over?

The High Court nodded obliquely to this potential problem in *Re Culleton,* where four Justices pointed out that no question as to the temporal operation of s 44 arose in that case.

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[7] *Re Canavan* [2017] HCA 45, [28]-[29] and [35].
[8] *Sykes v Cleary* (1992) 176 CLR 77, 99-101 (Mason CJ, Toohey and McHugh JJ) 108 (Brennan J, agreeing) 130 (Dawson J agreeing) and 132 (Gaudron J, agreeing).
[9] See *Re Wood* (1988) 167 CLR 145, 168 (Mason CJ, Wilson, Brennan, Deane, Dawson, Toohey and Gaudron JJ), where their Honours stated that the disqualification of Senator Wood meant that his place had not been filled in the eye of the law but it 'can be filled by completing the election after a recount of the ballot papers'.
[10] *Re Culleton [No 2]* [2017] HCA 4, [13] (Kiefel, Bell, Gageler and Keane JJ).
[11] *Re Canavan* [2017] HCA 45, [3].

Their Honours contended that this was because Rodney Culleton's conviction occurred before nomination and 'persisted during the whole of the period from the time of nomination to the return of the writs for the election'.[12] As the later annulment of his conviction was not regarded as having a retrospective effect,[13] he was clearly incapable of being chosen during that election period.

Ordinarily, the critical point for the timing of disqualification is the start, not the end, of the period. This is because s 44 continues in its application after the completion of the election period because it also renders elected persons incapable of 'sitting'. Section 45 also provides that if a senator or member 'becomes subject to any of the disabilities' mentioned in s 44 his or her 'place shall thereupon become vacant'. It is therefore generally unnecessary to define the point at which 'chosen' finishes and the elected person is then disqualified from 'sitting'. But what if the election was not completed because the candidate who was declared to have won the seat proves to have been disqualified and therefore incapable of being chosen? In such a case, a special recount is ordered so as to complete the election.

When this occurs, as it has a number of times recently, the process of choosing may extend for a much longer period. This means that there was, potentially, a temporal paradox in relation to Rodney Culleton. The fact of his disqualification meant that the period of the election was extended, meaning that the annulment of his conviction technically occurred within that election period. While it is doubtful that even Culleton would have argued that his disqualification had the effect of extending the election period, allowing his disqualification to be removed during that period, so that he was validly elected after all, this is one of the potential temporal paradoxes that arises from tying being 'chosen' to a period rather than a particular date.

A further temporal problem was raised, but not resolved, in Culleton's case. What happens if a disability is removed with retrospective effect so that in law it never happened? Culleton argued that the subsequent annulment of his conviction meant that it had never legally occurred and therefore he was not disqualified. The Court did not need to decide this issue because it could resolve the case on the narrower point that the legislation that gave effect to the annulment did not have retrospective effect, so that the initial conviction stood at the time of nomination and thereafter.

Justice Nettle, however, went further, addressing what the position would have been if the annulment had been given retrospective effect. He held that s 44(ii) was 'directed to a conviction in fact regardless of whether it is subsequently annulled.'[14] He considered that there was no room for 'contingent qualification' and that the Constitution required 'certainty that, at the date of nomination, a nominee is capable of being chosen'.[15] Nettle J concluded that an 'understanding of s 44(ii) as requiring order and certainty in the electoral process' accords with the system of representative and responsible government established by the Constitution.[16] Given the Court's recent concern in *Re Canavan* for certainty and stability, it is likely that the rest of the Court would follow this approach if the issue were to require determination in the future.

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[12] *Re Culleton [No 2]* [2017] HCA 4, [13] (Kiefel, Bell, Gageler and Keane JJ).
[13] *Re Culleton [No 2]* [2017] HCA 4, [29] (Kiefel, Bell, Gageler and Keane JJ).
[14] *Re Culleton [No 2]* [2017] HCA 4, [57] (Nettle J).
[15] *Re Culleton [No 2]* [2017] HCA 4, [57] (Nettle J).
[16] *Re Culleton [No 2]* [2017] HCA 4, [59] (Nettle J).

A final timing problem concerns the fact that while the initiation of the removal of a disqualification may be under the control of the candidate, its completion is usually not. It is dependent on the acts of others. What happens if a person has taken all reasonable steps to rid himself or herself of a disqualifying disability (eg renouncing citizenship, resigning from an office of profit or selling shares in a corporation that holds an agreement with the Commonwealth Public Service) but it is not processed before nomination? A number of Labor members took action before nomination to renounce foreign citizenship, but it was not processed in the relevant country until some time after nomination. This meant that at the time of nomination, they still held dual citizenship. Were they incapable of being chosen, even though they had done everything they could in advance of the nomination date, because they were still technically dual citizens at the time of nomination?

Again, we do not know for sure. In *Re Canavan,* the High Court seemed to wish to confine the notion of 'reasonable steps'. It said:

> Section 44(i) is cast in peremptory terms. Where the personal circumstances of a would-be candidate give rise to disqualification under s 44(i), the reasonableness of steps taken by way of inquiry to ascertain whether those circumstances exist is immaterial to the operation of s 44(i).[17]

The reasonable steps that must be taken are those required by the foreign law for renunciation of citizenship.[18] It is not enough to say one took reasonable steps to inform oneself of one's status regarding qualification or disqualification.

But what if the candidate has taken all the steps which he or she can take to renounce foreign citizenship under the foreign law, but is awaiting the response of the foreign country? Is it not a reasonable step if it is not taken early enough for the process to be completed in time? For example, is it unreasonable to take the steps two or three days before nomination? It has been suggested that one reason that candidates, despite sometimes having been pre-selected as long as a year before the election, have waited until as late as possible to renounce their dual citizenship before the nomination date is that they wanted to ensure it was not processed prior to the election, so that if they did not win, they could withdraw the renunciation and retain their foreign citizenship. Is this kind of equivocal renunciation sufficient to avoid disqualification?

On the other hand, a person might have been pre-selected shortly before a by-election or early election is held and may not have sufficient time for his or her renunciation to take effect. Should a prospective candidate be held hostage to disqualification by short time-frames or the amount of time that it may take for renunciation to be processed and recorded by the bureaucracy in a foreign country?

Despite the duelling opinions of David Bennett QC for the Commonwealth[19] and Peter Hanks QC for the Labor Party,[20] expressing adamant views on opposite sides, the reality is that the issue was left unclear by the Court of Disputed Returns in *Re Canavan.* On the one hand,

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[17] *Re Canavan* [2017] HCA 45, [61].
[18] *Re Canavan* [2017] HCA 45, [72].
[19] David Bennett QC, 'Opinion – Re Justine Keay MP, Susan Lamb MP and Rebekha Sharkie MP' 10 November 2017.
[20] Peter Hanks QC, 'Opinion – Section 44(i) of the Constitution and Justine Keay, Susan Lamb and Rebekha Sharkie' 13 November 2017

when the taking of 'reasonable steps' was recognised as the relevant test in *Re Canavan*, it was in the context of the constitutional imperative to avoid the irremediable exclusion of citizens from being capable of election to Parliament.[21] The Court in *Re Canavan* did not expressly recognise the application of a reasonable steps test in circumstances where the other country permitted renunciation by the taking of steps that could be reasonably performed and which did not involve risks to the person or property of the candidate.[22]

On the other hand, the High Court in *Re Canavan* upheld the authority of the majority judgment in *Sykes v Cleary* in circumstances where that Court appeared to accept that it was enough that a candidate take all reasonable steps to renounce his or her citizenship, where renunciation is permitted or is a matter of discretion by the appropriate Minister.[23] One could therefore argue that *Re Canavan* implicitly accepted that all that is needed is for a candidate to take all the reasonable steps that he or she can take before the nomination date, regardless of whether it is processed in time.

Until the issue is resolved, it would be prudent for any candidate for election to ensure all s 44 disabilities are removed and properly processed well before the nomination date.

Section 44 - Interpretation

In *Re Canavan*, the High Court as the Court of Disputed Returns again applied a very strict approach in its constitutional interpretation. It chose to adhere closely to the ordinary and natural meaning of the language of the section.[24] The factor that seemed to influence the Court most was the need for stability and certainty.[25] This also influenced its approach in *Re Culleton*, particularly in the judgment of Nettle J,[26] and was an issue that was closely addressed in *Re Day*, particularly by Gageler J.[27] Where there are constructional choices in relation to the application of s 44, stability, certainty and the setting of a clear rule for the future will be given priority by the Court. As Gageler J said, Members of Parliament 'should know where they stand' and 'are entitled to expect tolerably clear and workable standards by which to gauge the constitutional propriety of their affairs'.[28]

In *Re Canavan*,[29] there was close adherence to the earlier authority of *Sykes v Cleary*[30] and little reliance was placed on the purpose of the provision.[31] In contrast, in *Re Day*, earlier authority was overturned and significant reliance was placed upon the identification of a broader purpose in doing so. So the influence of both purpose and authority will depend on the particular case.

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[21] *Re Canavan* [2017] HCA 45, [13], [43]-[46], [72].
[22] *Re Canavan* [2017] HCA 45, [69].
[23] *Re Canavan* [2017] HCA 45, [64]-[65] and [68].
[24] *Re Canavan* [2017] HCA 45, [19].
[25] *Re Canavan* [2017] HCA 45, [48], [54], and [57].
[26] *Re Culleton [No 2]* [2017] HCA 4, [57]-[59] (Nettle J).
[27] *Re Day [No 2]* [2017] HCA 14, [97] (Gageler J).
[28] *Re Day [No 2]* [2017] HCA 14, [97] (Gageler J).
[29] *Re Canavan* [2017] HCA 45, [23], [24], [39], [46], [53], [67].
[30] *Sykes v Cleary* (1992) 176 CLR 77.
[31] Historical material that was sought to be used to support a narrower purpose was rejected by the Court at [27]-[36] and the Court took a constrained and arguably artificial view at [24]-[26] of how the second limb of s 44 was intended to give effect to a purpose of preventing split allegiance.

In all three cases – *Re Day*, *Re Culleton* and *Re Canavan* – the High Court took an approach that expanded, rather than narrowed, the potential circumstances in which s 44 applies. It gave little scope for excuses or exceptions. This suggests that legal advice in this area in the future should err on the side of prudence and caution. Apart from the judgment of Barwick CJ in *Re Webster*, all the successive cases on s 44 have involved strict and arguably harsh[32] interpretations of it. The High Court has regarded s 44 as an important provision to maintain the integrity of Parliament and has shown that it is prepared to enforce it, no matter how unpopular it makes it with politicians.

Section 44(i)

In *Re Canavan*, the High Court approached s 44(i) as having two limbs.[33] The first limb which deals with acknowledgement, adherence and obedience to a foreign power was regarded as involving an 'exercise of the will of the person concerned'.[34] It required a voluntary act of allegiance on the part of the person concerned. The second limb, concerning being a subject or citizen of a foreign power or being entitled to the rights of such a citizen or subject, was regarded as involving questions of legal status or rights under the law of the foreign power. No act of will or even knowledge of the circumstances was required of the person who held such status or rights.[35] The Commonwealth's arguments about the need for knowledge or reasonable suspicion of foreign citizenship and the need for a reasonable time in which to renounce foreign citizenship once a person becomes aware of it, were swept away by the High Court as inconsistent with the application of the second limb of s 44(i).[36]

While the Court accepted that the purpose of s 44(i) was to ensure that members of Parliament do not have a 'split allegiance',[37] it saw this purpose as being achieved in different ways by the two limbs of s 44(i). While the first limb looked to that conduct of the person concerned, which would encompass knowledge of split allegiances, the second limb did not address conduct or a person's 'subjective feelings of allegiance'.[38] Instead it was directed at the 'existence of a duty to a foreign power as an aspect of the status of citizenship',[39] regardless of whether or not the person knew of that status or was minded to act upon it.

Foreign Law

The Court confirmed that whether 'a person has the status of a subject or a citizen of a foreign power necessarily depends upon the law of the foreign power' because only a foreign law can be the source of that status of citizenship or the rights attached to it.[40] This has the unfortunate consequence that the application of a provision of the Australian Constitution is dependent upon the vagaries of foreign law – which might be changed without notice, or

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[32] The Court in *Re Canavan* conceded that its interpretation of s 44(i) may be said to be 'harsh' but contended that diligence and serious reflection are required before nomination: *Re Canavan* [2017] HCA 45, [60].
[33] *Re Canavan* [2017] HCA 45, [21]-[23].
[34] *Re Canavan* [2017] HCA 45, [21].
[35] *Re Canavan* [2017] HCA 45, [21].
[36] *Re Canavan* [2017] HCA 45, [47]-[60] and [71].
[37] *Re Canavan* [2017] HCA 45, [24].
[38] *Re Canavan* [2017] HCA 45, [25].
[39] *Re Canavan* [2017] HCA 45, [26].
[40] *Re Canavan* [2017] HCA 45, [37].

applied retrospectively, or be unclear in its application, as was the case in relation to the Italian law applicable to the citizenship status of Senator Canavan.[41]

Senator Canavan's survival is the great oddity coming out of this case. The Court noted that Senator Canavan had been entered on the 'Register of Italians Resident Abroad' in 2006 which entitled him to vote in Italian elections and had been registered by the Municipality of Lozzo di Cadore on 18 January 2007.[42]

Despite Canavan's formal registration, which the Italian consulate described as being registered as an Australian citizen, the Court appears to have accepted that the potential source of Senator Canavan's citizenship status derived from a decision of the Italian Constitutional Court in 1983 that a law restricting the inheritance of citizenship to the male line was invalid to the extent that it discriminated against female Italians. The effect of that decision was said to be retrospective, so that from 1948 children with a mother who was an Italian citizen were also Italian.[43] In this manner, Senator Canavan would have inherited Italian citizenship through his mother and grandmother, making him, with retrospective effect, an Italian at birth.

However, there was also evidence before the Court that Senator Canavan had not applied for a separate declaration of Italian citizenship.[44] There was uncertainty as to whether this positive act was required to activate what may otherwise have been 'potential' citizenship. A distinction was drawn in the evidence before the Court between registration as an Italian Resident Abroad for voting purposes, and the declaration of Italian citizenship. The Court concluded that on 'the evidence before it' it could not be satisfied that Senator Canavan was a citizen of Italy and it preferred an interpretation that positive steps were required as conditions precedent to citizenship, given the potential for Italian citizenship by descent to extend indefinitely.[45]

What it did not address was whether he satisfied the other part of the second limb of s 44(i) by being 'entitled to the rights or privileges of a subject or a citizen of a foreign power', as he was entitled to vote in Italian elections as a registered Italian resident abroad. This ought to be a classic case in which s 44(i) is triggered, even though formal citizenship has not been activated. It is curious that it was not addressed by the Court. Perhaps the Court took the view that the right to vote was not, in this case, a privilege of citizenship or that Canavan was never validly registered to vote. The judgment is just not clear on this issue.

It is also curious that the Court did not seek to obtain further evidence and to hold a separate hearing to resolve the question of his status under s 44(i), as it had done in relation to Malcolm Roberts when there was contested evidence. While the Court was under time-pressure to deliver a speedy judgment, this ought not to have prevented it from obtaining the evidence necessary to resolve this aspect of the dispute. This part of the judgment smacks of an unsatisfactory compromise reached to ensure the maintenance of a unanimous decision delivered in a short period of time. It does not make for a sustainable precedent.

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[41] *Re Canavan* [2017] HCA 45, [74]-[87].
[42] *Re Canavan* [2017] HCA 45, [78].
[43] *Re Canavan* [2017] HCA 45, [81].
[44] *Re Canavan* [2017] HCA 45, [86].
[45] *Re Canavan* [2017] HCA 45, [86].

What the judgment tells us about foreign law, however, is two things. First, the fact that the law changed with retrospective effect was not regarded as a ground for excluding the application of s 44(i). Hence, Members of Parliament who currently are not dual citizens may need to be aware of whether they have the potential to acquire citizenship with retrospective effect. The most common circumstance in which this occurs is where citizenship through the maternal line has been previously denied and then later is corrected with retrospective effect due to the discriminatory nature of the law.

The second is that while foreign law applies, it is the High Court that will interpret the foreign law and how it should be considered to apply to the Member in question. It was the High Court that took the view that a positive act of registration was required to activate Italian citizenship. While its conclusion may have been based upon expert evidence, it was the Court that took the policy view that it should adopt that particular interpretative choice, given the fact that citizenship could pass down for generations, which was described in the proceedings as an 'exorbitant' law.

The nature of citizenship

Despite these very limited exceptions to the strict application of s 44(i), there is another way by which its application may be avoided. This is when the nature of the citizenship held is such that it cannot be described as genuine citizenship. This was so in the case of Senator Nick Xenophon. His status as a 'British overseas citizen' was not regarded by the Court as sufficient to trigger the application of s 44(i) because it did not confer the main attributes of citizenship, such as the right of abode. This status did not allow Xenophon to enter or reside in the United Kingdom.[46] Nor did it impose a duty of loyalty to the United Kingdom, although there was still a duty of loyalty to the Queen.[47]

As the status of a British overseas citizen did not confer the rights or privileges normally attached to citizenship, such as the right of abode, and did not entail any reciprocal obligation of allegiance to the United Kingdom or to the Queen in right of the United Kingdom, the Court held that s 44(i) did not disqualify Senator Xenophon from being chosen.

Other aspects of s 44

While most the recent controversy concerning s 44 has concerned dual citizenship, this is nowhere near the most difficult and potentially dangerous aspect of s 44 of the Constitution. Far greater peril would appear to lurk in the uncertainties concerning offices of profit under the Crown in s 44(iv) and pecuniary interests in agreements with the public service in s 44(v).

Office of profit under the Crown

While Phil Cleary's disqualification for being a school teacher on leave without pay[48] shed some light on the ground of office of profit under the Crown, there is still a lot that is unknown about the application of s 44(iv). The key question is whether or not the office of profit can be categorised as coming under the Crown.

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[46] *Re Canavan* [2017] HCA 45, [132].
[47] *Re Canavan* [2017] HCA 45, [133].
[48] *Sykes v Cleary* (1992) 176 CLR 77.

For many years there has been a tacit truce between the main political parties concerning those members of the Commonwealth Parliament who also hold an office as a local councillor. As both major parties have had members who fall into this category, the threat of 'mutually assured destruction' has ensured that neither has challenged the other on this point. Whether the office of a local councillor amounts to an office of profit will depend first upon whether or not the local councillor receives remuneration or is simply reimbursed their actual expenses. Payments made to local councillors are usually described as 'allowances' or 'fees', but given that actual expenses are also usually separately reimbursed, these allowances and fees would appear to be a form of remuneration or profit. This is particularly so for a mayor who in Victoria, for example, can receive close to $100,000 per year as an 'allowance' plus an equivalent amount to the superannuation guarantee. It is therefore likely to be an office of profit.

The next question is whether or not it is 'under the Crown'. It is possible that the fact that local councillors are elected, rather than appointed, would exclude their offices from being characterised as falling under the Crown. A further factor may be the degree to which local government may be the subject of direction or control by a minister of the Crown. If, for example, local councillors may be dismissed and the council placed into administration, and if local councils are in any way accountable to or subject to instruction by ministers, then it is possible that they would be regarded as holding offices of profit under the Crown. If a court were to turn its mind to possible conflicts of interest between a person's role as a local councillor and as a member of Parliament, this could also lead to disqualification. The issue remains uncertain, but also a high risk for political parties that continue to permit their members to hold these dual offices.

Another uncertain area is employment in a university. This is relevant to Senator Andrew Bartlett, who replaced Larissa Waters, and who held a research position in a university at the time that he nominated as a candidate at the 2016 election. Such an office would be an office of profit. The question is whether it is 'under the Crown'. Universities are established under statute and their employees are paid out of public sector funds. The question would be whether the relevant university was sufficiently independent from ministerial instruction and accountability to the government that it would be regarded as not being 'under the Crown'. This may differ from State to State and in relation to different universities.

If one takes, as an example, the Australian National University, it is established by statute as a body corporate[49] and is governed by a Council. Although the Minister has the power to appoint seven members of the 15 member Council, he or she acts upon the recommendation of the Nominations Committee of Council and is prohibited from appointing a current member of Parliament to the Council.[50] It is the University, not the Minister, which has the power to employ and dismiss staff.[51] The University is subject to the application of the *Public Governance, Performance and Accountability Act* 2013 (Cth) which imposes a degree of accountability to the government, but the Council is not required to 'do anything that will or might affect the academic independence or integrity of the University'.[52] On balance, employment at ANU is probably too remote from the Crown to amount to an office of profit

[49] *Australian National University Act* 1991 (Cth), s 4.
[50] *Australian National University Act* 1991 (Cth), s 10.
[51] *Australian National University Act* 1991 (Cth), s 6.
[52] *Australian National University Act* 1991 (Cth), s 4A.

under it, but this we cannot be sure of this until it is ruled upon by a court and the situation may be different at other universities under different legislation.

Pecuniary interests

The most difficult part of s 44 is disqualification for having a 'direct or indirect pecuniary interest in any agreement with the Public Service of the Commonwealth otherwise than as a member and in common with the other members of an incorporated company consisting of more than twenty-five persons'.

The High Court in *Re Day [No 2]* extended the interpretative scope of this provision, both in relation to its purpose and its application. The Court rejected the narrow view of its purpose taken by Barwick CJ in *Re Webster,*[53] that it was confined to potential influence by the Commonwealth over members of Parliament.[54] Kiefel CJ, Bell and Edelman JJ observed that the object of s 44(v) is 'to ensure not only that the Public Service of the Commonwealth is not in a position to exercise undue influence over members of Parliament through the medium of agreements; but also that members of Parliament will not seek to benefit by such agreements or to put themselves in a position where their duty to the people they represent and their own personal interests may conflict'.[55]

Kiefel CJ, Bell and Edelman JJ observed that 'parliamentarians have a duty as a representative of others to act in the public interest' and that they have 'an obligation to act according to good conscience, uninfluenced by other considerations, especially personal financial considerations.'[56] In a similar vein, Nettle and Gordon JJ said that the 'fundamental obligation of a member of Parliament is "*the duty to serve* and, in serving, to act with fidelity and with a single-mindedness for the welfare of the community".'[57]

This is the standard by which parliamentarians will be judged in relation to disqualification. Their Honours regarded s 44 as having a special status because it is 'protective of matters which are fundamental to the Constitution, namely representative and responsible government in a democracy'. This was considered more important than the effect of disqualification upon a particular Member.[58]

The Court also expanded the application of s 44(v) beyond legal interests. It looked to the 'practical effect' of the agreement upon a person's pecuniary interests.[59] 'Beneficiaries of a discretionary trust, which benefits from, or via its trustee is party to, an agreement' with the Public Service may be regarded as holding an indirect pecuniary interest in that agreement.[60] Hence, the common use of family trusts by members of Parliament will not be sufficient to avoid the application of s 44(v).

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[53] *Re Webster* (1975) 132 CLR 270.
[54] *Re Day [No 2]* [2017] HCA 14, [51] (Kiefel CJ, Bell and Edelman JJ); [98] (Gageler J); [161] (KeaneJ); and [263]-[264] (Nettle and Gordon JJ).
[55] *Re Day [No 2]* [2017] HCA 14, [48] (Kiefel CJ, Bell and Edelman JJ).
[56] *Re Day [No 2]* [2017] HCA 14, [49] (Kiefel CJ, Bell and Edelman JJ). See also [183] (Keane J).
[57] *Re Day [No 2]* [2017] HCA 14, [269] (Nettle and Gordon JJ).
[58] *Re Day [No 2]* [2017] HCA 14, [72] (Kiefel CJ, Bell and Edelman JJ).
[59] *Re Day [No 2]* [2017] HCA 14, [54] (Kiefel CJ, Bell and Edelman JJ).
[60] *Re Day [No 2]* [2017] HCA 14, [62] (Kiefel CJ, Bell and Edelman JJ). See also Gageler J at [90] and [92]; Keane J at [190]-[192]; and Nettle and Gordon JJ at [253] and [287].

However, agreements ordinarily made between the government and a citizen, such as paying for a passport, will not trigger s 44(v).[61] Kiefel, Bell and Edelman JJ observed that one must look to 'the personal financial circumstances of a parliamentarian and the possibility of a conflict of duty and interest' as this is the mischief towards which the provision is addressed.[62] Nettle and Gordon JJ described s 44(v) as applying only when by reason of the existence, performance or breach of the agreement with the Public Service, the person 'could conceivably be influenced by the potential conduct of the executive in performing or not performing the agreement or that person could conceivably prefer their private interests over their public duty.[63]

This leaves a lot of uncertainty about the application of s 44(v), as is evidenced by the forthcoming case of *Alley v Gillespie.* The question there is whether the sub-lease of an Australia Post outlet in a shopping centre owned by the family company of a parliamentarian, David Gillespie, would be an agreement with the Public Service in which Dr Gillespie has an indirect pecuniary interest.

The first question is whether the sub-lease with Australia Post would amount to an agreement with the 'Public Service', or whether Australia Post, as a corporatized entity, would fall outside of the 'Public Service'. In *Re Day,* both Gageler J and Keane J stressed that 'Public Service' does not mean the Executive Government or the Commonwealth as a polity.[64] On the other hand, Nettle and Gordon JJ did not regard it as necessary to give 'some narrow or limited operation to the notion of "the Public Service of the Commonwealth" that would exclude agreements specifically authorised by statute'.[65] Whether an agreement with Australia Post could trigger s 44(v) remains unclear.

The second issue is whether, assuming that the agreement was an ordinary standard contract which was entered into without any involvement or influence by Dr Gillespie, he could be regarded as having an indirect pecuniary interest in it. If no influence was involved in securing the contract, either by the Commonwealth seeking to influence Dr Gillespie or Dr Gillespie seeking to use his position to influence the Commonwealth, then the risk of a breach of s 44 is diminished. Assuming, in the absence of the facts, that the contract between the tenant and Australia Post had nothing to do with Dr Gillespie or his status as a Member of Parliament and the contract was conducted on a normal commercial basis, this case is quite different from that of Senator Day, who actively lobbied the Commonwealth to enter into the contract regarding his electoral office.

Nonetheless, there remains the question of whether the performance of the contract could conceivably influence Dr Gillespie to prefer his private financial interest over his public duty. This will turn on the relevant facts of the situation and whether the rent that Dr Gillespie's family company received from its tenant in the shopping centre was dependent upon the performance of the contract between the tenant and Australia Post. The High Court's very strict interpretation of s 44(i) in *Re Canavan* may bode ill for Dr Gillespie to the extent that it indicates the Court is unwilling to take a flexible or pragmatic approach to the interpretation of the section.

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[61] *Re Day [No 2]* [2017] HCA 14, [69] (Kiefel CJ, Bell and Edelman JJ); [102] (Gageler J); [200] (Keane J).
[62] *Re Day [No 2]* [2017] HCA 14, [66] (Kiefel CJ, Bell and Edelman JJ).
[63] *Re Day [No 2]* [2017] HCA 14, [260] (Nettle and Gordon JJ).
[64] *Re Day [No 2]* [2017] HCA 14, [105]-[106] (Gageler J) and [199] (Keane J).
[65] *Re Day [No 2]* [2017] HCA 14, [265] (Nettle and Gordon JJ).

If Dr Gillespie is found to be disqualified as a result of the application of s 44(v), this could start off a further wave of disqualifications, as the activities of family trusts and family companies are closely scrutinised for any agreements with government bodies, including corporatized entities, such as Australia Post.

Conclusion

There is a lot we still do not know about the intricacies of the application of s 44 of the Constitution. Nonetheless, nearly all of these problems can be avoided by candidates acting out of an abundance of caution to avoid all disqualifying disabilities well before they nominate for office. This may discourage some people from standing for office, particularly if it is not a safe seat and the chances of being elected are low. While a different approach to the meaning of 'chosen' by the High Court may have alleviated that problem to some extent by giving people the ability to take action to remove disqualifying disabilities after polling day but before the return of the writs, it now seems unlikely that the High Court will change tack on that issue.

The only other option, apart from prudence, is a constitutional referendum to reform s 44. One option would be to repeal s 44 and to legislate instead for disqualification, allowing for clearer rules and the passage of amendments to deal with anomalies where necessary. This would run the risk, however, of partisan legislation when one party controlled both Houses. It could potentially legislate in such a way as to disqualify persons who hold attributes connected with a political party, such as union membership. Another approach would be to amend the Constitution so that a person is only 'chosen' upon the return of the writs, or to allow the renunciation of foreign citizenship to be determined by Australian, not foreign, law.

While a good case could be made for updating and clarifying aspects of s 44 of the Constitution, it remains doubtful that such a referendum would pass, particularly in the face of competing priorities for constitutional reform. It may well be that in the end, prudence and vigilance by candidates and parties is the best means of preventing a disqualification crisis from arising in the future.