CHAPTER 8

# Procedural questions (ss. 15, 33, 46, 47)

## INTRODUCTION

**8.1** Although we have briefly touched on the consequences of a breach of ss. 44 and 45 of the Constitution we have not closely examined the differences between these provisions, nor the ways in which the various constitutional issues may arise for authoritative determination. The Constitution provides two mechanisms by which members and senators may be challenged for an alleged breach of ss. 44 and 45. They are ss. 46 and 47 which provide as follows:

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

If a determination is made under either of the above provisions that a member or senator has contravened either ss. 44 or 45, the question arises as to whether the place of the member or senator becomes vacant in such a way as to bring into operation the casual vacancy provisions in ss. 15 and 33, or whether an election is required under ss. 7 and 32 of the Constitution. The relevant parts of the casual vacancy provision are as follows:

> 15. If the place of a senator becomes vacant before the expiration of his term of service, the Houses of Parliament of the State for which he was chosen, sitting and voting together, or, if there is only one House of that Parliament, that House, shall choose a person to hold the place until the expiration of the term. But if the Parliament of the State is not in session when the vacancy is notified, the Governor of the State, with the advice of the Executive Council thereof, may appoint a person to hold the place until the expiration of fourteen days from the beginning of the next session of the Parliament of the State or the expiration of the term, whichever first happens.
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> 33. Whenever a vacancy happens in the House of Representatives, the Speaker shall issue his writ for the election of a new member, or if there is no Speaker or if he is absent from the Commonwealth the Governor-General in Council may issue the writ.

## DISTINCTION BETWEEN A BREACH OF s. 44 AND OF s. 45

**8.2** Section 44 enumerates the different kinds of status which, so long as they continue, render a person incapable of being chosen or of sitting as a senator or a member. If a person is in fact chosen, perhaps in ignorance or disregard of the disqualifications within s. 44, he is nevertheless 'not chosen within the meaning of the Constitution, and accordingly is not a senator or a member.'[1] As the election is void ab initio, one cannot speak of a senator or member vacating his seat and consequently the vacancy provisions

in ss. 15 and 33 of the Constitution are inapplicable, and an election is required pursuant to either s. 7 (Senate) or s. 32 (House of Representatives) of the Constitution. Quick and Garran, commenting on this point, state:

> The proper course for the House, upon proof of disqualification, is either (1) to declare the candidate next on the poll duly elected, or (2) to declare that the seat is vacant—not that 'his place is vacant'—and require another election.[2]

However, if such a person takes his seat, he may be liable to a penalty for every day on which he sits. We discuss this issue later under the common informer provisions.

**8.3** Section 45 deals only with senators or members who are qualified at the time of their appointment or election, but who at some time thereafter become disqualified. This section enumerates different acts or events which vacate a senator's or a member's seat: in s.45 (1) the disqualifying event is the acquisition of any of the kinds of disqualifying status listed in s. 44, and s.45 (ii) and (iii) add two further categories of disqualifying acts which do not involve a continuing status. The consequence of a contravention of s. 45 is automatic and is effected by the section itself as soon as the s. 44 disability or s. 45 disqualification arises. Under the provision, 'his place shall become vacant' and there is now a vacancy—a casual vacancy within s. 15 when the State legislature acts, or a casual vacancy within s. 33 when the Speaker acts.

## COMMON INFORMERS

**8.4** As we noted at the beginning of this chapter, s. 46 of the Constitution provides one of the mechanisms by which members and senators could be brought to account for an alleged breach of ss. 44 or 45. The provision enabled any person to sue a member who was disqualified under the Constitution and provided that such a member would be liable to a penalty of one hundred pounds for every day on which he sat. Consequently the total penalty incurred under s. 46 could have been enormous[3] if an infringement only became apparent years after it had occurred. Despite these obvious financial attractions, s. 46 was never once relied upon. As Evans noted:

> The reasons for this are perhaps not hard to find. Common informers are not, for one reason or another, very highly regarded by the courts, who tend to place as many procedural and evidentiary barriers in the way of the informer's success as they can reasonably devise, and to construe the substantive law even more strictly in favour of the defendant member than they might otherwise be tempted to do.[4]

**8.5** In April 1975 at the height of the Webster affair, the Parliament 'provided otherwise' pursuant to ss. 46 and 51(xxxvi) of the Constitution and passed the *Common Informers (Parliamentary Disqualifications) Act* 1975.[5] The Act abolishes suits brought directly under s. 46[6] and provides instead for a suit to be brought in the High Court of Australia by any person for the recovery of a penalty of $200 in respect of a past breach, and for the recovery of a further penalty of $200 for every subsequent day on which the member sits while dsqualified after service of the originating process.[7] In addition, the Act limits informer suits to recent allegations,[8] ensures that no member can be penalized more than once in respect of any given period of sitting,[9] and vests exclusive jurisdication in these matters with the High Court.[10]

**8.6** A question arises as to whether common informer provisions, however cast, serve any useful purpose. Evans commented:

> The attraction in principle of such provision is, of course, that any member of the public who feels that Parliament is being unduly protective of one of its own members can force the issue and have the matter canvassed in a totally impartial forum. The trouble in practice,

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

**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 time[17] 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

respecting qualifications and vacancies, whereas, in regard to s. 183 of the Act, the Parliament distinctly provided that the Court of Disputed Returns alone shall have jurisdiction. Secondly, the provision states that the Houses of Parliament 'may' refer certain questions to the Court. The operative word is 'may' and the relevant House clearly retains a discretion as to whether to refer such questions. As Professor Campbell notes:

> The effect of section 203 is simply to create a concurrent jurisdiction in the Court, a jurisdiction arising on reference by the House of Parliament concerned. It may be that if either of the Houses refers a question to the Court, and the Court determines the question so referred the referring House thereupon lacks jurisdiction to determine the question anew. But when a question of the type specified in section 47 arises, the House in which that question arises may proceed to decide that question itself.[18]

**8.11** Despite the strength of the arguments in support of this interpretation of s. 203, we are of the opinion that the issue should be put beyond doubt. We recommend that s. 203 be amended to ensure that both Houses of Parliament retain a clear jurisdictional discretion under s. 47 of the Constitution to determine any question respecting qualifications, vacancies or disputed elections of senators and members.

**8.12 Recommendation: Section 203 of the Commonwealth Electoral Act 1918 should be amended along the following lines:**

> **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 determined by the House in which the question arises or may be referred by resolution of the House to the Court of Disputed Returns and the Court shall thereupon have exclusive jurisdiction to hear and determine the question.**

**8.13** The debate concerning the alleged vacancy of Senator Gair's seat raises a number of other issues which require consideration. The Senate's interpretation of the Constitution and of s. 203 of the Commonwealth Electoral Act is not binding on any court of law. As Professor Campbell notes:

> Neither House of Parliament can, by mere assertion of authority, give itself jurisdiction which as a matter of law it does not possess. The existence of their jurisdiction under the Constitution or under enactments of the Commonwealth Parliament is ultimately a matter to be determined in the courts of law.[19]

Thus, if either House of Parliament asserted jurisdiction to determine a question respecting a vacancy and adjudged that a seat had become vacant, such a determination could be challenged in the Court.

**8.14** However, it is by no means certain whether the Court, in reviewing such a determination, would inquire beyond the jurisdictional issue. Professor Campbell canvasses the issue and states:

> But I think it unlikely that a Court, having found that the House adjudging a vacancy to have occurred was acting within jurisdiction, would presume to rule on whether the House had made erroneous findings of fact or had misapplied the constitutional provisions defining qualifications, disqualifications or the circumstances in which seats become vacant.[20]

In support of this argument, Professor Campbell notes, among other things, that no court has been invested by statute with jurisdiction to entertain appeals against decisions made by the Houses of Parliament under s. 47 of the Constitution, and that it would require a distinct statutory provision to give a court such jurisdiction.

**8.15** The other question which arises for consideration concerns the possible conflict of procedures which could occur between a determination made under s. 47 and a suit instituted pursuant to the *Common Informers (Parliamentary Disqualification) Act*

1975. Thus, if either House of Parliament exercised its jurisdiction under s. 47 and determined that a member's qualification or seat was not in jeopardy, the determination could be challenged indirectly in a suit for penalties. It has been suggested that a prior determination by the House would render the matter *res judicata*, i.e. the matter cannot be raised again. Lumb and Ryan, writing before the passage of the Act in their Constitution of Australia Annotated, state:

> if the matter is being dealt with by the House or has been referred to a Court of Disputed Returns, the common informer's suit would be excluded.[21]

We do not agree with this assertion, however, as the legislation enacted pursuant to these provisions provides for two entirely different procedures, each of them independent from the other. Furthermore, there is judicial comment in the English case of *Bradlaugh* v. *Gossett* which suggests that the court trying the suit for penalties would not be bound by the House's adjudication.[22] Although the matter has not yet come up for judicial decision, we have little doubt that a court would decide the matter independently of what might have been previously decided by the relevant House of Parliament.

**8.16** Obvious difficulties arise if the Court determining a suit for penalties reaches a different conclusion to that of the House. If the Court held that a member was incapable of sitting and voting in the House or that his seat was vacant, contrary to a determination by the House, the member would be in an invidious position: he could be liable for a penalty of $200 for every day he continued to sit and vote. If he was not prepared to run the risk of further penalties by sitting and voting, he would deprive his electors of representation.

**8.17** In such circumstances it is probable that the relevant House would not see fit to issue a writ for the election of a new member, or to take the necessary action prescribed by s. 15 for filling a casual vacancy in the Senate. Professor Campbell suggests that in such circumstances it is possible that legislation would be sought to extinguish the penalty, present and future. She states:

> Care would need to be taken in the formulation of such legislation. An enactment which on its face contradicted the court's judgment that the member was incapable of sitting as a member would be open to constitutional challenge on the gound that it represented a usurpation of the judicial power of the Commonwealth. On the other hand, sections 46 and 51(36) authorise the Parliament to remove or alter the penalties for sitting whilst disqualified. An act which merely removed the liability to penalties, generally or in relation to a particular person, would probably be held *intra vires*.[23]

**8.18** While on the one hand the present difficulties associated with the informer provisions lead us to the conclusion that they should be abolished, on the other hand we believe these provisions do provide a necessary alternative mechanism by which the qualifications of members can be tested. Despite the fact that they have not yet been availed of, we recommend, on balance, that such provisions remain, but only in the form of an action for a declaration, while penalties, which serve no useful purpose, should be abolished.

**8.19 Recommendation: The *Common Informers (Parliamentary Disqualifications) Act* 1975 should be amended, deleting the penalty provisions, and providing simply for an action for a declaration to be brought in the High Court of Australia at the suit of any person, as to whether or not a senator or member of the House of Representatives is disqualified.**

Alan Missen
*Chairman*

The Senate
Canberra
May 1981

## Notes and references

1. Quick and Garran, *Annotated Constitution of the Australian Commonwealth*, 1901, at p. 491.
2. ibid., p. 491. See also, *Vardon* v. *O'Loghlin* (1907) 5 CLR 201. Vardon appeared to have been elected as a South Australian senator. His election was challenged in *Blundell* v. *Vardon* (1907) 4 CLR 1463 and the Court declared the election 'absolutely void' because of defective ballot papers. The South Australian legislature took the view that the Court's judgment created a 'casual vacancy' under s. 15 of the Constitution and in accordance with this provision chose O'Loghlin as Senator for South Australia. Vardon challenged the State legislature's action in *Vardon* v. *O'Loghlin*. The Court declared that s. 15 was inapplicable as there had never been a valid and effective election: because Vardon had not become a senator there was no casual vacancy. An election under s. 7 of the Constitution was required to fill the vacancy and the people consequently elected Vardon.
3. See the comments made by Senator Withers on the effect of s.46: 'Some of our longer serving colleagues could be up for $250,000 or a similar penalty': Senate, *Hansard* 22 April 1975, p. 1237.
4. Gareth Evans, 'Pecuniary Interests of Members of Parliament under the Australian Constitution, (1975) 49 ALJ 462 at p. 472.
5. The legislation passed through all stages in both Houses in one evening and came into effect the following day.
6. *Common Informers (Parliamentary Disqualifications) Act* 1975, s. 4.
7. ibid, s. 3(1).
8. ibid., s. 3(2): A suit under this section shall not relate to any sitting of a person as a senator or as a member of the House of Representatives at a time earlier than 12 months before the day on which the suit is instituted.
9. ibid., s. 3(3).
10. ibid., s. 5.
11. Evans, cited fn. 4, at p. 473.
12. Australia, Royal Commission on Australian Government Administration: *Appendix, Volume One*, Parl. Paper 186/1976, p. 191 at p. 209.
13. Western Australia, Report of the Law Reform Committee, *Disqualification for Membership of Parliament: Offices of Profit Under the Crown and Government Contracts* (Project No. 14), 1971.
14. ibid., para. 38.
15. *R* v. *Governor of South Australia* (1907) 4 CLR 1497.
16. Senate, *Hansard*, 4 April 1974, p. 681 ff.
17. See Campbell's paper in Coombs, *Appendix, Volume One*, cited fn. 12, pp. 205-6; Evans, cited fn. 4, p. 471; P.H. Lane, *The Australian Federal System*, 2nd edn, The Law Book Company Limited, Sydney, 1979 at p. 50; P. Hanks, *Australian Constitutional Law*, 2nd edn, Butterworths, Sydney, 1980, at pp. 25-6; P. Hanks, 'Parliamentarians and the Electorate'; in G. Evans (ed.), *Labor and the Constitution*, Heinemann, Melbourne, 1977 pp. 193-4; G. Sawer, *Federation Under Strain*, MUP, Melbourne 1977, pp. 35-6.
18. ibid., p. 205.
19. Coombs, *Appendix, Volume One*, cited fn. 12, pp. 206-7.
20. ibid., p. 209.
21. In the 1st edition (1974), at p. 61. This statement was not repeated in the 2nd edition 1977.
22. (1884) 12 QBD 271 at 281-2.
23. Coombs, *Appendix, Volume One*, cited fn. 12, p. 209.