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Office of profit under the Crown

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Executive summary

- Section 44(iv) of the Constitution provides that a person is incapable of being chosen as a Member of Parliament if he or she holds an ‘office of profit under the Crown’. This is also a ground for disqualification from office for existing members and senators under section 45. There has been considerable uncertainty about what is meant by holding an office of profit under the Crown.
- First the person must hold an ‘office’. This is a position to which duties attach of a work-like nature. It is usually, but not always the case, that the office continues to exist independently of the person who holds it. However, a person on the ‘unattached’ list of the public service still holds an office.
- Second, it must be an ‘office of profit’. This means that some form of ‘profit’ or remuneration must attach to the office, regardless of whether or not that profit is transferred to the office-holder. Reimbursement of actual expenses does not amount to ‘profit’, but a public servant who is on leave without pay or an office-holder who declines to accept a salary or allowances still holds an office of profit. The source of the profit does not matter. Even if it comes from fees paid by members of the public or other private sources, as long as the profit is attached to the office, that is sufficient.
- Third, the office of profit must be ‘under the Crown’. It is under the Crown if the office-holder is appointed at the will of the executive government. In such a case it does not matter whether the executive government also has the power to dismiss the office-holder, control the profit attached to the office, or direct or supervise the performance of functions by the office-holder. If, however, the office is not one appointed at the will of the executive government, but the executive government maintains effective control over removal from the office or its remuneration, then it may also be ‘under the Crown’. Public servants hold offices ‘under the Crown’. Offices to which a person is appointed by a House of Parliament are not held ‘under the Crown’. There is uncertainty as to whether the offices of staff of members of Parliament, certain statutory offices and the offices of employees of government business enterprises are ‘under the Crown’.
- An office is ‘under the Crown’ if it is under the Crown in right of the Commonwealth or the Crown in right of a state or territory. Hence a person who holds the office of a state public servant is also disqualified from being chosen as a member of the Commonwealth Parliament.

- There is also uncertainty about when a person ‘holds’ an office. Does this occur upon acceptance of the office, or upon steps being taken to formalise the appointment, such as approval by the Executive Council or the issue of letters patent, or only once the person commences to fulfil the functions of the office? This was the subject of debate during the 1974 Gair affair and has not yet been resolved.
- Ministers hold offices of profit under the Crown, but are exempt from the application of section 44(iv). Parliamentary secretaries also avoid disqualification by being formally appointed as ministers administering a department.
- Senators-elect will be disqualified if they take up an office of profit under the Crown after their valid election but before their term commences.
- While there is no constitutional prohibition upon a member or senator in the Commonwealth Parliament also holding the office of a member of a State Parliament, there is legislation that prohibits it.
- Members of the reserve defence forces who are not employed full-time are exempt from disqualification under section 44(iv). There is doubt, however, about reservists who are on full-time duty and members of Parliament who are on active service during a war.
- While there was previously doubt about whether a judicial appointment was ‘under the Crown’, it is now clear that as long as a judge is appointed at the will of the executive (rather than through a process controlled by an independent body), then the holder is disqualified from being chosen as a member of Parliament. In any case, the holder of a judicial office could not simultaneously hold office as a member of Parliament as this would breach the separation of powers or the doctrine of incompatibility derived from Chapter III of the *Constitution*.
- Ambassadors clearly hold offices of profit under the Crown. As members of Parliament are sometimes appointed as ambassadors, there is a timing question about when the office is first ‘held’, as this vacates the seat of the member.
- Whether a local councillor holds an office of profit under the Crown has long been contested, given that the office is an elected one. In *Re Lambie*, the Court applied a test of whether the executive has effective control over the continued holding of the office or continued profiting from it. While the Tasmanian local government legislation did not evince such a degree of effective control, it remains possible that the office of local councillor in another jurisdiction could be an office of profit under the Crown. It will depend upon the relevant legislation in each jurisdiction concerning removal from office and remuneration.
- Persons who hold offices in universities are employed by a body corporate that is given the title of ‘university’ by statute. They are therefore unlikely to hold offices of profit under the Crown unless the university represents the Crown or is otherwise sufficiently controlled by the Crown to be regarded as part of the executive government. So far this has not been found to be the case.
- Receiving social security or superannuation benefits does not give rise to a disqualification under section 44(iv) for receipt of a pension. The disqualification is directed only at pensions payable during the pleasure of the Crown. Such discretionary pensions were granted a long time ago to people such as war heroes, but are now no longer relevant.
- There remain difficulties concerning identifying the timing of when an office of profit is held, when a person is ‘chosen’ and when an election period ends. This is relevant not only to the vacation of seats, but also to whether Senate vacancies are to be filled by a special count or as a casual vacancy.

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Introduction

Section 44(iv) of the *Constitution* provides:

Any person who-

....

(iv) Holds any office of profit under the Crown, or any pension payable during the pleasure of the Crown out of any of the revenues of the Commonwealth:

....

shall be incapable of being chosen or of sitting as a senator or a member of the House of Representatives.

But sub-section iv. does not apply to the office of any of the Queen's Ministers of State for the Commonwealth, or of any of the Queen's Ministers for a State, or to the receipt of pay, half-pay, or a pension, by any person as an officer or a member of the Queen's navy or army, or to the receipt of pay as an officer or member of the naval or military forces of the Commonwealth by any person whose services are not wholly employed by the Commonwealth.

Section 45 adds that if a senator or member of the House of Representatives becomes subject to any of the disabilities mentioned in section 44, 'his place shall there upon become vacant'.

This paper addresses the interpretation and application of section 44(iv) of the Constitution in light of its history, its application in both Australia and the United Kingdom (from where section 44(iv) is derived) and recent developments in Australian jurisprudence on section 44. Occasional comparative reference is also made to India and Canada as they are federations with similar disqualification provisions.

In particular, this paper looks at the different rationales for such a disqualification and how they have affected the interpretation of section 44(iv). It breaks down the disqualification, analysing what is meant by an 'office', when it is 'of profit', when it is 'under the Crown', which 'Crown' is involved and when an office is 'held'.

The paper then considers the position in relation to particular categories of office holders, including ministers and parliamentary secretaries, senators-elect, members who hold offices in both Commonwealth and state parliaments, members of the armed services, judges, ambassadors, local councillors and employees of universities. It also considers the disqualification in relation to pension-holders. It concludes with consideration of timing issues and the effect of court findings in relation to special counts to fill a seat after a failed election.

Statutory origins

Section 44(iv) finds its origins in a number of statutes enacted in the United Kingdom. The first is the *Act of Settlement 1701*,¹ section 6 of which provided that no person who had an office or place of profit under the King, or received a pension from the Crown, should be capable of serving as a member of the House of Commons. This would have excluded all ministers from the House of Commons, shifting the seat of government to the House of Lords. There were second thoughts about the appropriateness of this course and section 6 was repealed by the *Succession to the Crown Act 1705*, with new sections substituted to permit members to be re-elected to the House after they accepted ministerial office. This section was re-enacted in the *Succession to the Crown Act 1707*, which continued to apply the disqualification in relation to offices of profit under the Crown for 250 years² in the United Kingdom until it was replaced by the *House of Commons Disqualification Act 1957* (UK), which was later re-enacted as the *House of Commons Disqualification Act 1975* (UK).

At the time the *Commonwealth Constitution* was drafted and enacted, the prevailing UK statute was the *Succession to the Crown Act 1707*.³ Section 24 of it provided:

No person who shall have in his own name or in the name of any person or persons in trust for him or his benefit any new office or place of profit whatsoever under the crown which at any time since [25 October 1705] have been created or erected, or hereafter shall be created or erected... nor any person having any pension from the crown during pleasure shall be capable of being elected or of sitting or voting as a member of the House of Commons in any Parliament which shall be hereafter summoned and holden.⁴

In addition, section 25 of that Act provided that a member of the House of Commons who accepted ‘any office of profit from the crown’ had his election declared void and a new writ issued for an election in his seat. It also provided that he was capable of being re-elected to that seat while holding that office. This provision was intended to deal with members who were appointed as ministers, by requiring that their seat be vacated and they be re-elected to signify that their constituents supported their holding of a ministry. This practice was altered in the United Kingdom in 1919⁵ and finally terminated in 1926.⁶

The contrast between offices of profit under the Crown and offices of profit from the Crown, arising as a result of these contrasting sections, has given rise to confusion. Offices from the Crown were taken to be those made directly by the monarch, not through ministers or other officials.⁷ They were later confined to ministerial offices and certain offices in the royal household. Offices under the Crown encompassed ‘all non-political executive offices and also minor ministerial

1. 12 & 13 Wm III, c 2.

2. Note also that disqualifying offices were expanded by the Place Act 1741 and Burke’s Act 1782 as well as numerous other Acts relating to specific offices.

3. 6 Anne, c 41, which followed an earlier version in 4&5 Anne, c 20. Note that prior to the enactment of this law, there had been a parliamentary practice of disqualification, particularly during the reign of James I. The interpretation of the statutory provision is influenced by the prior parliamentary decisions. See further: UK, Report from the Select Committee on Offices or Places of Profit Under the Crown, HC 120, 1941, p. viii.

4. Emphasis added. In addition to ‘new offices’ persons were also disqualified under s 24 if they held the office of commissioner or sub-commissioner of prizes, comptroller of the accounts of the army, commissioner of transports or of the sick and wounded, agent for any regiment, commissioner for wine licences, governor or deputy governor of any of the plantations or commissioner of the navy in any of the out ports. Section 27, however, provided an exemption for members of the House of Commons who were officers in the army or navy or received any commission in the army or navy.

5. Re-election of Ministers Act 1919 (UK)—it made re-election unnecessary if the person was appointed a minister within 9 months of the last general election.

6. Re-election of Ministers Act 1926 (UK).

7. This was clarified in 41 Geo III, c 52, an office accepted ‘immediately and directly from the Crown’.

offices’.⁸ This distinction therefore resulted in a permanent civil service that was politically neutral and the system of responsible government under which government is formed from the lower House and ministers sit in and are responsible to the Parliament.

Section 28 of the *Succession to the Crown Act 1707* also imposed a prohibitive penalty on any person sitting while disqualified under the Act. It provided:

And if any person disabled or declared incapable by this Act to be elected shall after the dissolution or determination of this present Parliament presume to sit or vote as a member of the House of Commons in any Parliament to be hereafter summoned such person so sitting or voting shall forfeit the sum of five hundred pounds to be recovered by such person as shall sue for the same in England...

This provision appears to be the original source of the ‘common informer’ provision in section 46 of the *Commonwealth Constitution*, which has now been substituted by the *Common Informers (Parliamentary Disqualifications) Act 1975* (Cth).

It should also be noted that in the United Kingdom there is no capacity for a member of the House of Commons to resign or retire. He or she must either fail to be elected at an election or become deliberately disqualified in order to vacate his or her seat. This is commonly achieved by the member requesting and being granted appointment to the office of ‘steward or bailiff of Her Majesty’s three Chiltern Hundreds of Stoke, Desborough and Burnham’ or ‘steward of the Manor of Northstead’. These offices are now nominal in nature and any ‘profit’ attached to them is notional only, having long ceased to be paid.⁹ Nonetheless, these offices have been preserved as ‘offices of profit under the Crown’ in order to permit members to resign. To do so, a member applies to the Chancellor of the Exchequer, who grants the office, giving rise to the vacation of the member’s seat. The former-member continues to hold this office until such time as the next person is appointed to the office or until the former-member seeks to stand for election again and is granted a release from the office, whichever occurs first.¹⁰

Accordingly, most of the persons who are formally disqualified for holding an ‘office of profit’ in the United Kingdom are those who wish to retire from Parliament by taking up this nominal office. Others retire by taking up a genuine office of profit under the Crown, such as Chair of the Civil Aviation Authority¹¹ or Deputy Chairman of the British Railways Board.¹² Many others have taken up judicial appointments, which also vacate the office of a member of the House of Commons.¹³

8. UK, *Report from the Select Committee on Offices or Places of Profit Under the Crown*, HC 120, 1941, p xiii. The distinction between ‘old’ and ‘new’ offices was, by further legislation, converted to the distinction between political and non-political offices.

9. *Ibid.*, p xx. While all other ‘manors’ were abolished in 1922, these two were expressly preserved as offices of profit under the Crown.

10. Malcolm Jack, *Erskine May’s Treatise on the Law, Privileges, Proceedings and Usage of Parliament* (Lexis Nexis, 24th ed, 2011) p. 40.

11. Major John Boyd-Carpenter retired from Parliament by taking up this office in 1971.

12. Richard Marsh retired from Parliament by taking up this office in 1971.

13. From 1900 to 2011, 103 Members of the House of Commons vacated their seats to take up judicial office. See list of ‘Members of Parliament Disqualified since 1900’: <https://www.parliament.uk/site-information/foi/foi-and-eir/commons-foi-disclosures/members-of-the-house-of-commons-and-members-staff/details-about-disqualified-members/>.

Application in the United Kingdom

The distinction between old and new offices and the application of sections 24 and 25 of the *Succession to the Crown Act 1707*, led to frequent errors and the need to legislate to correct them. For example, the office of the President of the Board of Trade was re-made in 1909, but it was not until 1932 that it was realised that all Presidents of the Board of Trade since 1909 had been disqualified from the House of Commons and potentially incurred significant penalties for sitting and voting in the House while disqualified.

In the United Kingdom, unlike Australia, legislation can be enacted to correct such problems. The *President of the Board of Trade Act 1932* (UK) was accordingly passed to remove the disqualification with retrospective effect back to 1909 and indemnify the members affected from their liability to pay penalties to any common informer.¹⁴ Similarly, the *Under-Secretaries of State Act 1929* (UK) dealt with the invalid appointment of Under-Secretaries of State in excess of the maximum number. Its preamble noted that as it was not possible to ascertain which of seven Under-Secretaries last accepted the office, it was possible that all or one might have been disqualified and subject to penalties. Accordingly all were indemnified by the Act and their seats were declared not to have been vacated by reason of taking up the office.

The need during World War II to appoint members to particular war-related bodies led to uncertainty as to the application of the law concerning disqualification for the holding of an office of profit under the Crown. This resulted in a Select Committee being formed on the subject in 1941. It noted that the law was contained in a mixture of statute and parliamentary practice, which had not been compiled anywhere and could only be sought in the original sources. It recommended the consolidation of the law in one statute, which specified those offices that could be validly held by members of Parliament and disqualified members from holding all other offices of profit under the Crown. However, legislation was not enacted, leading to a number of disqualifications in the mid-1940s and 1950s.

One of the first was Arthur Jenkins, who while already a member of the House of Commons became chairman of an appeals board in relation to employment at the Royal Ordnance Factory. He was entitled to a small payment per sitting, but did not accept it. This was enough to cause his seat to be vacated. The *Arthur Jenkins Indemnity Act 1941* (UK) was passed to indemnify him from any liability to penalties and to restore him to his seat in the House of Commons.

In 1945, John Forman and Jean Mann were found to be disqualified for being members of a Tribunal established by the *Rent of Furnished Houses Control (Scotland) Act 1943* (UK), in relation to which a 'negligible amount' of remuneration was paid.¹⁵ As their disqualification occurred by inadvertence and they had acted in good faith, legislation was enacted to indemnify them from all penalties and to deem them not to have been incapable of election or sitting and voting by reason of their holding an office of member of the Tribunal.¹⁶ This was influenced by the fact that the general election had occurred only a few weeks earlier and that requiring by-elections would be 'disturbing to the constituency and costly to the candidates of all parties... with possibly the same result'.¹⁷ This was the first occasion upon which legislation restored the seat of a person who was disqualified at the time of election, as opposed to a member who was disqualified at a time after his or her valid election.¹⁸ Three more members, James Harrison, Stanley Awbery and Freda

14. UK, Report from the Select Committee on Offices or Places of Profit Under the Crown, HC 120, 1941, p 165, Appendix 3, Memorandum by Sir William Holdsworth

15. UK, Report from the Select Committee on Elections, 23 August 1945, HC 3.

16. Coatbridge and Springburn Election (Validation) Act 1945 (UK).

17. UK, Report from the Select Committee on Elections, 23 August 1945, HC 3, p. 5.

18. UK, *Report from the Select Committee on Elections*, 23 August 1945, HC 3, Appendix 1, Memorandum by the Clerk of the House of Commons, p. 17.

Corbet were also found to be disqualified shortly afterwards for being members of various appeals tribunals,¹⁹ and again legislation was enacted to indemnify them and restore their seats.

In 1949 John Hynd and John Robertson were disqualified for holding offices on the General Medical Council,²⁰ but the *House of Commons (Indemnification of Certain Members) Act 1949* (UK) was enacted, indemnifying them and deeming them not to have been incapable of sitting or voting.

In 1954-55 there was another spate of disqualifications. Niall Macpherson started it in 1954, with his office of profit on the Commonwealth Dried Fruits Control Board, followed by John George and Sir Roland Jennings in 1955.²¹ They were followed by Christopher Holland-Martin, who was a local director of the Bank of New Zealand,²² and Charles Howell who was a member of certain national insurance panels.²³ The last in 1955 was Charles Beattie.

All, apart from Beattie, were indemnified and had their seats deemed not to have been vacated.²⁴ By the time Beattie's disqualification arose for determination, the Select Committee decided to distinguish his case from that of the others because Beattie had come to be elected due to the disqualification of his opponent²⁵ and his nomination date was after the House had recently considered three disqualification cases and had introduced validating legislation. The Select Committee concluded that the 'question of disqualification must have been a prominent issue' at the by-election and that it was 'well within public knowledge' that the performance of a variety of offices would lead to disqualification.²⁶ While accepting that Beattie acted in good faith, and therefore should be indemnified from any penalties, the Committee concluded that he should have more carefully examined his own appointments before nomination. It therefore recommended, and the House agreed, that Beattie be indemnified but that his election should not be validated.²⁷

The constant stream of disqualifications and legislative validation and indemnification led to the relevant provisions in the *Succession to the Crown Act 1707* being replaced by the *House of Commons Disqualification Act 1957* (UK).²⁸ This Act described or listed the offices which disqualify a person from being a member of the House of Commons and provided that the scheduled disqualifying offices could be altered by order in council. It preserved the Chiltern Hundreds and the Manor of Northstead as a means of disqualification to give effect to resignations.²⁹ While the

19. UK, *First Report from the Select Committee on Elections*, 11 February 1946, HC 71, p. 5. Note, however, the exculpation of Jack Jones who had resigned the office of profit after his nomination but before the polling day, which was regarded by the Select Committee at p 5 as sufficient to avoid disqualification. See the analysis at p. 9 by the Solicitor-General, who considered that the nomination date was the date of election where there was only one candidate, but the polling day is the relevant date where the election is contested as that is the day of decision when the votes are cast. Compare the different approach by the Court of Disputed Returns in *Sykes v Cleary* (1992) 176 CLR 77.

20. UK, *Parliamentary Debates*, House of Commons, Vol 467, 12 July 1949, col 285-301.

21. UK, *Report from the Select Committee on Elections*, 12 July 1955, HC 35.

22. *Ibid.*, HC 50.

23. UK, *Report from the Select Committee on Elections*, 7 November 1955, HC 117.

24. *Validation of Elections Act 1955* (UK) (re John George and Sir Roland Jennings); *Validation of Elections (No 2) Act 1955* (UK) (re Christopher Holland-Martin); *Validation of Elections Act (No 3) 1955* (UK) (re Charles Howell).

25. His opponent, Thomas Mitchell, had been convicted in Northern Ireland of treason felony and was elected while serving time in prison. Mitchell's seat was declared vacant because he was disqualified. A by-election was held at which Mitchell increased his majority. This was challenged in a court which held that the voters knew Mitchell was disqualified and threw away their votes. His only opponent, Beattie, was held to have been elected and took up his seat on 25 October 1955. In November, the Attorney-General became aware of Beattie's membership of various appeals tribunal and the matter was referred to a Select Committee, which in December found that Beattie was also disqualified.

26. UK, *Second Report of the Select Committee on Elections*, 15 December 1955, HC 145, p. iv.

27. *Charles Beattie Indemnity Act 1956* (UK).

28. See further: S A de Smith, 'House of Commons Disqualification Act, 1957' (1957) 20(5), *Modern Law Review*, p. 492.

29. These offices continue to be preserved as a disqualification by the *House of Commons Disqualification Act 1975* (UK), section 4.

Act still permitted actions by common informers, it removed the penalty of £500 per day, making such an action far less likely.

The Act also gave the House the power to direct that disqualification does not apply if the member had resigned the relevant office.³⁰ This obviated the need for the future enactment of validation and indemnification Acts. For example, on 3 April 1974 the House of Commons exercised this power to waive the disqualification of Michael Winstanley who held the disqualifying post of sessional medical officer at a Royal Ordnance Factory. After resigning from that office, the House directed, in accordance with section 6 of the *House of Commons Disqualification Act 1957*, that his disqualification be disregarded.³¹ He continued to sit as a member and was later made a life peer.

The 1957 Act was re-enacted as the *House of Commons (Disqualification) Act 1975*, with alterations made in relation to the Northern Ireland Assembly. Those disqualified include persons employed full-time and part-time in the Civil Service, active members of the regular armed forces, members of police forces, members of other legislatures outside of the Commonwealth and the Republic of Ireland, and holders of judicial office. The disqualification of clergy³² (some of whom were regarded as holding offices of profit under the Crown because of their stipend from the established churches)³³ was abolished by the *House of Commons (Removal of Clergy Disqualification) Act 2001* (UK).

Application in Australia

Disqualification in the Australian Colonies and States

When the Westminster Parliament set out the rules for the qualification and disqualification of members of Australian colonial legislatures in the *Australian Constitutions Act (No 1) 1842* (UK), it did not include disqualification for holding an office of profit under the Crown. In New South Wales, this disqualification was imported in its 1855 Constitution as a result of a long running dispute concerning whether appointed government officers (such as the Surveyor-General) could stand for election and if elected vote in the legislature against Government policies.³⁴ A Bill passed by the NSW Legislative Council to disqualify persons holding the offices listed in the Schedules to the 1842 Act was refused royal assent, because it would have prevented officers such as the Attorney-General and the Treasurer from being elected to the legislature.

The NSW *Constitution Act 1855*, however, reverted to the more traditional formulation of disqualifying persons who held an office of profit under the Crown, with the exception of official members of the government, being the Colonial Secretary, the Colonial Treasurer, Auditor-General, Attorney-General, Solicitor-General and any one of five other offices proclaimed by the Governor. In so doing, it picked up terminology from the *Succession to the Crown Act 1707*, which was also later used in s 44(iv) of the Commonwealth Constitution.

30. A similar power exists in the Queensland Parliament, where the disqualifying ground has ceased to have effect, the breach was trivial in nature and happened with the knowledge or consent of the person or was accidental or due to inadvertence: *Parliament of Queensland Act 2001* (Qld), subsection 73(3). See also: *Constitution Act 1902* (NSW), section 13B; *Constitution Act 1975* (Vic), section 61A; and *Constitution Acts Amendment Act 1899* (WA), subsection 39(2).

31. UK, *Parliamentary Debates*, House of Commons, Vol 871, 3 April 1974, cols 1274-82.

32. See, eg, *Re MacManaway* [1951] AC 161, in which a priest of the Church of Ireland was held to be disqualified as a member of the House of Commons.

33. See, eg, the *House of Commons (Clergy Disqualification) Act 1801* (UK). Note, however, that Roman Catholic clergy were also formally disqualified in 1829 when Catholics were enfranchised, to place them in an equivalent position to clergy from the established churches. This was the case even though they did not hold offices of profit under the Crown.

34. The history is discussed in more detail in: Anne Twomey, *The Constitution of New South Wales* (Federation Press, 2004), pp. 432-3.

All states³⁵ and the Commonwealth Constitution now have some kind of disqualification for the holding of an office of profit under the Crown, although disqualification at the state level has proved to be more limited and flexible. Like the United Kingdom, most states can alter their disqualification provisions by ordinary legislation³⁶ and can legislate to provide general exemptions in relation to particular offices³⁷ as well as specific exemptions from disqualification when a member has become disqualified by inadvertence. For example, Western Australian legislation to exempt a member of the Legislative Assembly from disqualification for holding an office of profit under the Crown and to prevent the success of a common informer action against the member, was upheld by the High Court in *Clydesdale v Hughes*.³⁸

In Tasmania, the *Constitution (Doubts Removal) Act 1999* (Tas) exempted John White from disqualification as a member of the Legislative Council for taking up the office of Chair of the State Committee of the Centenary of Federation. In Queensland legislation was enacted to protect Eric Deeral and John Greenwood from claims that they held offices of profit under the Crown for receiving fees for attendance at meetings of a local council advisory committee and for acting as a barrister on behalf of the Crown, respectively.³⁹

In New South Wales, a House also has the capacity to waive disqualification if it is satisfied that the member has ceased to hold that office.⁴⁰ Prior to the enactment of this capacity, members sometimes found themselves disqualified through lack of knowledge or confusion as to what amounted to an office of profit under the Crown. For example, in 1870, Ezekiel Baker was disqualified for accepting the office of a royal commissioner⁴¹ and in 1879 Edward Combes was disqualified for accepting the office of Executive Commissioner of NSW at the Universal Exhibition in Paris.⁴²

Disqualification from the Commonwealth Parliament

At the Commonwealth level a blind eye was sometimes turned towards disqualification. For example, in 1910 the Secretary of the Attorney-General's Department, Robert Garran, was asked about the situation of Mr W H L Smith, who had been an officer in the Tasmanian Railway Service at the time of nomination and up to polling day, but was on leave without pay during that period. Garran's response was that the question of whether he was disqualified 'can only arise now upon a petition to the Court of Disputed Returns' and that no useful purpose could be served by advising on it.⁴³ Garran also took the view that returning officers should not reject nominations on the ground of ineligibility unless they knew without any doubt that the person was ineligible. He noted that a returning officer 'is not equipped with the machinery for making enquiries' into

35. Constitution Act 1902 (NSW), section 13B; Parliament of Queensland Act 2001 (Qld), s 72(1)(f); Constitution Act 1934 (SA), section 45; Constitution Act 1934 (Tas), section 32; Constitution Act 1975 (Vic), section 49; and Constitution Acts Amendment Act 1899 (WA), sections 34-42

36. See, eg, the exemption from the application of manner and form constraints in section 7A(6)(c) of the *Constitution Act 1902* (NSW) for provisions 'with respect to the capacity of a person who holds or accepts an office of profit under the Crown... to be elected or to sit and vote as a Member of either House of Parliament'.

37. See, eg, Public Works Committee Act 1914 (Tas), section 35; Museums Act 1983 (Vic), section 11A; Libraries Act 1988 (Vic), section 24; Animal Research Act 1985 (NSW), sch 1; State Records Act 1998 (NSW), sch 2; Aboriginal Lands Parliamentary Standing Committee Act 2003 (SA), section 27.

38. *Clydesdale v Hughes* (1934) 51 CLR 518.

39. *Constitution Act and Another Act Amendment Act 1977* (Qld). See also: 'Queensland' (1977) 23(1) *Australian Journal of Politics and History* 88, p. 91. Note that accepting fees as a barrister for representing the Crown is more likely to trigger disqualification as a contract with the public service or the acceptance of fees under section 45(iii) of the Commonwealth Constitution.

40. *Constitution Act 1902* (NSW), section 13B(2).

41. NSW, *Votes and Proceedings*, Legislative Assembly, 3 November 1870, p. 1211.

42. NSW, *Votes and Proceedings*, Legislative Assembly, 11 February 1879, p. 11.

43. Robert Garran, 'House of Representatives Elections' 5 May 1910: P Brazil (ed), *Opinions of Attorneys-General of the Commonwealth of Australia 1901-1914*, Vol 1, (AGPS, 1981), p. 485.

eligibility and that a 'high degree of probability' as to ineligibility would not be sufficient to reject a nomination.⁴⁴

While the office of profit disqualification arose occasionally for advice by the Crown Law Officers, particularly during war, it first came to national prominence during the politically fraught period of the Whitlam Government. It initially arose in 1974 with the appointment of Senator Vince Gair as an Ambassador and debate about when this happened and whether he had vacated his office as senator by accepting the appointment.⁴⁵ A legal challenge was commenced but it was abandoned after the 1974 double dissolution of Parliament was called.

The office of profit disqualification again rose to prominence due to the controversial appointment of Albert Field to fill a casual Senate vacancy in 1975. Field had resigned from his office in the Education Department of Queensland before his appointment, but it was argued by the Labor Party that he continued to hold an office of profit at the time of his appointment because the statutory three weeks' notice for a resignation had not yet run. The Labor Party initiated proceedings to challenge his appointment, and Field took leave from the Senate in October 1975.⁴⁶ His term ended with the 1975 double dissolution that resulted from the dismissal of the Whitlam Government, so the litigation never proceeded.

In 1992, Phil Cleary was elected in a by-election, as an independent, to fill the seat vacated by the former Labor leader, Bob Hawke. Cleary was a Victorian teacher who was on leave without pay at the time of his election. He resigned after polling day but before the declaration of the poll. The Court of Disputed Returns held that he had not been validly elected as he had held an office of profit under the Crown at the date of his nomination.⁴⁷ Cleary won back the seat in the ensuing by-election.

In 1996, Jackie Kelly was found by the Court of Disputed Returns to have been invalidly elected for the division of Lindsay because she was an officer of the Royal Australian Air Force at the time of nomination.⁴⁸ She had transferred to the reserve forces before polling day, but this was only given effect after nomination date⁴⁹ and was therefore too late to prevent her disqualification. The exception in section 44 for any person in 'receipt of pay as an officer or member of the naval or military forces of the Commonwealth by any person whose services are not wholly employed by the Commonwealth' presumably did not apply on the ground that her services were 'wholly employed' at the relevant time.⁵⁰ As her counsel conceded her disqualification, the application of the exception was not addressed. It was noted in *Odgers* that previously members of the armed forces had transferred to the reserves before nominating, but it was queried whether or not this was necessary.⁵¹

44. Robert Garran, 'Public Servant – Whether State public servant may conduct candidature for and be nominated for Commonwealth Parliament', 16 April 1913, in P Brazil (ed), *Opinions of Attorneys-General of the Commonwealth of Australia 1901-1914*, Vol 1, (AGPS, 1981), pp. 649-50.

45. See the discussion below in relation to 'holding' and office of profit and in relation to Ambassadors and the timing of appointments.

46. Commonwealth, *Parliamentary Debates*, Senate, 1 October 1975, p. 823 and 5 November 1975, p. 1753. See also: P J Hanks, 'Parliamentarians and the Electorate', in Gareth Evans (ed), *Labor and the Constitution 1972-1975* (Heinemann, Melbourne, 1977), p. 199.

47. *Sykes v Cleary* (1992) 176 CLR 77.

48. *Free v Kelly* (1996) 185 CLR 296.

49. Commonwealth, House of Representatives Standing Committee on Legal and Constitutional Affairs, 'Aspects of Section 44 of the Australian Constitution – Subsections 44(i) and (iv)', 1997: [3.114].

50. Note that as the reference to 'military' in s 51(vi) of the Constitution has been regarded as accommodating an air force, it is unlikely that 'naval or military forces' in section 44 would be regarded as excluding an air force. This issue was not addressed by the Court.

51. Rosemary Laing (ed), *Odgers' Australian Senate Practice* (Dept of Senate, 14th ed, 2016), p. 170. See the discussion below.

The year 1996 also saw the more difficult case of Jeannie Ferris. She had been elected as a senator for South Australia, but during the period before commencing her term as a senator, she was employed by Senator Minchin. There was disagreement as to whether she was employed by him in his capacity as a Member of Parliament or in his capacity as a Parliamentary Secretary. If the latter, it was an office of profit under the Crown, because a Parliamentary Secretary holds an executive office, causing Ferris's employment to be 'under the Crown'.⁵² There was also a dispute as to whether section 44(iv) even applied. On the one hand, it was argued that she did not hold an office of profit under the Crown when she was 'chosen' and as she had not yet taken up her seat in the Senate, she could not be disqualified for 'sitting'.⁵³ On the other hand, it was argued that she had taken up the office of profit after polling day, but before the return of the writs, so that the election period was ongoing at that time and she was incapable of being 'chosen'. Given the various doubts about whether she could validly hold the office of senator, some kind of resolution was needed.

Section 376 of the *Commonwealth Electoral Act* allowed the Senate to refer to the Court of Disputed Returns any question respecting the qualifications of a senator or a vacancy. There was some doubt as to whether a referral could be made before Ferris's term as a senator had commenced. The Senate eventually voted that the referral would take effect upon 7 July (after the new senators had taken up their offices), but only if Ferris was a member of the Senate at that time.⁵⁴ This was done in anticipation of her resignation. Ferris did indeed 'resign' and after the Senate term commenced, she was appointed to fill her own casual vacancy.

The legal effectiveness of this manoeuvre is doubtful.⁵⁵ If she had not been validly elected, because her disqualification occurred during the election period, then she could not 'resign' a seat to which she had not been elected and a special recount should have instead been ordered. There would not, therefore, have been a casual vacancy to fill and section 15 of the Constitution could therefore not have operated to fill it.⁵⁶ If, however, the election had been 'completed' before the return of the writs and before she had accepted the office of profit under the Crown, then either her seat would not have become vacant if section 44(iv) did not operate between being 'chosen' and 'sitting' or she would have become disqualified, but it would have given rise instead to a casual vacancy, which she could fill.⁵⁷ In the face of this legal uncertainty, notice was given of a motion to refer the matter to the Court of Disputed Returns, but it was withdrawn, 'apparently for lack of support'.⁵⁸ Instead it was left for a common informer to bring a proceeding to test the legal position,⁵⁹ but this did not occur, leaving Ferris in place.

In 2017, Hollie Hughes was held to be incapable of being chosen in a special count to fill the seat from which Fiona Nash had been held disqualified. This was because Hughes had accepted an office of profit under the Crown, being a part-time appointment to the Administrative Appeals

52. See the opinion of the Clerk, Harry Evans, 27 May 1996: Commonwealth, *Parliamentary Debates*, Senate, 29 May 1996, pp. 1253-4.

53. See the discussion in relation to senators-elect below.

54. Commonwealth, *Parliamentary Debates*, Senate, 29 May 1996, p. 1257.

55. Note the doubts raised before a parliamentary committee: Commonwealth, House of Representatives Standing Committee on Legal and Constitutional Affairs, 'Aspects of Section 44 of the Australian Constitution – Subsections 44(i) and (iv)', 1997: [3.9].

56. *Re Kakoschke-Moore* [2018] HCA 10, [44] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ).

57. Note that there was some doubt as to whether a casual vacancy could occur before a senator's term had started. However, the death of a senator-elect during such a period had been treated in the past as giving rise to a casual vacancy: Harry Evans, Opinion, 27 May 1996: Commonwealth, *Parliamentary Debates*, Senate, 29 May 1996, p. 1254.

58. Rosemary Laing (ed), *Odgers' Australian Senate Practice* (Dept of Senate, 14th ed, 2016), p. 170.

59. Commonwealth, *Parliamentary Debates*, Senate, 12 September 1996, p. 3355. Note that this avenue has since been cut off by the narrow interpretation of the application of the *Common Informers (Parliamentary Disqualifications) Act 1975* (Cth) in *Alley v Gillespie* [2018] HCA 11.

Tribunal, after the return of the writs but during what became an elongated election period.⁶⁰ The election period extended beyond the return of the writs because the return of Nash to fill the seat had been invalid due to her disqualification on other grounds.⁶¹ The fact that Hughes resigned from her office of profit before the special count was held was not to be sufficient to prevent her disqualification.

In 2018 the Court of Disputed Returns held that Steven Martin was not disqualified from being chosen in a special count to fill the seat from which Jacquie Lambie had been held disqualified. Martin was mayor of Devonport and a local councillor in Tasmania at the time of nomination. The Court held that this did not amount to holding an office of profit under the Crown.⁶²

The rationales for disqualification

One of the problems with disqualification for an ‘office of profit under the Crown’ is that it is based upon a number of different rationales. Prior to the enactment of the *Succession to the Crown Act 1701*, the House of Commons of the Westminster Parliament, through the exercise of its privileges, disqualified office-holders for a number of reasons. They included the following:

- that the office, such as the office of a judge or Attorney-General,⁶³ was involved in advising the House of Lords, and it was therefore contrary to the privileges of the House of Commons for such a person also to be its member
- that the office, such as that of a colonial governor, was permanently based outside of the country, so that the holder could not devote sufficient time to attendance of the House (unlike ambassadors, who were not disqualified, as their office was regarded as temporary) and
- that the office, such as that of sheriff who was the returning officer at elections, required political impartiality.

The House of Commons is described as having gone through a number of different phases in its approach. The first was its ‘privilege’ phase, when its focus was on protecting its privileges and ensuring the attendance of its members. The second was the ‘corruption’ phase, where it sought to counter efforts by the King to win over members to the King’s interest through the distribution of offices of profit. A Bill to disqualify all holders of offices of profit under the Crown from sitting in the Commons was passed in 1694, but was refused royal assent by William III. This was followed by the ‘ministerial responsibility’ phase from 1705, during which the Commons transformed from being a House in opposition to the Crown to a House from which government was formed and to which it was responsible.⁶⁴ Ministers could therefore sit in the House of Commons, but their numbers were restricted.

The House of Commons sought to balance preserving the independence of the House from the influence of the executive against retaining ministers in the House so that they could be made accountable and responsible to the House.⁶⁵ The 1941 Select Committee on Offices or Places of

60. *Re Nash [No 2]* [2017] HCA 52.

61. *Re Canavan; Re Ludlam; Re Waters; Re Roberts [No 2]; Re Joyce; Re Nash; Re Xenophon* [2017] HCA 45.

62. *Re Lambie* [2018] HCA 6.

63. Note that the House of Commons later chose to ignore its prior decisions concerning the disqualification of the Attorney-General.

64. UK, Report from the Select Committee on Offices or Places of Profit Under the Crown, HC 120, 1941, pp 138-145, Appendix 2, Memorandum by Sir Gilbert Campion. See also: Edward Fellowes, Sir Thomas Erskine May’s *Treatise on the Law, Privileges Proceedings and Usage of Parliament* (Butterworths, 16th ed, 1957), pp. 201-2.

65. UK, Report from the Select Committee on Offices or Places of Profit Under the Crown, HC 120, 1941, p. xiv.

Profit Under the Crown, in assessing which types of non-political offices should be the subject of disqualification, observed that:

Provided that such an office is not incompatible with membership of the House, does not substantially interfere with performance of a Member's duties, and is not of such a nature as to increase the influence or control of the executive government, there would seem to be no good reason for the House to exclude holders thereof.⁶⁶

The Committee also noted the countervailing interest that 'electors should be allowed as wide a field as possible from which to select their representatives'.⁶⁷

In *Sykes v Cleary*, the Court of Disputed Returns recognised some of these rationales. Mason CJ, Toohey and McHugh JJ, with whom Brennan, Dawson and Gaudron JJ agreed on the application of section 44(iv), first acknowledged the rationales identified by the 1941 UK Select Committee, as including:

(1) the incompatibility of certain non-ministerial offices under the Crown with membership in the House of Commons (here, membership must be taken to cover questions of a member's relations with, and duties to, his or her constituents); (2) the need to limit the control or influence of the executive government over the House by means of an undue proportion of office-holders being members of the House; and (3) the essential condition of a certain number of Ministers being members of the House for the purpose of ensuring control of the executive by Parliament.⁶⁸

Their Honours went on to explicate these rationales further and give examples of their operation under section 44(iv). They noted that the 'exclusion of public servants from membership of the House contributes to their exclusion from active and public participation in party politics'.⁶⁹ Their Honours also pointed to the 'principal mischief which section 44(iv) and its predecessors were directed at eliminating or reducing, namely, Crown or executive influence over the House'.⁷⁰ In this case, however, the relevant rationale was that of incompatibility. Their Honours developed the incompatibility ground as follows:

There are three factors that give rise to that incompatibility. First, performance by a public servant of his or her public service duties would impair his or her capacity to attend to the duties of a member of the House. Secondly, there is a very considerable risk that a public servant would share the political opinions of the Minister of his or her department and would not bring to bear as a member of the House a free and independent judgment. Thirdly, membership of the House would detract from the performance of the relevant public service duty.⁷¹

Their Honours rejected an argument that the disqualification in section 44(iv) should be confined to those holding senior positions, as this would 'fail to give effect to all the considerations or policies said to underlie the disqualification'.⁷²

Deane J also recognised a number of different rationales for section 44(iv), observing that 'it is undesirable that a person be subjected to the possibly conflicting responsibilities and loyalties and the potential for abuse of power or opportunity which may be involved in, or flow from,

66. UK, Report from the Select Committee on Offices or Places of Profit Under the Crown, HC 120, 1941, p. xx.

67. UK, Report from the Select Committee on Offices or Places of Profit Under the Crown, HC 120, 1941, p. xx.

68. *Sykes v Cleary* (1992) 176 CLR 77, 95 (Mason CJ, Toohey and McHugh JJ, with Brennan J agreeing at 108, Dawson J agreeing at 130, and Gaudron J agreeing at 132).

69. *Ibid.*, 95-6 (Mason CJ, Toohey and McHugh JJ).

70. *Ibid.*, 97 (Mason CJ, Toohey and McHugh JJ).

71. *Ibid.*, 96 (Mason CJ, Toohey and McHugh JJ) (footnotes excluded).

72. *Ibid.*, 96 (Mason CJ, Toohey and McHugh JJ).

concurrent membership of the national Parliament and the holding of an office of profit under the Crown.’⁷³ He also pointed to the ‘need to preserve the freedom and independence of the Parliament and to limit the control or influence of the executive government’.⁷⁴

In *Sykes v Cleary*, the office in question was a school teacher under a different Crown, the Crown in right of Victoria. Clearly, the principal mischief of the Commonwealth executive influencing members of Parliament by conferring on them offices within the Commonwealth executive’s gift would not have been relevant to a teacher employed under the Crown of the State. The appointment of a school teacher does not fall within the gift of the Commonwealth executive. Hence, the Court looked to ‘incompatibility’ of office, noting that a teacher, ‘falls within the categories of public servants whose public service duties are incompatible, on the three grounds mentioned previously, with the duties of a member of the House of Representatives or of a senator’.⁷⁵ Their Honours added in relation to state public servants that the ‘risk of a conflict between their obligations to their State and their duties as members of the House to which they belong is a further incident of the incompatibility of being, at the same time, a state public servant and a member of the Parliament’.⁷⁶

In summary, the various rationales for disqualification for holding an office of profit under the Crown, prior to *Re Lambie*, included:⁷⁷

- the separation of powers—so a judge, even if he or she cannot be directed or dismissed by the executive, cannot simultaneously be a member of Parliament, because this would undermine the separation of powers and the independence of the judiciary
- incompatibility of the duties of offices—a person cannot hold two offices in relation to which their duties or obligations conflict,⁷⁸ such as when a person has a duty to serve the interests of two different groups and those interests are different
- incompatibility of the nature of offices – a person cannot hold two offices, one of which involves the person in participating in partisan politics and the other of which requires independence from partisan politics
- capacity to fulfil the duties of the office—a person cannot adequately fulfil the duties of the office of a member of Parliament if he or she is unable to attend Parliament due to the duties imposed by his or her other office, or the amount of time that must be allocated to it
- undue Crown influence—a member of Parliament should not be beholden to the Crown for remunerative offices or subject to its influence by the offer of such an office
- obligation to comply with government policy—an office-holder who is under an obligation to act upon ministerial instruction and comply with government policy, such as a public servant or member of the defence forces, may not simultaneously be a member of Parliament as this would undermine the member’s independence (except that members of Parliament may be ministers, as the doctrine of responsible government requires ministers to sit in and be responsible to a House of Parliament) and

73. Ibid., 122 (Deane J).

74. Ibid., 122 (Deane J).

75. Ibid., 97 (Mason CJ, Toohey and McHugh JJ).

76. Ibid., 98 (Mason CJ, Toohey and McHugh JJ).

77. See also: Commonwealth, Senate Standing Committee on Constitutional and Legal Affairs, *The Constitutional Qualifications of Members of Parliament*, 1981, [5.9] – [5.10]; Commonwealth, House of Representatives Standing Committee on Legal and Constitutional Affairs, ‘Aspects of Section 44 of the Australian Constitution – Subsections 44(i) and (iv)’, 1997: [3.2]-[3.5].

78. See the discussion of the common law doctrine of incompatibility of office in: *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1, 15 (Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ).

- responsible government—ministers are responsible to Parliament for the actions of departments and public servants under their administration and it would undermine that responsibility if public servants were also Members of the House whose duty it is to hold the minister to account.

In *Re Lambie*, however, a majority of the Court of Disputed Returns, while purporting to uphold and apply *Sykes v Cleary*, appeared to reject the reasoning of the Court in that case concerning incompatibility and to apply a much narrower, single rationale, for the application of section 44(iv) of the Constitution. It confined itself to the need to eliminate or reduce executive influence over members of Parliament. While acknowledging that incompatibility had previously been recognised as a reason for the office of profit ground of disqualification, the Court concluded that to ‘the extent section 44(iv) has the effect of eliminating... a conflict between duties, the operation of the provision has been consequential but serendipitous’.⁷⁹

The majority concluded that section 44(iv) was not designed to eliminate conflicts between the duties of a person as a member of Parliament and the holder of an office of profit, because if it had been so designed, it would not have been confined to offices ‘of profit’ and it would not have exempted State Ministers from its application.⁸⁰ One could just as easily, however, make the opposite argument, that if the provision had been intended only to deal with the influence of the executive government over Parliament, then section 44(iv) would not extend to other Crowns which do not have such influence because the executive government is drawn from a different legislature. Neither the history of the provision’s drafting, its roots in British law, nor its application support the narrow view taken by the Court of Disputed Returns of the rationale for section 44(iv). While such an approach may enhance ‘certainty’, by cutting down the field of the provision’s application, it does not advance any cogency in the reasoning for its application.

What is an ‘office’?

An office is a position, which may be held by a person, to which duties of some kind of employment attach. It usually, but not always, has an existence that extends beyond that of its current holder. In *Re Lambie*, the Court of Disputed Returns described as falling within an ‘office of profit’, a ‘position of a public character constituted under governmental authority to which duties and emoluments are attached’.⁸¹

Simply being paid by the government for services rendered does not trigger the application of section 44(iv), although it might trigger other disqualification provisions, such as section 44(v) if an agreement with the public service was involved or section 45(iii) if a fee or honorarium was involved. Hence, a lawyer who is engaged to appear on behalf of the Commonwealth and who is paid a fee does not hold an ‘office of profit under the Crown’, because no ‘office’ is involved. The Supreme Court of India held that this was because the word ‘office’, in its equivalent disqualification for the holding of an office of profit, means a subsisting, permanent, substantive position which has an existence independent of the person who fills it.⁸²

Campbell argued, however, that this definition of office should not be adopted in Australia, as it would mean that persons on the ‘unattached’ list of the Public Service would not be disqualified, while those who held a particular office in the Public Service would be. She could not see how this

79. *Re Lambie* [2018] HCA 6, [27] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ).

80. *Ibid.*

81. *Ibid.*, [9] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ).

82. *Kanta Kathuria v Manak Chand Surana* AIR 1970 SC 694 (Supreme Court of India). See also: M P Jain, *Indian Constitutional Law*, (Lexis Nexis, 6th ed, 2010), p. 32.

was consistent with the mischief against which the provision was directed.⁸³ In *Sykes v Cleary*, Mason CJ, Toohey and McHugh JJ took Campbell's approach. They declined to confine 'office' in such a way, noting that its meaning must depend upon the context in which it is found and the principal mischief to which it is directed.⁸⁴ Their Honours held that an 'unattached' officer 'nonetheless remains a permanent employee of the Crown and is, for the purposes of section 44(iv), the holder of an office of profit under the Crown.'⁸⁵ Similarly, being on leave without pay did not affect the fact that the person continued to hold the office.⁸⁶

In *R v Murray and Cormie; ex parte Commonwealth*, Isaacs J described the term 'office' as one connoting 'some conceivable tenure', an appointment and 'usually a salary'.⁸⁷ Isaacs J returned to the meaning of 'office' in *R v Boston*, where with Rich J he quoted the *Oxford Dictionary* definition of an 'office' as including a 'position or place to which certain duties are attached, esp. one of a more or less public character; a position of trust, authority, or service under constituted authority'. Their Honours concluded that a Member of Parliament is a 'public officer' because he or she has 'duties to perform which would constitute in law an office'.⁸⁸ This definition was approved by Heydon J in *Williams v Commonwealth*, where he observed that an office 'is a position under constituted authority to which duties are attached'.⁸⁹

Beech-Jones J, in *R v Obeid (No 2)*, also regarded a member of Parliament as holding an 'office', as did Meagher JA in *Sneddon v New South Wales* where he observed that the 'office' of a member of the Legislative Assembly is 'properly described as a "public office"' and that a member's duties are inseparably attached to that office.⁹⁰

In *Sykes v Cleary*, the Court of Disputed Returns referred to Blackstone's definition of 'office' for guidance. Their Honours stated:

Blackstone defined an "office" as "a right to exercise a public or private employment" and to take the "fees and emoluments thereunto belonging". Blackstone had in mind offices to which particular duties were attached and which entitled the holder to charge and retain fees for the performance of the services rendered by the office-holder.⁹¹

They rejected an argument that the term 'office' should be confined to senior persons, such as directors, presidents and other leaders of organisations. Their Honours considered such an interpretation to be contrary to history and to the principal mischief at which section 44(iv) was directed. They concluded that the term 'office' embraces 'at least those persons who are permanently employed by government'.⁹²

When is an office one 'of profit'?

This part addresses the questions of whether an office is still regarded as one of profit if:

- the holder declines to accept the profit

83. Enid Campbell, 'Ministerial Arrangements' in *Royal Commission on Australian Government*, (AGPS, 1976) Appendices Vol 1, pp. 191, 197-8.

84. *Sykes v Cleary* (1992) 176 CLR 77, 96-7.

85. *Ibid.*, 97 (Mason CJ, Toohey and McHugh JJ).

86. *Ibid.*, 98 (Mason CJ, Toohey and McHugh JJ) and 117-8 (Deane J).

87. *R v Murray and Cormie; ex parte Commonwealth* (1916) 22 CLR 437, 452 (Isaacs J).

88. *R v Boston* (1923) 33 CLR 386, 402 (Isaacs and Rich JJ).

89. *Williams v Commonwealth* (2012) 248 CLR 156, [444] (Heydon J).

90. *Sneddon v New South Wales* [2012] NSWCA 351, [224] (Meagher JA).

91. *Sykes v Cleary* (1992) 176 CLR 77, 95 (Mason CJ, Toohey and McHugh JJ) (footnotes excluded).

92. *Ibid.*, 96 (Mason CJ, Toohey and McHugh JJ).

- the profit is comprised of allowances or rights, rather than remuneration
- the profit may only be paid in the future if a decision-maker so decides, but is presently not payable
- the profit comes from private sources
- the office permits its holder to charge the public for particular services or
- the profit, while historically and formally attached to the office is no longer paid in practice.

In all these cases, the office has still been regarded as one of profit. The exception is where the allowance involves only the reimbursement of costs actually incurred (or a reasonable estimation of those costs) or wages actually lost, but not compensation for loss of remunerative time. This is reflected in practice in the United Kingdom and Australia.

The relevant question is whether profit, regardless of its source, attaches to the office, regardless of whether it is actually received by the holder of the office.⁹³

Office of Profit in the United Kingdom

It has long been recognised in the United Kingdom that an office may be an ‘office of profit’, even though its holder declines to accept any payment. In 1839, in the case of Whittle Harvey, a UK Select Committee of the House of Commons concluded that being appointed Registrar of Hackney Carriages resulted in Daniel Whittle Harvey’s disqualification as a member of the House of Commons, even though he had not accepted the salary attached to that office.⁹⁴ In 1906, John Fuller (who was later appointed as Governor of Victoria) had his seat in the House of Commons vacated for accepting the office as a ‘Lord of the Treasury’, even though it was on terms involving no salary.⁹⁵

Where no salary applied, but there were other benefits, an office could still be classified as one of profit. Lord Palmerston, while UK Prime Minister, had his seat vacated in 1861 when he accepted the office of Lord Warden of the Cinque Ports, even though it was an honorary office, as the appointment also formally granted ‘all manner of wrecks’, ‘fees, commodities, emoluments, profits, perquisites and other advantages’ as well as the occupation of Walmer Castle.⁹⁶ As this was an ‘old’ office under s 25 of the *Succession to the Crown Act 1707*, he was able to stand for re-election, which he did without being opposed.

The Clerk of the House of Commons, Sir Gilbert Campion, concluded in 1941, after reviewing all the precedents, that any ‘taint of profit that has once adhered, or is capable of accruing, to an office, adheres indefinitely, and cannot be purged by the individual office-holder’s refusal to accept payment’.⁹⁷ In 1945 a Select Committee accepted that ‘the receipt of remuneration by the holder of office is immaterial, provided that his office is one in respect of which remuneration is

93. The Supreme Court of India has also held that the issue is whether the office held is capable of yielding a profit – not whether the profit is in fact received: *Jaya Bachchan v Union of India* AIR (2006) SC 2119.

94. UK, *Parliamentary Debates*, 15 February 1839, Vol 45, col 449 and 464.

95. UK, *Parliamentary Debates*, House of Commons, Vol 152, 19 February 1906, col 96-103. This was because the office could be changed into a paid one. As the office was ministerial in nature, the holder could stand at the by-election for his own seat and retain the office.

96. UK, *Parliamentary Debates*, House of Commons, Vol 162, 22 March 1861, col 208. Note that Sir Robert Menzies was offered the appointment of Lord Warden of the Cinque Ports in 1965, while he was still Prime Minister of Australia, but he did not take up the appointment until July 1966, after he had retired from politics. See also *Jaya Bachchan v Union of India* AIR (2006) SC 2119, where the Supreme Court of India regarded an entitlement to a car with driver, free accommodation and medical treatment as falling within ‘profit’ for the purposes of the equivalent Indian disqualification.

97. UK, *Report from the Select Committee on Offices or Places of Profit Under the Crown*, HC 120, 1941, p. 153, Appendix 2, Memorandum by Sir Gilbert Campion. The only recorded anomaly is Pringle’s case from 1926 where he escaped disqualification because he had not accepted fees for performing the relevant office since becoming a Member of Parliament.

payable, and this is so even when the remuneration is now fictional, as in the case of the Stewardship of the Chiltern Hundreds'.⁹⁸ For example, John George was disqualified in 1955 for being a government appointed director to a company which had received a government loan. The Articles of Association of the company provided that as long as the company was indebted to the government, no remuneration would be paid to any director unless it had been approved by the Minister. While George did not receive any remuneration, the mere fact that he might have done so, if the Minister had consented, was enough for a UK Select Committee to conclude that he was disqualified from office.⁹⁹

In the same report, the Select Committee also found that Sir Roland Jennings was disqualified. He had become a 'public auditor', appointed by the Treasury under statute, so that he could audit the accounts of his local British Legion and Village Club, to save it the expense of employing an auditor. Under the relevant statute, the Treasury could have paid remuneration to public auditors, but did not do so. The appointment entitled its holder to charge for the auditing services. Sir Roland charged the British Legion a nominal fee of one guinea per year for these audits and never received any payment from the Treasury. Nonetheless, the Committee found that the office of public auditor was an office of profit under the Crown because nominal fees had been paid – the fact that the fees came from the public and not the Crown was regarded as irrelevant.¹⁰⁰ In addition 'other payments could have been made' by the Crown.¹⁰¹ Both John George and Sir Roland Jennings had their elections validated by statute. Even when a person was appointed to a Tribunal, but had not been summoned to actually sit on it and therefore could not receive any allowances or remuneration, he was still found by a Select Committee to be disqualified.¹⁰²

The argument that any amount received was less than the amount of wages lost in fulfilling the office, and that the office was therefore 'an office of loss' rather than an office of profit, did not find success before British Select Committees.¹⁰³ Charles Beattie was disqualified from the House of Commons because the offices on appeals tribunals to which he had been appointed included an entitlement to 'allowances (including compensation for loss of remunerative time)'. This was regarded as being more than mere reimbursement for expenses or lost wages,¹⁰⁴ because it would be possible that the remunerative time might not otherwise have been remunerated, resulting in a profit to the holder. The Attorney-General, Sir Reginald Manningham-Buller, told a Select Committee that compensation for loss of earnings is not profit, but compensation for loss of remunerative time may or may not be profit depending upon whether the person might otherwise not have earned money during that time. He concluded that 'where the statute itself permits of a payment which constitutes a profit, the correct conclusion is... that the statute creates an office of profit under the Crown even though certain individuals may not obtain a profit from holding it'.¹⁰⁵

In Beattie's case it was also noted that his letters of appointment stated that his office was voluntary and unpaid and that any allowances were intended to reimburse amounts actually

98. UK, Report from the Select Committee on Elections, 23 August 1945, HC 3, pp. 3-4.

99. UK, Report from the Select Committee on Elections, 12 July 1955, HC 35, pp. iii-iv.

100. This had been addressed in 1949 when members of the General Medical Council were paid fees out of monies collected from the medical profession from registration fees. The Attorney-General concluded, and the Parliament accepted, that the source of the funds was irrelevant, as long as the office was under the Crown. '[W]e do not think that it is a criterion of whether or not an office is an office of profit under or from the Crown that the actual emoluments of it are derived from sources other than public funds': UK, *Parliamentary Debates*, House of Commons, Vol 467, 12 July 1949, col 287 (Sir Hartley Shawcross).

101. UK, Report from the Select Committee on Elections, 12 July 1955, HC 35, p. iv.

102. UK, Report from the Select Committee on Elections, 7 November 1955, HC 117, p. iv.

103. UK, First Report from the Select Committee on Elections, 11 February 1946, HC 71, p. 3; UK, Report from the Select Committee on Elections, 12 July 1955, HC 35, p. 7.

104. Compare the more generous NSW provision which excludes from an 'office of profit' any office which entitles a person merely to fees for attendance at meetings or 'an allowance for reasonable expenses incurred or to be incurred in carrying out the duties of the office': *Constitution Act 1902* (NSW), subsection 13B(3).

105. UK, Second Report of the Select Committee on Elections, 15 December 1955, HC 145-I, p. 2.

expended or lost. However, the Select Committee accepted the Attorney-General's advice that where an appointment is governed by a statute, it is the terms of the statute, not the terms of the letter of appointment, which must be construed in deciding whether or not it is an office of profit. The Attorney-General had advised the Committee that even if the terms of Beattie's appointment barred him from receiving any payment, this did not affect the status of the office. This was 'because if the statute or subordinate legislation makes the office as such one of profit, it does not cease to be one of profit because a particular office holder is debarred from receiving profit, for the Crown cannot fetter its future executive action and the bar might always be removed.'¹⁰⁶ As the statute permitted an allowance for lost remunerative time, and this might amount to profit, this was enough to render it an 'office of profit'.¹⁰⁷

In contrast, Mark Hewitson survived scrutiny of his membership of the UK House of Commons when his appointment to certain trade and wages boards only entitled him to receive a travelling allowance that was restricted to reimbursement for actual expenditure and an allowance to compensate for actual loss of earnings. A UK Select Committee concluded that while he held an office under the Crown, it was not an office 'of profit' and that he was therefore not disqualified.¹⁰⁸

Office of Profit in Australia

In Australia the same approach was taken by the Crown Law Officers. Isaac Isaacs, when Attorney-General, gave an opinion that a 'reasonable travelling allowance' for 'defraying or reimbursement of actual expenses' would not cause the disqualification of a Member of Parliament.¹⁰⁹ A public servant, however, would be disqualified, according to Robert Garran, even if he or she was on leave without pay.¹¹⁰ Dr Vernon Davies, a doctor who held the office of medical officer for the Repatriation Commission, was also regarded as holding an office of profit under the Crown, even though he received no salary or retainer, but was paid a fee for each medical examination.¹¹¹ The same was true of a member of a NSW Land Board who was paid a fee for each sitting.¹¹² Use of a company through which to funnel the profit to a member does not prevent disqualification from arising.¹¹³

106. UK, Second Report of the Select Committee on Elections, 15 December 1955, HC 145-I, p. 3.

107. UK, *Second Report of the Select Committee on Elections*, 15 December 1955, HC 145, p. iv. This problem has been avoided in Canada by s 32 of the *Parliament of Canada Act 1985* (Can) which excludes from disqualification any appointment to an office if the commission or instrument of appointment declares that no profit shall attach to it. In Queensland, there is also a capacity for the office holder to waive the entitlement to reward, so long as the waiver is in writing and given to the registrar: *Parliament of Queensland Act 2001* (Qld), section 65.

108. UK, Second Report from the Select Committee on Elections, 5 March 1946, HC 92, p. 4.

109. Isaac Isaacs, 'Member of Parliament – Whether disqualified by receipt of travelling allowance as member of Royal Commission', 17 August 1905 in: P Brazil (ed), *Opinions of Attorneys-General of the Commonwealth of Australia 1901-1914*, Vol 1, (AGPS, 1981), pp. 261-2.

110. Robert Garran, 'Holder of office of profit under the Crown: Whether taking of leave without pay would overcome disqualification applying to public servants', 2 December 1915, in P Brazil (ed), *Opinions of Attorneys-General of the Commonwealth of Australia 1914-1923*, Vol 2, (AGPS, 1981), pp. 145-6. This included persons employed in the public service of the Northern Territory, 26 October 1922: 915.

111. George Knowles, Solicitor-General, 'Elections – Disqualification from Candidature or Sitting', 30 July 1934, in J Faulkner and R Orr (eds), *Opinions of Attorneys-General of the Commonwealth of Australia 1923-1945*, Vol 3, (Commonwealth of Australia, 2013), pp. 399-400. Vernon Davies had requested this advice, as he proposed to stand for election and wished to know whether he had to terminate this office first: NAA A432 1934/1194.

112. M C Boniwell, Acting Solicitor-General, 'Elections – Whether Member of NSW Land Board capable of being nominated as candidate for election to federal Parliament' 4 June 1937, in: J Faulkner and R Orr (eds), *Opinions of Attorneys-General of the Commonwealth of Australia 1923-1945*, Vol 3, (Commonwealth of Australia, 2013) p. 506. Compare, however, the opinion of J G Latham, as Attorney-General, that a member of the SA Pastoral Board who waived his fees could sit as a senator, which would seem to be incorrect: Letter by J G Latham, Attorney-General, to Senator A J McLachlan, 2 October 1934: NAA A467 SF4A/40.

113. George Knowles, Solicitor-General, 'Parliament – Holder of Office of Profit Under Crown', 15 November 1918 in P Brazil (ed), *Opinions of Attorneys-General of the Commonwealth of Australia 1914-1923*, Vol 2, (AGPS, 1981), pp. 396-8.

In *Hodel v Cruckshank*, Lilley CJ of the Supreme Court of Queensland held that the office of a poundkeeper was an office of profit under the Crown even though the fees paid to him were from the public, not the Crown.¹¹⁴ In *Bowman v Hood*, Real J held that a member of the Queensland Legislative Assembly was disqualified because he held an office as member of a Board of Stock Commissioners, for which he was entitled to receive a sitting fee, even though he did not actually accept such a fee after becoming a member. His office as a member of the Central Rabbit Board was held not to be an office of profit under the Crown because it only entitled him to receive actual travelling expenses, not a profit.¹¹⁵

In *Clydesdale v Hughes*, Northmore CJ of the Western Australian Supreme Court also accepted that the office of member of a State Lotteries Commission was an office of profit, even though the profit came from public participants in the lottery, not from the Crown. He observed:

It is true that the profit did not come out of the moneys of the Crown, but what is sought to be prohibited... is the acceptance of an office in the gift of the Crown which carries with it profit to the holder and in that view the source from which the profit is to be derived is immaterial.¹¹⁶

On appeal, Dwyer J agreed, observing that all that is required is for the office to be 'one of profit and that the office should be from the Crown'.¹¹⁷ It was unnecessary that the profit come from the Crown.

Colin Hughes, in a submission to a parliamentary committee in 1997, observed that even the office of a marriage celebrant could be classified as an office of profit under the Crown, because the office is created by the Crown and its holder is paid for performing the duties of the office, even though it is not the Commonwealth which is providing the payments.¹¹⁸ This would be similar to the case of the public auditor of a charity, discussed above.

The position, as generally accepted in 1981, was described by a Senate Committee thus:

The meaning of 'profit' is ... best explained negatively: It appears that an office is not one of profit if it has never had attached to it anything in the nature of a salary or fee, and no holder of the office could claim payment of such emolument under any circumstances. Payment of reasonable expenses incurred in carrying out an office does not make it one of profit. However, the fact that the holder of an office is not paid any emolument which otherwise attaches to the office does not affect his position as the holder of the office of profit.¹¹⁹

Office of profit and the application of the Remuneration Tribunal Act

Section 7(10) of the *Remuneration Tribunal Act 1973* (Cth) provides that a 'member of, or a candidate for election to, either House of Parliament is not entitled to be paid, and shall not be paid, any remuneration or allowances in respect of his or her holding, or performing the duties of, a public office', but shall be reimbursed for expenses reasonably incurred in respect of holding or performing the duties of the office. Its intent is presumably to prevent any member who inadvertently accepts an office of profit from being disqualified. It only applies, however, in

114. *Hodel v Cruckshank* (1889) 3 QJ 141, 142.

115. *Bowman v Hood* (1899) 9 QJ 272, 277-8 (Real J).

116. *Clydesdale v Hughes* (1934) 36 WALR 73, 75 (Northmore CJ).

117. *Ibid.*, 85 (Dwyer J). See also Draper J at 80.

118. Commonwealth, House of Representatives Standing Committee on Legal and Constitutional Affairs, 'Aspects of Section 44 of the Australian Constitution – Subsections 44(i) and (iv)', 1997: [3.28].

119. Commonwealth, Senate Standing Committee on Constitutional and Legal Affairs, *The Constitutional Qualifications of Members of Parliament*, 1981, p. 29.

relation to persons remunerated under that Act.¹²⁰ Accordingly, it did not aid Cleary or Kelly.¹²¹ Further, as the Courts have held that the relevant question is whether profit attaches to the office, rather than whether the particular person received such a profit, it is doubtful whether this provision is effective.

The section was potentially relevant in the case of Hollie Hughes. She was a candidate in the 2016 double dissolution election for the Senate in New South Wales. She was not declared elected at the time the writ was returned and she subsequently took up an office of profit under the Crown, being a part-time appointment to the Administrative Appeals Tribunal. When a special recount was held, after Fiona Nash was found to have been incapable of being chosen as a senator at the 2016 election, it showed that the person next elected was Hollie Hughes. Hughes had resigned her office at the Administrative Appeals Tribunal after the Court of Disputed Returns had held that Nash was invalidly chosen, but before the special count was held. The issue was whether or not Hughes was also disqualified for holding an office of profit during a period after her nomination but before the recount determined that she had been chosen, and if so, whether it gave rise to a special recount or a casual vacancy. The Court of Disputed Returns held that Hughes was disqualified because at the time she held an office of profit under the Crown the election period had not been completed, due to the failure validly to elect a candidate.¹²² It was not, as Hughes had argued, a case of a casual vacancy arising from a disqualification that had occurred after the election had been completed.

The potential application of subsection 7(10) of the *Remuneration Tribunal Act* was raised in the Commonwealth's submissions. The Solicitor-General submitted that subsection 7(10):

may be intended to prevent s 44(iv) from disqualifying a person who holds an office the remuneration for which is specified by the Remuneration Tribunal, by removing the entitlement to "profit" from the office in any period that would engage that section. It is not, however, necessary to determine whether the provision is effective to achieve that result, because on the facts of this case s 7(10) can have had no operation. That follows because Ms Hughes was appointed as a member of the AAT approximately 12 months after she ceased to be a "candidate for election", and at a time when she obviously was not a member of either House of Parliament. The contrary view – being that Ms Hughes remained a "candidate" because Ms Nash's disqualification has revealed that the NSW Senate election was never complete – would have the consequence that s 7(10) would operate to deprive Ms Hughes (together with any other person who sought election as a senator for NSW at the 2016 election) of any entitlement to be paid any amount specified by the Remuneration Tribunal for any work performed at any time since the 2016 election. It would have that operation irrespective of whether the person deprived of that entitlement was elected on the special count. That operation of the provision would be so obviously unreasonable that s 7(10) should be construed as referring to periods when a person was a "candidate for election" in fact. If so construed, it plainly has no operation in this case.¹²³

The Court of Disputed Returns, however, held that the election was not completed until the seat was validly filled. On that basis, it would appear that Hughes was still regarded as a candidate at the time of the special recount, which would suggest that the Commonwealth's submission above was not accepted. Nonetheless, the Court of Disputed Returns did not seek to apply subsection 7(10) to Hughes. It confined its observations on the matter to the following:

120. Commonwealth, House of Representatives Standing Committee on Legal and Constitutional Affairs, 'Aspects of Section 44 of the Australian Constitution – Subsections 44(i) and (iv)', 1997: [3.112].

121. Cleary was remunerated according to Victorian legislation. The defence forces have their own Defence Force Remuneration Tribunal.

122. *Re Nash [No 2]* [2017] HCA 52, [44] (Kiefel CJ, Bell, Gageler, Keane and Edelman JJ).

123. Stephen Donoghue SC, Solicitor-General, 'Submissions of the Attorney-General of the Commonwealth', *Re the Hon Ms Fiona Nash* C17 of 2017, 13 November 2017, [68].

Members, including part-time members, of the Administrative Appeals Tribunal are entitled to remuneration in accordance with determinations made under s 7 of the *Remuneration Tribunal Act* 1973 (Cth). There could be, and was, no dispute that the position Ms Hughes held during the period between 1 July and 27 October 2017 answered the description of an “office of profit under the Crown” within the meaning of s 44(iv) of the Constitution.¹²⁴

Perhaps the Court took the view that subsection 7(10) was ineffective, because the profit continues to be attached to the office even though a candidate or member is not entitled to receive it. Alternatively, it may have considered that it did not need to address the issue as no party had claimed that the provision applied. The most one can conclude is that subsection 7(10) has so far proved ineffective in preventing the disqualification of candidates or members under section 44(iv) of the Constitution.

When is an office ‘under the Crown’?

Disqualification from membership of a House of Parliament only arises when the ‘office of profit’ held is ‘under the Crown’. The Crown, in this context, has been taken to mean the Executive Government.¹²⁵ As discussed in the next part, however, it extends beyond the Crown in right of the Commonwealth, to the Crown in its other manifestations.

This part addresses what is meant by ‘under the Crown’, which suggests a degree of subordination to, or control by, the Crown. It considers its application to public servants, officers appointed by the Houses of Parliament, the staff of members of Parliament and persons holding statutory offices or offices in government business entities. Other more specialised categories are discussed in separate parts below.

Factors relevant to whether an office is ‘under the Crown’

Factors which have been previously regarded as relevant to whether an office is ‘under the Crown’ include whether it is:

- (a) within the gift of the Crown (i.e. the Crown controls appointment to the office)
- (b) under the ongoing control of the Crown (i.e. the Crown controls the remuneration of the office and/or removal from the office)
- (c) under the supervision of the Crown, so that the office is accountable to the Crown or subject to ministerial instruction or direction and
- (d) an office concerning public service to the state.

Not all these factors have been regarded as necessary in each case to classify an office as one that is ‘under’ the Crown. For example, in 1949 the UK Attorney-General observed ‘we have taken the view that to be held under the Crown an office does not necessarily have to be subject to any continuing control in its exercise by the Crown’, but it does mean offices that are ‘connected with the public service or the appointment to which is in the hands of some authority under the Crown’.¹²⁶

In India, consideration is also given to a range of different elements, including ‘the power to appoint, the power to dismiss, the power to control and give direction as to the manner in which the duties of the office are to be performed and the power to determine the question of

124. *Re Nash [No 2]* [2017] HCA 52, [9] (Kiefel CJ, Bell, Gageler, Keane and Edelman JJ).

125. *Re Lambie* [2018] HCA 6, [9] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ).

126. UK, *Parliamentary Debates*, House of Commons, Vol 467, 12 July 1949, col 286 (Sir Hartley Shawcross).

remuneration'.¹²⁷ It is not regarded as necessary that all these elements co-exist or that the source from which the remuneration is paid is public revenue.

In the United Kingdom, an office may be regarded as 'under the Crown' even when it is an office held in a private body, such as a corporation with private shareholders. For example, in 1947 the British Government authorised a loan to a private company, Scottish Slate Industries Limited. A condition of the loan was that the minister nominated two directors to the company. The minister nominated John George as a director, and he was made chairman of the board. A UK Select Committee found in 1955 that this was an office of profit under the Crown.¹²⁸

In 2018 the Court of Disputed Returns of Australia chose to take a narrower view of when an office was 'under the Crown'. It did so in order to achieve greater certainty.¹²⁹ It relied solely on the two factors addressed in (a) and (b) above, and rejected the relevance of the Crown's supervisory powers or the relationship with public service.¹³⁰ The Court set out a two-limbed test:

- If an appointment is made to an office at the will of the executive government of the Commonwealth or of a State, this is sufficient to bring the office 'under the Crown'. In such a case it does not matter whether the executive controls the office-holder's tenure or remuneration.
- If the appointment is not made at the will of the executive Government, then the office will only be 'under the Crown' if the 'continued holding of that office or continued profiting from holding that office is dependent on the will of the executive government'. The executive government must have 'effective control over holding or profiting from the office' before it will be regarded as an office that is 'under the Crown'.¹³¹

Public servants

The office of a member of the Australian Public Service ('APS') is clearly one of profit that is under the Crown. Accordingly, public servants must resign their office before nominating to stand for election. If a person resigns from the APS for the purpose of contesting an election and fails to be elected, he or she is 'entitled to be again engaged as an APS employee' as long as this occurs within the stipulated timeframes and in accordance with the Commissioner's Directions.¹³²

State public servants who resign to run for Commonwealth elections either have a right to be reinstated if they fail to be elected or are permitted to apply for reinstatement. Where there is discretion about reappointment, there is a risk that reappointment may be refused upon political grounds.¹³³ While this ameliorates the disadvantage to public servants that would otherwise apply to them when it comes to running for Parliament and therefore widens the pool of potential candidates, it would also seem to thwart the intent of the constitutional provision and perhaps be regarded as unconstitutional¹³⁴ if the effect is that the person has not effectively terminated his or her office of profit under the Crown. There is therefore a risk that such legislation would be invalid for infringing section 44(iv).¹³⁵

127. *Gurugobinda Basu v Sankari Prasad Ghosal* AIR 1964 SC 254, 259; and *Biharilal Dobray v Roshan Lal Dobray* AIR 1984 SC 385.

128. UK, *Report from the Select Committee on Elections*, 12 July 1955, HC 35, p. iii.

129. *Re Lambie* [2018] HCA 6, [22] and [31] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ).

130. *Ibid.*, [30]-[34] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ).

131. *Ibid.*, [33]-[34] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ).

132. *Public Service Act 1999* (Cth), section 32.

133. See the example cited by Carney: Gerard Carney, *Members of Parliament: Law and Ethics* (Prospect Media, 2000), p. 80.

134. See Commonwealth, House of Representatives Standing Committee on Legal and Constitutional Affairs, 'Aspects of Section 44 of the Australian Constitution – Subsections 44(i) and (iv)', 1997: [3.119].

135. Commonwealth, House of Representatives Standing Committee on Legal and Constitutional Affairs, 'Aspects of Section 44 of the Australian Constitution – Subsections 44(i) and (iv)', 1997: [3.120].

Persons appointed by a House of Parliament

An office is not ‘under the Crown’ if the holder of the office is appointed by a House of Parliament, rather than the Crown.¹³⁶ For example, the offices of Speaker of the House of Representatives and President of the Senate, while being offices of profit, are not regarded as being ‘under the Crown’.¹³⁷ Similarly, the payment of special allowances or remuneration to the Leader of the Opposition, to whips and others for fulfilling parliamentary roles does not transform them into offices of profit under the Crown.¹³⁸

The appointment of a member or senator by a House is used as a means of avoiding the application of section 44(iv). For example, section 10 of the *National Library Act 1960* (Cth) provides that the Council of the National Library shall include ‘one Senator elected by the Senate’ and ‘one member of the House of Representatives elected by that House’.

Staff of Members of Parliament

A question arises as to whether employees of members of Parliament hold offices of profit under the Crown. Prior to 1984, legislative assistants to members of Parliament were employed as temporary employees under the *Public Service Act 1922* (Cth), which caused them to hold offices that were ‘under the Crown’.

The *Members of Parliament (Staff) Act 1984* (Cth) provides that senators and members may ‘on behalf of the Commonwealth’ employ staff. The reference to the ‘Commonwealth’ as the employer may mean that their employment comes ‘under the Crown’.¹³⁹ If the ‘Commonwealth’ is regarded as the ‘executive government’ rather than the polity and it controls the appointment, removal and remuneration of staff, then these would be offices of profit under the Crown.¹⁴⁰

The Commonwealth Government advises persons employed under this Act that they ‘may’ be disqualified and that they must seek their own legal advice.¹⁴¹ In the case of Jeannie Ferris, discussed above, one aspect of the debate was whether she was employed by Senator Minchin in his capacity as a parliamentarian or in his capacity as a Parliamentary Secretary. Employment by a minister of the Crown, in that capacity, would certainly fall within an office of profit under the Crown, but employment by a member or senator remains uncertain, especially if this employment occurs ‘on behalf of the Commonwealth’, rather than employment on behalf of the House concerned.

Statutory offices, corporate entities and government business enterprises

Appointment by the executive government to a statutory office would generally be regarded as the conferral of an office of profit under the Crown even though tenure in the office may be fixed or otherwise protected.¹⁴² A member of Parliament would, therefore, become disqualified if he or

136. UK, *Report from the Select Committee on Offices or Places of Profit Under the Crown*, HC 120, 1941, p 154, Appendix 2, Memorandum by Sir Gilbert Campion.

137. *Official Report of the National Australasian Convention Debates*, Sydney 1891, 6 April 1891, p. 660 (Sir Samuel Griffith); *Official Report of the National Australasian Convention Debates*, Melbourne 1898, 16 March 1898, p. 2448 (Edmund Barton); John Quick and Robert Garran, *The Annotated Constitution of the Australian Commonwealth* (Angus & Robertson, 1901), p. 493; Gerard Carney, *Members of Parliament: Law and Ethics* (Prospect Media, 2000), p. 64.

138. Commonwealth, *Parliamentary Debates*, House of Representatives, 27 August 1952, 619 (Robert Menzies).

139. This view was taken by Cole: Kathryn Cole, ‘Office of Profit under the Crown and Membership of the Commonwealth Parliament’ Issues Brief No 5 1993, Parliamentary Research Service, 30 April 1993, pp. 17-18. Note, however, that the terms of the Act have since changed and this might make a difference.

140. *Re Lambie* [2018] HCA 6, [33]-[34] and [41] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ).

141. Commonwealth, Department of Finance, Ministerial and Parliamentary Services, ‘MOP(S) Act Employees’: <https://maps.finance.gov.au/MOP%28S%29%20Act%20Employees#candidate>. It refers to the Electoral Reform Green Paper, *Strengthening Australia’s Democracy* (September 2009) which provides at [8.55] that it ‘remains unresolved as to whether persons working for elected Parliamentarians (including ministers) are disqualified under subsection 44(iv)’.

142. *Re Lambie* [2018] HCA 6, [33] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ).

she were appointed as the Ombudsman or the Commissioner of Taxation. Appointment by the Presiding Officers to a statutory office, such as Parliamentary Budget Officer, is likely to be regarded as not falling within an office of profit under the Crown.¹⁴³

The office of Auditor-General is more complex, because he or she is appointed by the Governor-General on the recommendation of Prime Minister, but only after the Prime Minister has referred the proposed recommendation to the Joint Committee of Public Accounts and Audit and it has approved it. The Auditor-General is also declared to be an independent officer of the Parliament.¹⁴⁴ The factors of appointment by the Governor-General and the incompatibility between the office and that of a member of Parliament make it likely that it is an office of profit under the Crown,¹⁴⁵ but it might be queried whether the constraints imposed upon appointment mean that it is not really 'at will' and the provisions conferring independence on the office show that it is not within the effective control of the executive.

Where an office is held in a body that fulfils a commercial function, rather than a public service function, or where it has been semi-privatised and treated as a commercial entity that is to act independently of the Crown, the position becomes even more uncertain. Subsection 5(1) of the *Public Governance, Performance and Accountability Rule 2014* (Cth) prescribes eight bodies as government business enterprises, including Australia Post, NBN Co and the Defence Housing Authority. In addition, there are other corporatized government entities, such as Snowy Hydro Ltd.¹⁴⁶ Sometimes legislation will expressly provide that a member of Parliament is not eligible to be or remain a director of the corporation,¹⁴⁷ which averts the issue arising.

Each State has its own corporatized or quasi-government bodies. As these bodies combine a level of autonomy from government with a level of accountability to government, it is difficult to determine whether their employees or directors might be classified as holding an office of profit under the Crown. It would be necessary for a court to examine the relationship between the body and the government with respect to appointment, removal and remuneration in any particular case to make a finding.

Which Crown?

In the United Kingdom, the disqualification of persons holding offices of profit under the Crown extended beyond offices to which persons were appointed by the executive government of the United Kingdom. It also extended to offices under the Crown in its other manifestations, where the person was appointed, removable by, or under the control of another executive government. This was because the rationale behind the office of profit disqualification was not confined to executive influence over office holders in the House of Commons. It also extended to cases of incompatibility of office.

For example, in 1878, Sir Bryan O'Loughlen was appointed Attorney-General of Victoria. He had shortly before been elected to the House of Commons, in his absence, to succeed his deceased brother as the member for Clare. A UK Select Committee concluded that the office of Attorney-General in a colony on the other side of the world was an office of profit under the Crown and that

143. See, eg, *Parliamentary Service Act 1999* (Cth), section 64X.

144. *Auditor-General Act 1997* (Cth), subsection 8(1).

145. Note that incompatibility was regarded as relevant in *Sykes v Cleary* (1992) 176 CLR 77, but irrelevant in *Re Lambie* [2018] HCA 6.

146. It is a corporation owned by the NSW Government (58%), the Victorian Government (29%) and the Commonwealth Government (13%).

147. See for example, *Special Broadcasting Service Act 1991* (Cth), section 17; *Australian Broadcasting Corporation Act 1983* (Cth), section 12 and the former *Australian Industry Development Corporation Act 1970* (Cth), section 12.

Sir Bryan had therefore vacated his seat in the House of Commons by accepting that office.¹⁴⁸ This was so despite the fact that neither the British Government nor the monarch had any role in the appointment of the Victorian Attorney-General. The Governor of Victoria appointed and removed Victorian ministers independently of the Crown in the United Kingdom.

O'Loghlen's seat was declared vacant, even though the Clerk of the House, Sir Thomas Erskine May, considered that the holder of the office 'is not under the influence of the Crown at home: the independence of Parliament is not concerned in his acceptance of a new office'.¹⁴⁹ In practice there was incompatibility upon at least two grounds. First, his capacity to attend the Commons and fulfil his duties would have been substantially impaired by the fact that he was performing ministerial functions in Australia. Secondly, there were potentially conflicts of interest in terms of his duties to the Victorian government and the United Kingdom House of Commons.

At the time of O'Loghlen's disqualification, the Crown was regarded as 'one and indivisible'. For that reason, the appointment of members of Parliament as colonial Governors also resulted in their disqualification.¹⁵⁰ From 1930 onwards, however, it came to be recognised that there were separate Crowns for the United Kingdom, Australia, Canada and the other Dominions. Did this make a difference to the operation of the *Succession to the Crown Act 1707*?

The House of Commons took the view that it did not. In 1955 it concluded that Christopher Holland-Martin was disqualified from membership of the House of Commons for being a local director of the Bank of New Zealand. The Bank was established by a New Zealand statute and its directors were appointed by the Governor of New Zealand. However, those directors were empowered to appoint local boards of directors, and Holland-Martin was appointed a director of the London Board. Even though he was not directly appointed by the Crown and even though the Crown involved was 'the Crown "in right of" the Government of New Zealand', a British Select Committee concluded that he was disqualified from sitting or voting in the House of Commons.¹⁵¹

The same view had been taken the previous year in relation to Niall MacPherson who was made Chairman of the London agency of the Commonwealth Dried Fruits Control Board, for which he was paid a fee of £500 per year. He was found to hold an office of profit under the Crown, even though he was paid under the Crown of Australia. Both Holland-Martin and MacPherson were indemnified and had their elections validated by special Acts of Parliament.

The same approach to the meaning of 'Crown' has been taken in relation to section 44(iv) of the Constitution. According to Quick and Garran, section 44(iv) 'would apply to persons holding office under the Crown in any part of the British Dominions, with the exceptions mentioned at the end of this section'.¹⁵² The Commonwealth Constitution was enacted at a time when the Crown was still regarded as 'indivisible' and 's. 44(iv) of the Constitution would have been understood, at the time of the establishment of the Commonwealth, as referring to any office of profit under the British Crown regardless of geographical location or distinctions between different governments within the then British Empire'.¹⁵³

148. UK, *Report from the Select Committee on Clare County Writ*, 3 April 1879, HC 130, p. iii.

149. *Ibid.*, p. 6.

150. For examples, see: Edward Fellowes, *Sir Thomas Erskine May's Treatise on the Law, Privileges Proceedings and Usage of Parliament* (Butterworths, 16th ed, 1957), p. 208.

151. UK, *Second Report from the Select Committee on Elections*, 21 July 1955, HC 50, p. iii.

152. John Quick and Robert Garran, *The Annotated Constitution of the Australian Commonwealth* (Angus & Robertson, 1901), p. 492. Compare the doubt expressed by George Knowles about whether s 44 disqualified holders of offices of profit under the Crown in right of a State: George Knowles, 'Elections – Whether permanent employee of Commissioner for Railways of Tasmania is eligible to nominate as candidate for Senate', 9 September 1937, in J Faulkner and R Orr (eds), *Opinions of Attorneys-General of the Commonwealth of Australia 1923-1945*, Vol 3, (Commonwealth of Australia, 2013) pp. 514-5.

153. *Sykes v Cleary* (1992) 176 CLR 77, 118 (Deane J).

This is supported by the paragraph at the end of section 44(iv) which provides exceptions for offices of profit held by the ‘Queen’s Ministers for a State’ and to persons in receipt of pay, half pay, or a pension ‘as an office or member of the Queen’s navy or army’ (as distinguished from the ‘naval or military forces of the Commonwealth’). The reference to state ministers was inserted in the Constitution due to the concern that otherwise existing state premiers and state ministers would not be able to nominate for election to the new Commonwealth Parliament without all of them having to resign their offices before doing so.¹⁵⁴ It was accepted that it would be ‘very inconvenient to have a person occupying the dual position of a minister in the Commonwealth and a minister in the state’, but it was observed by Richard O’Connor that this was something that the State Parliaments could be trusted to deal with.¹⁵⁵

The Court of Disputed Returns accepted in *Sykes v Cleary* that these exclusions of both state ministers and members of the British armed forces provided a textual basis for interpreting section 44(iv) as including an office of profit under the Crown in right of the State.¹⁵⁶ This was confirmed by the Court of Disputed Returns in 2018 in *Re Lambie*.¹⁵⁷ While other adjustments have been made to the interpretation of the Constitution to accommodate the existence of separate Crowns, the Court of Disputed Returns did not consider that this justified confining section 44(iv) to operation only with respect to offices under the Crown in right of the Commonwealth.¹⁵⁸

The same approach is taken in relation to disqualification in most State Parliaments. In Queensland, for example, the equivalent of an office of profit, which is described as ‘paid public employment’, extends to persons holding a paid public appointment for reward under the State, another State or the Commonwealth.¹⁵⁹ The same is true of Western Australia,¹⁶⁰ and Victoria.¹⁶¹ However, in New South Wales the relevant disqualification provision was altered in 1980 to provide an express exemption from disqualification for a person who ‘holds or accepts an office of profit under the Crown, other than the Crown in right of the State of New South Wales, but not being an office as a member of any legislature of a country [*sic*] other than New South Wales’.¹⁶² The rationale was that the influence of the Crown of another jurisdiction would be ineffectual in relation to a member of the state Parliament, but that it ‘would be clearly wrong’ for a person to serve concurrently as a member of the Commonwealth and State Parliaments.¹⁶³

Other federations have taken varying approaches to whether disqualification extends to offices under a sub-national Crown. In India, disqualification for the holding of an office of profit extends not only to those offices under the Government of India, but also offices under the government of any state.¹⁶⁴ In Canada, in contrast, disqualification is confined to offices ‘in the service of the Government of Canada, at the nomination of the Crown or at the nomination of any of the officers of the Government of Canada’.¹⁶⁵

154. *Official Report of the National Australasian Convention Debates*, Melbourne 1898, 7 March 1898, pp. 1941-2. It was also noted in *Sykes v Cleary* that this exclusion was ‘designed to ensure their availability for election at the inception of the Commonwealth Parliament’: *Sykes v Cleary* (1992) 176 CLR 77, 98 (Mason CJ, Toohey and McHugh JJ).

155. *Official Report of the National Australasian Convention Debates*, Melbourne 1898, 7 March 1898, p. 1942.

156. *Sykes v Cleary* (1992) 176 CLR 77, 98 (Mason CJ, Toohey and McHugh JJ) and 118 (Deane J).

157. *Re Lambie* [2018] HCA 6, [9] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ).

158. This is implicit in the findings of Mason CJ, Toohey and McHugh JJ, but explicit in that of Deane J: *Sykes v Cleary* (1992) 176 CLR 77, 119 (Deane J).

159. *Parliament of Queensland Act 2001* (Qld), subsection 65(1).

160. *Constitution Acts Amendment Act 1899* (WA), section 36.

161. *Constitution Act 1975* (Vic), section 49.

162. *Constitution Act 1902* (NSW), subparagraph 13B(3)(a)(iii).

163. NSW, *Parliamentary Debates*, Legislative Council, 19 March 1980, p. 5440.

164. Constitution of India, section 102.

165. *Parliament of Canada Act 1985* (Can), section 32.

‘Holds’ any office of profit under the Crown

At the Sydney 1897 Constitutional Convention, the draft clause dealing with office of profit under the Crown provided that if a member or senator ‘accepts’ any office of profit under the Crown, his place shall thereupon be vacated. Acceptance of the office was enough to give rise to disqualification. There was also a sub-clause that provided that a member shall not, within six months of ceasing to be a member ‘accept or hold’ any office of profit under the Crown. In this case both acceptance and holding, which were regarded as distinct things, were prohibited. This sub-clause was deleted, as discussed below, for policy reasons.¹⁶⁶

When the main clause was amalgamated with the other disqualification clauses and redrafted in 1898, this particular ground of disqualification was attached to any person who ‘holds’ such an office. While in some cases, acceptance may be sufficient for a person to be said to ‘hold’ the office, in other cases acceptance is just one pre-condition to holding the office and other formal procedures must first be completed. It may be, for example, that the office is offered and accepted but does not commence until a future date.

This may be important if the person is a member of Parliament who has been offered an appointment as an ambassador or a judge and accepted it, but continues to sit and vote for a period pending that appointment coming into effect at a future date. If one looks to the mischief that is addressed by section 44(iv), the Crown may hold a greater influence over a member when an appointment is offered and accepted, but not yet in effect. The member may feel beholden to the government and obliged to vote in the government’s favour on controversial issues as a consequence of the pending appointment.

For example, in New South Wales in 1859, a Select Committee of Inquiry was held into the offer of a judicial appointment to a member of the NSW Legislative Assembly, Robert Owen, on the basis that it may have influenced his vote for the government on a controversial matter. The Select Committee found that as a matter of fact there had been no formal offer and acceptance, so that his seat had not been vacated. But it nonetheless condemned the government for keeping an office suspended before Owen’s eyes.¹⁶⁷ The Select Committee observed:

It appears to your Committee, that to keep an office suspended (as it were) before the eyes of a Member, and still within the control of the Prime Minister – thus allowing the Member to continue voting, at the risk of displeasing the Minister, and perhaps causing him to retract, would be even more dangerous to the purity and independence of Parliament than even the actual possession of office. The state of dependence in which the Member would be kept in this way is entirely inconsistent with the unbiased discharge of his duty to his constituents, and is contrary to the spirit of the Constitution Act. Such a practice is, in the opinion of your Committee, highly dangerous to the integrity and independence of this House, and to the liberties of the people, and cannot be too strongly condemned.¹⁶⁸

The Gair Affair and the ‘holding’ of an office

The issue also arose in relation to the appointment of Vince Gair as Ambassador to Ireland. Gair was a DLP senator who had recently lost the leadership of his party and was open to receiving a government appointment. At that time (prior to the 1977 constitutional amendment) a casual vacancy could only be filled by a State Parliament or Governor until the time the next half-Senate election was held. Even if the original term of the vacating senator had another three years left to

166. *Official Report of the National Australasian Convention Debates*, Sydney 1897, 21 September 1897, p. 1033.

167. *NSW, Votes and Proceedings*, Legislative Assembly 1858-9, Vol 1, p. 377.

168. *Ibid.*, pp. 377, 386.

run, the seat would be added to the other seats that were to be filled in the next half-Senate election. As writs were to be shortly issued for a half-Senate election, Gair's resignation should have resulted in the Queensland half-Senate election being held for 6 seats, instead of the normal 5 seats. This would most likely have resulted in the Labor Party winning 3 out of 6 seats, rather than 2 out of 5. Gair accepted the appointment on 13 March 1974, it was formally approved by the Governor-General on 14 March,¹⁶⁹ the Irish Government gave *agrément* to the appointment on 19 March, and the Commonwealth received that approval on 20 March.

In the meantime, Gair had continued to sit and vote as a senator. On 21 March, the Executive Council approved a minute which provided for the setting of Gair's salary and other terms and conditions of appointment and stated that his appointment 'commences on and from a date to be determined by the Minister of State for Foreign Affairs'.¹⁷⁰ The same day, Whitlam announced that the Governor-General had agreed to the holding of a half-Senate election on 18 May 1974. The Constitution required, however, that the writs for Senate elections be issued by State Governors, rather than the Governor-General. This normally occurred by way of cooperation, but was outside the formal control of the Commonwealth.

When Parliament returned on 2 April, news leaked of Gair's appointment. The Queensland Premier advised the Queensland Governor to issue the writs for the half-Senate election immediately, before Gair resigned.¹⁷¹ This would mean that only five seats would be filled at the half-Senate election, leaving Gair's vacant seat to be filled by a person appointed by the Queensland Parliament for the next three years until the following election. There had been a long practice of not issuing a supplementary writ to fill a casual vacancy at a half-Senate election if the vacancy occurred after the writ for the election had been issued but before polling day.¹⁷²

In what became known as the 'night of the long prawns', Gair was plied with alcohol and prawns by Coalition senators on the evening of 2 April to divert him from undertaking the task of resigning before the Queensland Governor issued the writ. During the evening he continued to vote on bills, with no objection being made by the Government about his eligibility to do so. The writs were issued by the Queensland Governor at 11pm on 2 April, with Gair not yet having formally resigned his seat. The following day, Gair wrote to the President asserting that his seat had been vacated earlier as he had taken up an office of profit under the Crown.¹⁷³

The Government argued that Gair's seat had been vacated on either 14 March, when the Executive Council approved his appointment or on 20 March, when the Australian Government received notification that Gair's appointment had been accepted by the Irish Government.¹⁷⁴ When this 'line' was being developed at a meeting between the Prime Minister, the Attorney-General, the Solicitor-General and senior public servants, the Secretary of the Prime Minister's Department, Sir John Bunting, warned the Prime Minister that an implication was that from 14 March or 21 March as the case may be, Gair had continued to take his place in the Senate and vote. He warned that this appeared to be a 'contempt of the Senate and to be contrary to law' and

169. Commonwealth, *Parliamentary Debates*, Senate, 3 April 1974, p. 637.

170. *Ibid.*, p. 637.

171. For contrasting accounts of Bjelke-Petersen's role in the affair and the views of his legal advisers as to the effectiveness of this manoeuvre, see: Joh Bjelke-Petersen, *Don't You Worry About That!* (Angus & Robertson, 1990), p. 108-113; and Hugh Lunn, *Johannes Bjelke-Petersen – A Political Biography* (UQP, 1984), pp. 172-6.

172. Geoffrey Sawer, 'The Gair Affair – A tangled constitutional conundrum', *The Canberra Times*, 4 April 1974, p. 2.

173. Commonwealth, *Parliamentary Debates*, Senate, 3 April 1974, 611. The President, uncertain of whether Gair's seat had been vacated or resigned or neither, referred the matter to the Senate to decide at p. 635. Gair later admitted that his letter had been written for him, but that he had 'edited' it: Interview, *This Day Tonight*, 3 April 1974: NAA A432 1974/214. It had been agreed earlier in the day at a meeting between the Prime Minister and the Attorney-General that the Attorney-General would 'arrange for Gair to write to the President of the Senate consistent with the above' line that his seat had already been vacated: E J Bunting, Minute, 'Meeting in Prime Minister's Room, 3 April 1974, 12.20pm': NAA A1209 1975/1213.

174. Commonwealth, *Parliamentary Debates*, Senate, 3 April 1974, pp. 605-11.

that ‘the Prime Minister and the Attorney-General must be taken to have known’. He observed that this ‘will reflect on the Prime Minister, and perhaps seriously’.¹⁷⁵

Nonetheless, the Prime Minister and his advisers agreed to ‘take the above line in the Senate when it resumed’ and it was backed by a written opinion by the Solicitor-General, Maurice Byers. Byers contended that Gair held the office of Ambassador from the time that he accepted the appointment on 14 March. Byers also argued that Gair was disqualified at that time under section 45(iii) as he had agreed to take a fee for services rendered to the Commonwealth to the extent that he had accepted ‘the emoluments which the post of Ambassador confers on him’. Byers concluded:

I think that the better view is that a person holds an office of profit notwithstanding that he has not either commenced his duties or received his salary or that the appointment is expressed to be operative as from a future date.¹⁷⁶

The Attorney-General moved on 4 April that the question of whether, and if so when, a vacancy occurred in the Senate should be referred to the High Court sitting as the Court of Disputed Returns. On 8 April, this motion was amended so that the Senate determined that Senator Gair had not resigned his place by 3 April and censured the Government for asserting that he had vacated his seat on 14 or 21 March.¹⁷⁷ Assuming that the Senate had retained its power under section 47 of the Constitution to determine questions respecting the qualification of a senator or respecting a vacancy in either House, then its exercise of that power resolved the issue, even if it did not clarify the point at which a person ‘holds’ an office.¹⁷⁸

In legal terms, there would appear to be a distinction between the acceptance of the office and holding it. During the whole of the period from 14 March to 4 April, the Australian Ambassador to Ireland, Keith Brennan, continued to hold his office. Sawyer argued that ‘it is doubtful whether [Gair] could have been said to hold [the office of Ambassador] until the presentation of the appropriate formal documents in Dublin by which the appointment of his predecessor, Mr Keith Brennan, was withdrawn and Mr Gair’s appointment completed.’¹⁷⁹ The same point was made by Hanks¹⁸⁰ and in the *Australian Law Journal*.¹⁸¹ Diplomatic practice requires a person to present his or her credentials before becoming the Ambassador to a country.¹⁸² It also requires the relevant country to be notified that the existing Ambassador will cease to be accredited to the country at a particular date, which had not yet occurred. There could not be two heads of mission in place at the same time.¹⁸³

Hanks noted, however, that this is a narrow and technical approach to the application of section 44(iv). If one looks instead at the purpose of the provision, being prevention of parliamentarians from being influenced or suborned by the offer of remunerative appointments, then ‘diplomatic

175. E J Bunting, Minute, ‘Meeting in Prime Minister’s Room, 3 April 1974, 12.20pm’: NAA A1209 1975/1213.

176. Maurice Byers, ‘Re Sections 44 and 45 of the Constitution’, Opinion, Solicitor-General, 3 April 1974: NAA A5034 SR1974/3027. See also: Commonwealth, *Parliamentary Debates*, Senate, 3 April 1974, p. 638.

177. Commonwealth, *Parliamentary Debates*, Senate, 8 April 1974, p. 751.

178. See Campbell’s conclusion that if a court decided that the Senate was acting within jurisdiction, it would not further inquire into the manner in which the power was exercised. Nor was there any appeal from the decision of a House to a court: Enid Campbell, ‘Ministerial Arrangements’ in *Royal Commission on Australian Government*, (AGPS, 1976) Appendices Vol 1, 191, pp. 207-8.

179. Geoffrey Sawyer, *Federation Under Strain* (MUP, 1977), p. 37.

180. P J Hanks, ‘Parliamentarians and the Electorate’, in Gareth Evans (ed), *Labor and the Constitution 1972-1975* (Heinemann, Melbourne, 1977), p. 192.

181. Current Topics (1974) 48 *Australian Law Journal*, 221, p. 222.

182. The Letters of Credence for Gair’s appointment and Brennan’s recall were not signed by the Queen until 29 May 1974 and were only presented after Gair’s arrival in Ireland in June 1974: NAA A1838 1500/2/9/10.

183. Current Topics (1974) 48 *Australian Law Journal*, 221, pp. 222-3.

practice cannot be decisive of the question whether a member has been disqualified.¹⁸⁴ The question, according to Hanks, was whether the appointment of Gair to the office of Ambassador 'had proceeded so far that his independence and integrity as a "Parliament man" was compromised.'¹⁸⁵ Pat Lane, the Professor of Constitutional Law at the University of Sydney, also contended that the issue could be argued either way. He was reported by the press as taking the view that Gair's appointment would not come into effect until he presented his credentials to the Irish Government.¹⁸⁶ He then added:

But if I had a brief from the Commonwealth, I would argue that the holding of office should be interpreted more liberally.

On this view, Senator Gair's appointment took place when all the parties involved had agreed on the appointment – and his resignation was only a technical step. To all intents and purposes he holds an office.¹⁸⁷

Legal proceedings were commenced on 5 April 1974 seeking a declaration that the writ issued by the Governor on 2 April 1974 for five vacancies was invalid and that there were six vacancies as Senator Gair's place became vacant from 14 March 1974 or 21 March 1974.¹⁸⁸ Those proceedings were discontinued on 18 April.¹⁸⁹ This was most likely because the matter became academic on 10 April when the Governor-General granted Whitlam a double dissolution. Both Houses were dissolved the following day, on 11 April. Regardless of when Senator Gair's seat became vacant, it was thus filled at the same time as all of the other Senate seats for Queensland.

Post-parliamentary appointment as Agent-General

The issue was addressed more recently in Western Australia in 1999. The President of the Western Australian Legislative Council, Clive Griffiths, was offered and accepted an appointment as Agent-General for the State. His commission was approved by the Executive Council and granted by the Governor on 21 May 1996, but the appointment was stated to commence upon 1 January 1997 and run for two years. Did this have the immediate effect of vacating his seat, or was he able to continue presiding over the House for the rest of 1996, having accepted this office, even though it was not yet in effect? Chief Justice Malcolm concluded:

There is a clear distinction between the appointment to an office as such, on the one hand, and the commencement of the term of office on the other. Where the appointment is made on a particular date but the term of office does not commence until a later specified date, the appointment takes effect as an appointment, but the appointee does not hold the office until the date upon which the term of office is to commence.¹⁹⁰

From a literal reading of the provision, this would appear to be the correct result as Griffiths did not hold the office until the term of office commenced. Malcolm CJ also observed that the office of Agent-General was also an 'office of profit under the Crown' and that this reinforced his view,

184. P J Hanks, 'Parliamentarians and the Electorate', in Gareth Evans (ed), *Labor and the Constitution 1972-1975* (Heinemann, Melbourne, 1977), p. 192.

185. *Ibid.*, p. 193.

186. 'Date Eire job began is key to senate row' *The Australian*, 4 April 1974.

187. *Ibid.*, 'Date Eire job began is key to senate row' *The Australian*, 4 April 1974.

188. *Hatcher v Queensland and Weiss*, (No 38 of 1974). The proceedings were commenced by the solicitor Morgan Ryan representing Frank Hatcher, who proposed to stand in the half-Senate election in Queensland. The Crown Solicitor advised the Attorney-General that the proceedings were incompetent: Memorandum by R B Hutchison, Crown Solicitor, 10 April 1974: NAA A432 1974/214

189. Memorandum by Acting Deputy Crown solicitor, 24 April 1974: NAA A432 1974/214.

190. *R v Jones* [1999] WASCA 194, [30].

because Griffiths was not entitled to receive the profit until his term commenced.¹⁹¹ However, this does not appear to be consistent with the authorities discussed above, which focus on whether the 'office' is one of profit, rather than whether or when the person appointed to the office is entitled to receive that profit.

It is also notable that Griffiths' appointment as Agent-General was cancelled by the Governor on 24 December 1996, in an exercise of the royal prerogative, and a fresh commission was granted to him with a term commencing on 2 June 1997, to run for 2 years. This shows that a government may potentially influence a member by offering a prestigious and lucrative post-parliamentary office to a member, which even if accepted, could be cancelled under the royal prerogative at any time if the member did not behave as desired by the Crown. Hence, despite the above authority, there would still be a good argument that the offer and acceptance of an office of profit, even if the term of that office was intended to commence at a later time, is sufficient to trigger the disqualification in section 44(iv) as this outcome is consistent with one of the main purposes of the provision and the mischief it was intended to avert.

Ministers, Assistant Ministers and Parliamentary Secretaries

Ministers

The final paragraph of section 44 of the Constitution exempts from the application of section 44(iv) 'the office of any of the Queen's Ministers of State for the Commonwealth, or of any of the Queen's Ministers for a State'. Quick and Garran noted that this is 'one of the fundamental principles of the existing system of responsible government'. They placed stress upon the necessity of ministers being responsible to Parliament for their political conduct, which requires their presence 'in one of the Chambers in order to answer questions respecting the administration of their departments, to hear Parliamentary criticism, and, if necessary, to defend themselves when attacked'.¹⁹²

In the United Kingdom, as noted above, while it was accepted that ministers could sit in Parliament, in earlier times they had to resign their seat upon appointment as a minister and re-contest their seat in a by-election. This requirement was finally terminated in 1926. It was never adopted in Australia at the Commonwealth level, despite the fact that the Commonwealth Constitution was enacted before this reform took place in the United Kingdom. Edmund Barton said in the Convention Debates that the British requirement that ministers resign and seek re-election was a consequence of the condition of things at the time the *Statute of Anne* was enacted and that it had ceased to be relevant under representative government as it had since developed. He saw such a requirement, which applied at that time in New South Wales and Victoria, as an 'unnecessary burden'.¹⁹³

While the position of ministers was relatively clear in the United Kingdom and Australia, there was greater uncertainty in relation to lesser posts such as assistant ministers and parliamentary secretaries. In some countries, such as India, parliamentary secretaries have been found to hold offices of profit under the Crown and had their seats vacated.¹⁹⁴ For the same reason, there has been caution about the validity of such appointments in Australia.

191. *R v Jones* [1999] WASCA 194, [36].

192. John Quick and Robert Garran, *The Annotated Constitution of the Australian Commonwealth* (Angus & Robertson, 1901), p. 493.

193. *Official Report of the National Australasian Convention Debates*, Melbourne 1898, 7 March 1898, pp. 1944-5.

194. In January 2018, for example, 20 MLAs in Delhi were disqualified for holding offices of profit under the Crown because they were parliamentary secretaries: <https://currentaffairs.gktoday.in/explained-office-profit-01201851899.html>.

Parliamentary Secretaries in the United Kingdom

In the United Kingdom, ministers are ranked in three tiers. The highest tier is that of Secretary of State, followed by Ministers of State. The lowest tier is 'Parliamentary Under-Secretary of State'. Because it is a ministerial office, it is exempt from disqualification for being an office of profit under the Crown.¹⁹⁵

In addition, a minister may appoint a 'Parliamentary Private Secretary' to assist him or her in relation to parliamentary business and to be a liaison with other members of Parliament. This is an unpaid position and therefore not an 'office of profit'.¹⁹⁶ The holder simply receives his or her ordinary parliamentary remuneration, although he or she may be reimbursed for travel expenses involved in performing his or her functions. As Parliamentary Private Secretaries are subject to collective ministerial responsibility and required to vote with the government, there has been some criticism of their use as a means of 'increasing the voting strength and influence of the Government in the House of Commons'.¹⁹⁷ They may be regarded as offices 'under the Crown' but as they are not 'offices of profit', they do not give rise to disqualification.

Parliamentary Secretaries and Assistant Ministers in the Australian States

Most Australian States have clarified the position of parliamentary secretaries or assistant ministers by excluding these offices from those affected by disqualification provisions. In South Australia, section 45(1a) of the *Constitution Act 1934* (SA) provides that a person is not disqualified for accepting an office of profit from the Crown if he or she accepts an office as a 'Minister of the Crown or as a Parliamentary Secretary to a Minister' or when already a minister, from accepting an appointment to act in the office of another minister. In Queensland the office of 'Assistant Minister' under the *Constitution of Queensland 2001* is excluded from the definition of 'paid public appointment'.¹⁹⁸ In New South Wales the office of 'parliamentary secretary' is excluded from disqualification,¹⁹⁹ as is also the case in Western Australia.²⁰⁰

Parliamentary Secretaries, Assistant Ministers and Ministers without Portfolio in the Commonwealth

At the Commonwealth level, the exemption in section 44 for 'the Queen's Ministers of State for the Commonwealth' has been taken as having the same meaning as in sections 64-66 of the Constitution. Section 64 defines the Queen's Ministers of State for the Commonwealth as the officers appointed to administer 'such departments of State of the Commonwealth as the Governor-General in Council may establish'. Section 66 provides for the payment of the salaries of the 'Ministers of State' from an annual sum paid out of the Consolidated Revenue Fund. These two provisions have led to the conclusion that the exemption in section 44 only applies to ministers who are appointed to administer a department of state and who are paid out of the sum appropriated annually from the Consolidated Revenue Fund to pay for ministers.²⁰¹

195. UK, *Report from the Select Committee on Offices or Places of Profit Under the Crown*, HC 120, 1941, p. xvii.

196. *Ibid.*, p. xvi.

197. *Ibid.*, p. xvi.

198. *Parliament of Queensland Act 2001* (Qld), s 65(3).

199. *Constitution Act 1902* (NSW), subparagraph 13B(3)(c).

200. *Constitution Acts Amendment Act 1899* (WA), s 44A(2). Note also that in Canada, parliamentary secretaries are excluded from disqualification: *Parliament of Canada Act 1985* (Can), subsection 33(3).

201. Geoffrey Sawer, 'Councils, Ministers and Cabinets in Australia' [1956] *Public Law* 110, 123-4; Enid Campbell, 'Ministerial Arrangements' in *Royal Commission on Australian Government*, (AGPS, 1976) Appendices Vol 1, 191, 193.

This has resulted in difficulty in finding a basis to appoint ministers without portfolio (who do not administer a department),²⁰² assistant ministers or parliamentary secretaries. Nonetheless, such officers have been appointed, since federation, in one guise or another.²⁰³ Initially, the primary means of avoiding disqualification was to decline to pay them, as then these offices were not 'of profit'. Occasionally, ingenious (albeit probably unconstitutional) efforts were made to pay them. For example, under Prime Minister Bruce, ministers were paid by the Crown and then part of those ministerial salaries were passed on to their assistant ministers. It was then argued that the payment to the assistant ministers was not made by the Crown and therefore they did not hold an office of profit under the Crown.²⁰⁴ It is unlikely that this reasoning was correct, as it is now well accepted that the source of the profit is irrelevant as long as it attaches to the office.

From time to time, attacks were made on the constitutionality of such offices. For example, in 1952 the Speaker of the House of Representatives argued that the office of Parliamentary Under-Secretary was constitutionally invalid and that the holders of this office had vacated their seats and were vulnerable to actions from common informers.²⁰⁵ He therefore refused to allocate them offices in Parliament House.²⁰⁶ Prime Minister Menzies disagreed, arguing that they were not remunerated, receiving only the reimbursement of expenses and that their office was akin to that of British Parliamentary Private Secretaries who worked in an honorary capacity for members in their legislative capacity.²⁰⁷ This was disputed by H V Evatt, who argued that these officers fulfilled executive functions. He also noted that Menzies had stated that they were not entitled to criticise the ministers whom they were assisting. This showed that they really formed part of the executive.²⁰⁸ While it was probably the case that the parliamentary under-secretaries held 'offices under the Crown', the absence of any payment meant that they were not 'offices of profit'.²⁰⁹ Sawyer also argued that because the House divided on party lines, with a majority supporting Menzies' view that the offices did not result in disqualification, then the House had decided the matter under section 47 of the Constitution.²¹⁰

In 1971, Tom Hughes noted that he had previously advised the Government, when he was Attorney-General, that it could appoint assistant ministers or parliamentary secretaries as members of the Executive Council and to fulfil executive functions, as long as they did not receive any emoluments above and beyond travelling expenses incurred in performing their duties.²¹¹ He considered that these officers would not be exempt as falling within the category of Ministers of State because they did not administer a department of state.

202. John Quick and Robert Garran, *The Annotated Constitution of the Australian Commonwealth* (Angus & Robertson, 1901), p. 711.

203. See the history recounted in: Commonwealth, Senate Standing Committee on Constitutional and Legal Affairs, *The Constitutional Qualifications of Members of Parliament*, 1981: [6.4]-[6.13].

204. L F Crisp, *Australian National Government* (Longmans, 1967) 350; and S Encel, *Cabinet Government in Australia* (MUP, 1962) 266-7.

205. Commonwealth, *Parliamentary Debates*, House of Representatives, 22 May 1952, p. 717.

206. The Parliamentary Under-Secretaries then occupied offices in defiance of the Speaker and had their titles attached to the doors, but they were later torn down by the Speaker. See further: Geoffrey Sawyer, 'Councils, Ministers and Cabinets in Australia' [1956] *Public Law* 110, pp. 125-6.

207. Commonwealth, *Parliamentary Debates*, House of Representatives, 27 August 1952, pp. 618-21.

208. Commonwealth, *Parliamentary Debates*, House of Representatives, 27 August 1952, pp. 621-3.

209. Sawyer, correctly, doubted that the payment of out-of-pocket expenses or a reasonable estimate of those expenses would be regarded by a court as amounting to 'profit': Geoffrey Sawyer, 'Councils, Ministers and Cabinets in Australia' [1956] *Public Law* 110, p. 127.

210. Sawyer also took the view that the enactment of legislation allowing a House to refer such a question to the Court of Disputed Returns did not deprive the House of its power to decide such matters: Geoffrey Sawyer, 'Councils, Ministers and Cabinets in Australia' [1956] *Public Law* 110, 126-8. See also: Enid Campbell, 'Ministerial Arrangements' in *Royal Commission on Australian Government*, (AGPS, 1976) Appendices Vol 1, pp. 191, 192 and 205.

211. Commonwealth, *Parliamentary Debates*, House of Representatives, 20 August 1971, p. 440.

When the *Parliamentary Secretaries Act 1980* was enacted, formalising the office of parliamentary secretary, it was stated in the second reading speech that for constitutional reasons the office was not to be remunerated. Only the reimbursement of reasonable expenses actually incurred was to be permitted. This was to avoid it being classified as an office of profit.²¹² The 1981 Senate Committee referred to advice from Tom Hughes QC, Nigel Bowen QC, Douglas Menzies QC and Garfield Barwick QC that an officer cannot be a ‘Minister of State’ unless he or she is appointed to administer a Commonwealth Department.²¹³ While Barwick considered that only one person could fulfil the office of administering a particular department of state, Douglas Menzies considered that more than one person could be appointed to administer a department and that the division of labour among those ministers would be a matter for arrangement by the Prime Minister.²¹⁴ Douglas Menzies also distinguished the position of a person whose functions were parliamentary only—such as a parliamentary secretary whose function was to facilitate the passage of a bill through the House.²¹⁵

In 1987 the Solicitor-General, Gavan Griffith, advised the Commonwealth that it could appoint more than one minister to administer a department of State.²¹⁶ It was not until 2000, however, that the *Ministers of State Act 1952* (Cth) was amended to deal with this problem by classifying parliamentary secretaries as ministers, even though they were not given that title, and allocating all of them to administer departments, with more than one minister per department. This was intended to allow them to be remunerated but remain exempted from the application of section 44(iv).²¹⁷

The issue was finally tested in the High Court in *Re Patterson; ex parte Taylor*.²¹⁸ In that case there was a challenge to a decision of a Parliamentary Secretary, Senator Patterson, who had been appointed to administer the Department of Immigration and Multicultural Affairs, even though there was already a minister, Philip Ruddock, administering that department. The challenge failed. Gleeson CJ stressed that the provisions in the Constitution concerning executive arrangements were intended to be flexible. He considered that there was nothing inconsistent with section 64 of the Constitution in appointing two persons to administer a Department or in having more than one person who is responsible to Parliament for the administration of the Department.²¹⁹ The other members of the Court who addressed the issue agreed.²²⁰ On this basis, the appointment of paid parliamentary secretaries as ministers who administer a department of state with other ministers would not result in a breach of section 44(iv) of the Constitution because it would fall under the exception concerning the Queen’s Ministers of State for the Commonwealth.

212. Commonwealth, *Parliamentary Debates*, House of Representatives, 26 November 1980, 81 (Mr Viner).

213. Commonwealth, Senate Standing Committee on Constitutional and Legal Affairs, *The Constitutional Qualifications of Members of Parliament*, 1981: [6.15].

214. *Ibid.*, [6.16]–[6.17].

215. *Ibid.*, [6.23].

216. Gavan Griffith QC, *In the matter of the appointment of ministers and section 64 of the Constitution*, 30 June 1987, quoted in: Kathryn Cole, ‘Office of Profit under the Crown and Membership of the Commonwealth Parliament’ Issues Brief No 5 1993, Parliamentary Research Service, 30 April 1993, p. 8. Such a view had also previously been taken by: Geoffrey Sawer, ‘Councils, Ministers and Cabinets in Australia’ [1956] *Public Law* 110, p. 124; and Enid Campbell, ‘Ministerial Arrangements’ in *Royal Commission on Australian Government*, (AGPS, 1976) Appendices Vol 1, 191, pp. 201–2.

217. Note, however, Carney’s doubt about the validity of this change: Gerard Carney, *Members of Parliament: Law and Ethics* (Prospect Media, 2000), p. 77.

218. *Re Patterson; ex parte Taylor* (2001) 207 CLR 391.

219. *Re Patterson; ex parte Taylor* (2001) 207 CLR 391, [17] (Gleeson CJ).

220. *Re Patterson; ex parte Taylor* (2001) 207 CLR 391, [65]–[68] (Gaudron J); [210]–[211] (Gummow and Hayne JJ); [320] (Kirby J); and [380] (Callinan J).

Senators-elect

While senators are usually elected at half-Senate elections held at the same time as a general election to the House of Representatives, they do not take up their office as senator until the following 1 July.²²¹ This means there may be a considerable period between being ‘chosen’ and ‘sitting’ as a senator. Do sections 44 or 45 apply to them if they exercise any disqualifying office during that period?

Section 44 of the Constitution applies to ‘any person’, because it deals with the fact that the person is ‘incapable of being chosen’, so that the person does not become a senator. It addresses both the act of being ‘chosen’ and the act of ‘sitting’, leaving a potential gap of many months between the two events. In contrast, section 45 applies to a senator and if breached imposes the consequence that ‘his place shall thereupon become vacant’. Does a person become a ‘senator’ who holds a ‘place’ immediately upon being validly returned as elected (that is, upon the return of the writs), or does a person only become a senator at the time he or she commences office?

Two further constitutional provisions are relevant to answering this question. Section 13 of the Constitution provides that, except in the case of a double dissolution or a casual vacancy, the term of service of a senator ‘shall be taken to begin on the first day of July following the day of his election’. Section 42 provides that ‘every senator... shall before taking his seat make and subscribe before the Governor-General, or some person authorised by him, an oath or affirmation of allegiance’.²²² On the one hand, these provisions suggest that a person does not become a senator until he or she commences his or her term of office and takes the oath or affirmation. On the other hand, section 42 refers to the person as a senator before taking the seat, which implies that he or she already holds the status of a senator before being sworn in, and possibly before the commencement of the term on 1 July, going back to the point of election, although this is unclear.

While accepting that there was uncertainty about the position, Carney argued that the preferable view is that a person is not disqualified if he or she acquires a disqualifying office *after* being validly chosen as long as he or she terminates that disqualifying office *before* taking up the office of senator upon being sworn-in. He saw this as consistent with the ‘natural and literal meaning of the language of the section’.²²³ Carney acknowledged that the alternative argument is that the use of the word ‘sitting’ in section 44 was intended to prevent any gap between the application of sections 44 and 45.²²⁴

Carney’s view was also taken by Fred Whitlam, the Commonwealth Crown Solicitor, in 1946. While recognising the argument that election and sitting were ‘so connected as to be virtually a single event’ and that s 44 is intended to disqualify persons if any of the listed disabilities occur within the period from being chosen to sitting, he concluded that such an argument necessitates the importing of an intent ‘for which there is no positive foundation and which cannot be supported without express words’.²²⁵

221. Note that the position is different when a double dissolution is held under s 57 of the Constitution. It is also different in relation to senators elected to represent the Territories and when a casual vacancy is filled under s 15 of the Constitution.

222. Compare in the United Kingdom, where the *Parliamentary Oaths Act 1866* (UK) requires ‘every member of the House of Commons to swear or affirm an oath of allegiance. A member may not sit or vote in the House and is not paid a salary until he or she has taken the oath. In practice, some members from Northern Ireland habitually do not take the oath and therefore do not ever sit. If a member votes or sits without having sworn or affirmed the oath, he or she is subject to a penalty of £500 for each day of sitting and his or her seat shall be vacated.

223. Gerard Carney, *Members of Parliament: Law and Ethics* (Prospect Media, 2000), p. 72.

224. *Ibid.*, p. 73.

225. Fred Whitlam, ‘Senator Elect – Disqualification from being chosen or sitting as a Senator’, 11 November 1946: <http://legalopinions.agps.gov.au/legalopinion/opinion-1787>.

The issue has arisen on a number of occasions. In 1944, Senator-elect Sheehan sought advice from the Attorney-General, H V Evatt, as to whether he could accept an office in connexion with the Victory Loan Campaign while a senator-elect, without being the subject of disqualification. Evatt replied that the Law Officers have consistently declined to give such advice, lest it be relied upon and later contradicted by a court. He then added:

I think, however, that in the present case I might point out to you that section 44 of the Constitution creates incapacity to be chosen as a Senator or to sit as a Senator. You have already been chosen, and it is, in my view, clear that section 44, in so far as it imposes a disability on a disqualified person being chosen, can no longer apply to you.

As to the disability on a disqualified person sitting as a Senator, you will not be entitled to sit until 1st July next, and if you vacate on or before 30th June next the position in connexion with the Victory Loan Campaign, which has been offered to you, it seems clear to me that section 44 can have no application to preclude you from sitting by reason of your having held that position.

As previously stated, however, I must inform you that the question you ask is not one on which I can advise you in my official capacity as Attorney-General.²²⁶

In 1962, when Doug McClelland was a senator-elect, he had resigned from his position as a Commonwealth court reporter prior to the election but faced six months unemployment before taking up his office as a senator. Advice was sought from the Solicitor-General as to whether McClelland could be re-employed as a court reporter during this period. The Solicitor-General followed the general government practice of declining to give advice as to the application of section 44 of the Constitution to individuals, while the Public Service Board expressed doubts about 'the desirability of a Senator-elect being employed in the Public Service'.²²⁷

In 1980 a senator-elect sought advice as to whether he could accept employment as a 'legislative assistant' to a member of Parliament during the period before taking up his place the following 1 July. The Attorney-General, Senator Durack, advised that he should not do so, concluding that this was both the safe and correct view. He noted the lack of authority and the different interpretative approaches that could be taken. He observed:

A strict construction of section 44 as a penal provision would indicate that it is not to be regarded as applicable to senators-elect. A strong regard on the other hand to the mischiefs that section 44 was intended to deal with would, I think, justify the implication that appears to be necessary to make section 44 applicable to senators-elect. The notion of disqualification provisions applying during the election processes and during the time of service as a senator, but being interrupted by an interregnum while the elected person awaits the time when he takes up his place, can only be regarded, I believe, as highly anomalous.²²⁸

In 1981 a Senate Committee took the view that a person holding the position of research assistant to a member of Parliament 'can be regarded as essentially a servant of the Parliament or of a member, and not of the Executive, and he should not be precluded from accepting such an

226. Letter by H V Evatt, Attorney-General, to Senator-elect Sheehan, 15 March 1944: NAA A472 W19918 [original emphasis].

227. Commonwealth, *Parliamentary Debates*, House of Representatives, 7 March 1962, p. 586.

228. Letter by Senator P Durack to Senator G Evans, 21 November 1980, reproduced in: Commonwealth, Senate Standing Committee on Constitutional and Legal Affairs, *The Constitutional Qualifications of Members of Parliament*, 1981: Appendix 2, pp. 99-100. Senator Durack reaffirmed this opinion in 1997, and other witnesses, including George Williams and Geoffrey Lindell, also considered that senators-elect who held offices of profit under the Crown risked disqualification: Commonwealth, House of Representatives Standing Committee on Legal and Constitutional Affairs, *Aspects of Section 44 of the Australian Constitution – Subsections 44(i) and (iv)*, 1997, [3.23].

opportunity to gain valuable experience by an over-cautious interpretation of the expression “office of profit under the Crown”.²²⁹

In 1996, as discussed above, Jeannie Ferris was appointed to work for a Parliamentary Secretary in the period between being chosen and first sitting as a senator. Questions were raised about whether or not she had become disqualified. Ferris had relied upon legal advice that taking up this office in the period before she was sworn in as a senator would not result in her disqualification.²³⁰

Nonetheless, others took a different view, including the Clerk of the Senate, Harry Evans.²³¹ According to *Odgers*:

The argument was ... advanced that the disqualification provisions do not apply to a senator-elect, but only to a candidate and to a senator who has commenced a term. It would seem to be a strange result, however, if the safeguard intended to be provided by the disqualification could be defeated by conferring an executive government position on a senator-elect, which could influence the conduct of the senator during an election and after the beginning of the senator’s term. In any case, the writ for the election had not been returned at the time when Senator Ferris took up the position, so that the election was technically still in progress and she was still in the process of being chosen.²³²

The issue most recently arose in relation to Hollie Hughes in 2017. As discussed above, at the 2016 double dissolution election, Fiona Nash was declared to have been elected but was later found to have been disqualified. A special recount found that Hollie Hughes was elected to fill the seat, but a question arose as to whether she had been disqualified for accepting an office of profit under the Crown after the writs for the election had been returned. In discussing the point at which an election period ends and whether there is a hiatus between the disqualification provisions, the Court of Disputed Returns observed:

Such difficulty as might be thought to inhere in the potential for such a hiatus is put in perspective, however, when it is recognised that an election to fill places in the Senate is permitted by s 13 of the Constitution to occur at any time up to a year before those places become vacant. Whatever the end-point of the process of being chosen, it is inevitable that there will be some period of time between the day on which the process of being chosen ends and the day on which the person chosen is first due to take the place for which he or she was chosen during which period a disqualification might arise as result of which the person, although chosen, would be prevented by s 44 from sitting.²³³

The Court decided to avoid any such hiatus by concluding that there was no gap between the operation of section 44 and section 45(i) of the Constitution. It extended the operation of section 45(i) so that it applies to persons who are chosen but have not yet commenced their term as a senator. Their Honours said:

Whatever the end-point of the process of being chosen to which s 44 refers, a person has become a senator or member of the House of Representatives within the meaning of s 45 once that end-point is reached. If the person thereafter becomes subject to a disability mentioned in s 44, not only does s 44 operate to prevent the person from sitting but s 45(i) operates to vacate his or her place. Section 45(i) has that operation even if the person has not yet taken his or her seat for the place for which he or she

229. Commonwealth, Senate Standing Committee on Constitutional and Legal Affairs, *The Constitutional Qualifications of Members of Parliament*, 1981: [5.57].

230. Commonwealth, *Parliamentary Debates*, Senate, 29 May 1996, p. 1251.

231. Harry Evans, ‘Constitution, Section 44: Disqualification of Senators: Senator-Elect Jeannie Ferris’, 27 May 1996: Commonwealth, *Parliamentary Debates*, Senate, 29 May 1996, p. 1254.

232. Rosemary Laing (ed), *Odgers’ Australian Senate Practice* (Dept of Senate, 14th ed, 2016), p. 169.

233. *Re Nash [No 2]* [2017] HCA 52, [31] (Kiefel CJ, Bell, Gageler, Keane and Edelman JJ).

was chosen and, by reason of becoming subject to the disability, is prevented by s 44 from ever doing so.²³⁴

On the basis of this reasoning, if a person is validly chosen in a Senate election, thereby ending the period of being chosen, he or she becomes a senator, even though his or her term has not yet commenced,²³⁵ and if a disqualifying event occurs in the period before the term commences, he or she is disqualified by section 45 of the Constitution and prevented from taking up his or her seat and sitting. This was confirmed by six Justices of the Court of Disputed Returns in *Re Lambie*, who said:

If a qualified candidate once having been returned as elected thereafter becomes subject to a disability mentioned in s 44, “not only does s 44 operate to prevent the person from sitting but s 45(i) operates to vacate his or her place”.²³⁶

This would presumably mean that where a qualified person was validly elected as a senator and subsequently became disqualified before taking up his or her place in the Senate, a casual vacancy would arise because the senator’s place became vacant before the expiration of his or her term. It would have to be argued that this was so, even though that term had not yet commenced.

Despite the Court of Disputed Returns addressing this issue in *Re Nash*, it did not apply to Hollie Hughes. She was not regarded as having been validly elected and then later disqualified during the period she was a senator-elect. Instead, she was held to have been disqualified during the period of being ‘chosen’ because the election had failed to be completed due to the fact that Nash was incapable of being chosen.²³⁷ For this reason, a further special recount was ordered with Jim Molan being elected to the seat.

Membership of both Commonwealth and state parliaments

While membership of a Parliament has been regarded as an ‘office’ and one ‘of profit’, it has not been regarded as being ‘under the Crown’ because it is instead a legislative office. The ‘office of profit under the Crown’ disqualification would therefore not of itself prevent a member of one House being simultaneously elected to the other House, or a person simultaneously being a member of both the Commonwealth and state parliaments.²³⁸ Section 43 of the Commonwealth Constitution addresses the first issue by providing that a ‘member of either House of the Parliament shall be incapable of being chosen or of sitting as a member of the other House’. It does not, however, deal with the issue of a member of a state parliament sitting in the Commonwealth Parliament. Indeed, the Constitution appears to accept this as a possibility to the extent that state ministers are excluded from the application of section 44(iv).

The 1891 draft of the Constitution prevented a member of the Commonwealth Parliament from being elected to a state parliament and vacated the seat of any state member who, with his own consent, was chosen as a member of the Commonwealth Parliament.²³⁹ One of the objections to

234. *Re Nash [No 2]* [2017] HCA 52, [33] (Kiefel CJ, Bell, Gageler, Keane and Edelman JJ).

235. This is because section 13 of the Constitution provides that the ‘term of service of a senator shall be taken to begin on the first day of July following the day of his election’ except after a double dissolution.

236. *Re Lambie* [2018] HCA 6, [7] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ). See also: *Alley v Gillespie* [2018] HCA 11, [66] (Kiefel CJ, Bell, Keane and Edelman JJ).

237. *Re Nash [No 2]* [2017] HCA 52, [44] (Kiefel CJ, Bell, Gageler, Keane and Edelman JJ).

238. Compare, however, the apparently erroneous assumption in *Sykes v Cleary* that section 44(iv) does operate to prevent a member of one House standing for the other: *Sykes v Cleary* (1992) 176 CLR 77, 96 (Mason CJ, Toohey and McHugh JJ).

239. *Official Report of the National Australasian Convention Debates*, Sydney 1891, 8 April 1891, pp. 877-83. See also: John Quick and Robert Garran, *The Annotated Constitution of the Australian Commonwealth* (Angus & Robertson, 1901), p. 488. Note that in Canada from 1867 to 1873 some persons simultaneously held office as members of the Canadian Parliament and a provincial legislature. This was prohibited in 1873.

this clause was that it would deter the best political leaders in the Australian colonies from running for the new federal Parliament. Another was that the Constitution should not unnecessarily impose requirements on the Parliaments of the Commonwealth and the states, as they would be perfectly capable of legislating for the benefit of the people from time to time.

These clauses were deleted at the Adelaide Convention in 1897 and an attempt to reinsert them failed, on the basis that it should be a matter for Parliaments to address.²⁴⁰ The Tasmanian Legislative Assembly then proposed a resolution to make state members of Parliament incapable of 'sitting' in the Commonwealth Parliament. It would have allowed their election to the Commonwealth Parliament, so that they could be confident they were elected before having to resign their state seat. This resolution was debated and defeated at the Sydney 1897 Convention.²⁴¹ In the course of debate, Barton pointed to the conflict of interest problem:

I take it that the very fact that a member of parliament, both of the state and of the commonwealth, would have a divided interest, is a strong reason against his being a member of both parliaments. "No man can serve two masters: either he will love the one and hate the other," and so on. I believe that there is likely to be, on the part of a member of both the local and commonwealth parliaments either too strong an adherence to the interests of the state to the neglect of his duty to and the interests of the commonwealth, or, on the other hand, such a strong adherence to the interests of the commonwealth as would prejudice the state of which he is a member.²⁴²

While still arguing that it was improper for a person to be a member of both Parliaments and that there should be a prohibition against it, Barton later accepted that such a prohibition should not be imposed by the Constitution, as it should be a matter for people of the Commonwealth to make their own laws.²⁴³ The Convention agreed and the amendment was defeated.

The Court of Disputed Returns has acknowledged that the exemption of State ministers from section 44 was 'designed to ensure their availability for election at the inception of the Commonwealth Parliament',²⁴⁴ although no transitional limits were placed on the provision. The matter was left to the Commonwealth Parliament to deal with after transitional needs were met. It was accepted at the time the exemption was first inserted in the draft Constitution that while it was necessary to ensure that State Premiers could be elected to the Commonwealth Parliament at the first federal election, it would later become unacceptable.²⁴⁵ Carney has regarded this exemption as now 'redundant'.²⁴⁶

Prior to the first election of the Commonwealth Parliament, the colonies (or States, as they became in 1901) enacted legislation dealing with federal elections. In New South Wales, section 7 of the *Federal Elections Act 1900* (NSW) provided that a member of the Commonwealth Parliament was incapable of being summoned, nominated or elected as a member of the NSW Parliament. Further, if any member of the NSW Parliament was elected to the Commonwealth Parliament, his seat in the NSW Parliament became vacant once the period for any successful petition against his election had expired.

240. *Official Report of the National Australasian Convention Debates*, Adelaide 1897, 22 April 1897, pp. 1181-2.

241. *Official Report of the National Australasian Convention Debates*, Sydney 1897, 21 September 1897, 996-1011.

242. *Ibid.*, 21 September 1897, p. 997.

243. *Ibid.*, p. 1007.

244. *Sykes v Cleary* (1992) 176 CLR 77, 100 (Mason CJ, Toohey and McHugh JJ).

245. *Official Report of the National Australasian Convention Debates*, Melbourne 1898, 7 March 1898, p. 1941.

246. Gerard Carney, *Members of Parliament: Law and Ethics* (Prospect Media, 2000), p. 77. See also: Commonwealth, House of Representatives Standing Committee on Legal and Constitutional Affairs, *Aspects of Section 44 of the Australian Constitution – Subsections 44(i) and (iv)*, 1997: [3.38].

In 1902, the Commonwealth responded with its own prohibition. Section 96 of the *Commonwealth Electoral Act 1902* (Cth), provided:

No person who is at the date of nomination or who was at any time within fourteen days prior to the date of nomination a Member of the Parliament of a State shall be capable of being nominated as a Senator, or as a Member of the House of Representatives.

In 1905, the Premier of New South Wales wrote to the Prime Minister asking whether, if NSW amended the *Federal Elections Act 1900* (NSW) to permit members of the Commonwealth Parliament to become candidates for election to the NSW Parliament, the Commonwealth might reciprocate by legislating to permit members of the NSW Parliament to become candidates for the Federal Parliament.²⁴⁷ The Premier noted that the matter had been discussed at a Conference of State Premiers in April 1903 and that a resolution had been agreed upon for disqualification to be ‘removed on both sides’, but no action had yet been taken.²⁴⁸ The Commonwealth rejected this overture, noting that it would not affect the position in relation to the other states.

Section 164 of the *Commonwealth Electoral Act 1918* (Cth) now provides that a person who is, at the hour of nomination a member of a state parliament or the Northern Territory or Australian Capital Territory Legislative Assembly, ‘is not capable of being nominated as a Senator or as a Member of the House of Representatives’. *Odgers* has noted that as this prohibition only attaches to nomination, there is no Commonwealth bar on the appointment of a current state member of parliament to fill a casual vacancy in the Senate.²⁴⁹

Theoretically, a person could also be nominated for election to the Commonwealth Parliament, while not being a member of any other parliament, and then be elected immediately afterwards to a state or territory parliament. The Commonwealth law would not prevent this from occurring, but a state law might.²⁵⁰

State legislation on the issue also continues to apply. Section 47 of the *Constitution Act 1934* (SA) provides that no member of either House of the Commonwealth Parliament shall be a member of either house of the state parliament. If a member of the state parliament is elected to the Commonwealth Parliament, he or she vacates his or her state seat upon taking up the Commonwealth seat. Tasmania has a similar provision in section 31 of this *Constitution Act 1934* (Tas), but the state seat becomes vacant upon the day the returning officer declares the state member as having been elected to either House of the Commonwealth Parliament. It adds, for good measure, that a state minister vacates this office upon acceptance of office as a minister of the Crown under the Commonwealth.

Section 44(2) of the *Constitution Act 1975* (Vic) provides that a person who is a member of either house of the Commonwealth Parliament ‘shall not be qualified to be elected a member of the’ Victorian Parliament. If a member of the Victorian Parliament is elected as a member of the Commonwealth Parliament, his or her state seat becomes vacant at the end of the period during which a petition against his or her election may be lodged, or if such a petition is lodged, upon its final determination in favour of the member.²⁵¹

Section 34 of the *Constitution Acts Amendment Act 1899* (WA) provides that a person is disqualified from membership of the state parliament if he or she is a member of the

247. Letter by Sir Joseph Carruthers, NSW Premier, to the Prime Minister, 10 August 1905: NAA A406 E1905/8412.

248. Letter by Sir Joseph Carruthers, NSW Premier, to the Prime Minister, 29 June 1905: NAA A406 E1905/8412.

249. Rosemary Laing (ed), *Odgers’ Australian Senate Practice* (Dept of Senate, 14th ed, 2016), p. 167.

250. Note that some State laws refer only to ‘election’ to the Commonwealth Parliament and may therefore also not cover ‘appointment’: Gerard Carney, *Members of Parliament: Law and Ethics* (Prospect Media, 2000), p. 26.

251. *Constitution Act 1975* (Vic), section 47.

Commonwealth Parliament or a legislature of another state or a territory. A member of one state house is also disqualified from being a member of the other house.

Section 13C of the *Constitution Act 1902* (NSW) provides that a member of either house of the NSW Parliament is incapable of being elected to or sitting in the other house, but the prohibition on a Commonwealth member of Parliament being elected to the state parliament is found in section 91 of the *Electoral Act 2017* (NSW). Section 79 of that Act also provides for the delay of the issue of a writ where a state member resigns in order to run for the Commonwealth Parliament, but seeks to stand in the state by-election if he or she is unsuccessful in the Commonwealth election.

Queensland also provides for the deferral of the issue of a state writ where a state member resigns his or her seat to run for the Commonwealth Parliament.²⁵² It also provides that any person who is elected as a member of the state parliament cannot take up his or her seat until the person stops holding membership of the Commonwealth Parliament or a legislature of another state.²⁵³ If a state member is elected to the Commonwealth Parliament or the legislature of another state, then his or her seat becomes vacant.²⁵⁴

Membership of the armed forces

In the United Kingdom, membership of the armed forces was not regarded as a disqualification from being a member of parliament, unless the person was on the active list in normal times (i.e. when no emergency legislation was in effect).²⁵⁵ Retired regular officers and members of the reserve forces or auxiliary services were all permitted to be members of parliament.²⁵⁶ The relevant criterion was regarded by a UK Select Committee in 1941 as being ‘whether or not the person concerned is under an obligation to act under or in accordance with orders or directions made or issued by or on behalf of the Crown or a member of the executive government’. The Committee concluded that by that test, ‘officers and men of the forces on the active list in normal times should clearly be disqualified’.²⁵⁷ Today it continues to be the case in the United Kingdom that members of the active regular armed forces are disqualified, but those who are retired or on emergency lists or in the reserve forces, are not.²⁵⁸ In Canada, members of the reserve forces who are not on full-time service are exempt from disqualification, as are members who are on ‘active service as a consequence of war’.²⁵⁹

In Australia the issue of whether members of the armed forces should be able to serve in Parliament was discussed in the Constitutional Convention debates. During the 1891 Convention,

252. *Parliament of Queensland Act 2001* (Qld), section 76. Note, however, that earlier legislation that allowed State members who resigned to stand for election to the Commonwealth Parliament and were defeated to regain their State seat without a by-election was rendered inoperative by conflicting Commonwealth legislation in 1922. See: *Legislative Assembly Act Amendment Act 1921* (Qld) and the *Commonwealth Electoral Act 1921*, section 2, amending section 70 to make incapable ‘of being nominated as a Senator, or as Member of the House of Representatives’ any person who has ‘resigned from the Parliament of a State and has the right, under the law of the State, if not elected to the Parliament of the Commonwealth, to be re-elected to the Parliament of the State without the holding of a poll’.

253. *Parliament of Queensland Act 2001* (Qld), section 68.

254. *Parliament of Queensland Act 2001* (Qld), paragraph 72(1)(e). Compare paragraph 224A(b) of the *Local Government Act 1993* (Qld), which provided that a councillor ceases to hold office as a councillor if he or she is declared to be a candidate for a Commonwealth election. This provision was held to be invalid by the Queensland Court of Appeal on grounds including that it was beyond the legislative competence of the Queensland Parliament because it dealt with qualifications for election to the Commonwealth Parliament: *Local Government Association of Qld (Inc) v Queensland* [2001] QCA 517.

255. Edward Fellowes, *Sir Thomas Erskine May's Treatise on the Law, Privileges Proceedings and Usage of Parliament* (Butterworths, 16th ed, 1957) 211. In war the position was different—see *House of Commons (Service in His Majesty's Forces) Act 1939* (UK) and *House of Commons Disqualification (Emergency Provisions) Act 1941* (UK).

256. UK, *Report from the Select Committee on Offices or Places of Profit Under the Crown*, HC 120, 1941, p. xxii.

257. *Ibid.*

258. *House of Commons Disqualification Act 1975* (UK), sections 1(1)(c) and 3.

259. *Parliament of Canada Act 1985* (Can), section 33.

Mr Burgess noted that he had been caught by a disqualification clause in his own colony of Tasmania. He had been an officer in the defence force and when parliament passed a bill providing for officers to be paid, the Attorney-General required him to vacate his seat, resign his commission as an officer and submit himself to his constituents again in an election.²⁶⁰ After some criticism of the draft clause, Sir Samuel Griffith agreed to revise it, taking into account various distinctions made in the Queensland Constitution.²⁶¹ The revised clause substantially resembles the final version, except that it also dealt with the issue of new commissions and increases in pay,²⁶² which was later removed.

The position of members of the defence forces is dealt with explicitly in the final paragraph of section 44 of the Constitution. It provides that sub-section (iv) does not apply 'to the receipt of pay, half pay, or a pension, by any person as an officer or member of the Queen's navy or army, or to the receipt of pay as an officer or member of the naval or military forces of the Commonwealth by any person whose services are not wholly employed by the Commonwealth'.

A number of distinctions are made in that paragraph. First, the Queen's navy or army is distinguished from that of the 'naval or military forces of the Commonwealth'. The Queen's navy or army means the British Imperial forces. In the Constitutional Convention Debates in 1897, Edmund Barton noted that members of these Imperial forces are exempted because their offices of profit come under the Imperial Government, which pays them, rather than the Commonwealth Government.²⁶³ Because they were still, however, 'under the Crown' (which at that time was regarded as 'one and indivisible') Barton considered that an express exemption was required, or otherwise the provision might be read to apply to them.²⁶⁴ The exemption was broad, as it took in those who were on full-time pay as well as those on half pay and pensions.

When it came to Commonwealth forces, however, the exemption only applies to those who are 'not wholly employed by the Commonwealth'. This would usually include those in the reserve forces, but there would be no exemption for full-time members of the armed forces.

This led to some uncertainty during war, as to whether members of parliament could retain their seats while serving in the armed forces. The issue was raised in the War Cabinet on 16 June 1942. The Attorney-General was asked to report on the legal aspects of the matter. On 31 July, the Prime Minister again wrote to the Attorney-General requesting legal advice on the subject. Draft advice was prepared by the Attorney-General's Department to the effect that commissioned officers held offices of profit under the Crown, but enlisted members of the armed forces and non-commissioned officers did not hold an office and were therefore not affected by section 44(iv). It also took the position that the reference in the final paragraph of section 44 to the 'military forces' of the Commonwealth included air forces, as the term 'military' should be read as a generic one that includes 'any species of combatant force of the Commonwealth not included in the expression "naval forces"'. The draft advice observed that if, at the time a person is chosen or sitting as a senator or member, his or her services are wholly employed by the Commonwealth as a member of the Defence Forces, then he or she does not fall within the exemption in the final paragraph of section 44. The draft advice concluded that if a member or senator is a

260. *Official Report of the National Australasian Convention Debates*, Sydney 1891, 3 April 1891, p. 661.

261. *Ibid.*, p. 661-2.

262. *Official Report of the National Australasian Convention Debates*, Sydney 1891, 8 April 1891, p. 898.

263. *Official Report of the National Australasian Convention Debates*, Adelaide 1897, 17 April 1897, p. 754.

264. *Ibid.*, p. 755. Barton noted the case of Sir Bryan O'Loghlen, discussed above.

commissioned officer engaged in full time military, naval or air force service, his or her seat is vacated.²⁶⁵

The Attorney-General instructed that the Department was not to proceed further on the matter and the advice was not provided to the Prime Minister. While no reason was given, it was presumably because the conclusion in the advice, while legally accurate, was politically inconvenient.

The issue was raised in Parliament by Senator Aylett who asked in September 1942 whether members of the Commonwealth Parliament holding military offices and drawing military pay were subject to the forfeiture of their seats in Parliament.²⁶⁶ The Attorney-General's response was that the Government does not express legal opinions on matters of law in reply to questions.²⁶⁷ He did, however, advise the Government that it should make a regulation that would ensure that state members of parliament could take up service in the armed forces or on Commonwealth bodies related to the war without their seats being vacated.²⁶⁸ The Regulation was made, but each state premier was also advised that due to doubts about the validity of the Regulation, they should consider state legislation to achieve the same outcome.²⁶⁹

The Attorney-General continued to sit on the draft advice, but the Prime Minister became impatient. Curtin pointed out that the matter had been 'outstanding for some time' and requested on 19 January 1943 that the advice be expedited.²⁷⁰ The Attorney-General persisted with his policy of inaction.

The matter was raised indirectly in December 1943, this time by the Commander-in-Chief of the Australian Military forces, General Blamey. He complained to the Minister for the Army about the potential conflict of duties of members of Parliament serving in the armed forces. He gave the example of Captain Clarence Martin of the staff of the Port Moresby Base Sub-Area who was Attorney-General of New South Wales. Martin applied for leave to deal with urgent ministerial matters. Leave was granted as otherwise his functions as a member of parliament and a minister would be unduly restricted. General Blamey took the view that such conflicts of duty should not be allowed to occur and that any member of parliament on the active list should be transferred to the reserves while serving as a member of the Commonwealth or state parliaments.²⁷¹ It seems that Blamey was concerned with practical conflicts, rather than the legal or constitutional ones, but that the Prime Minister, John Curtin, was more worried about the legal and constitutional ramifications.

In 1944, Curtin again noted the failure of the Attorney-General to respond to his request for advice from July 1942. He acknowledged that members of the British Parliament were permitted to serve in the armed forces, but that this was achieved by the enactment of a statute, the long title of which was 'An Act to prevent membership of any of His Majesty's Forces being a disqualification for Membership of the Commons House of Parliament'. He also observed that the President of the

265. Commonwealth, Attorney-General's Department, 'Opinion – Commonwealth Constitution, Section 44(iv) and final paragraph', undated: NAA A472 W6512.

266. Commonwealth, *Parliamentary Debates*, Senate, 25 September 1942, p. 943.

267. Letter by H V Evatt, Attorney-General, to Senator Aylett, undated: NAA A472 W6512.

268. H V Evatt, 'Position of Members of State Parliaments – Accepting Appointments Under the Crown', September 1942: NAA A472 W6512.

269. Letter by John Curtin, Prime Minister, to State Premiers, 15 October 1942, referring to Statutory Rules 1942, No 429. Sir Henry Manning, E M Mitchell and the Crown Solicitor of South Australia had all previously raised doubts about the validity of the Regulation: NAA A472 W6512.

270. Letter by John Curtin, Prime Minister, to H V Evatt, Attorney-General, 19 January 1943: NAA A472 W6512.

271. Letter by General Thomas Blamey to Frank Forde, Minister for the Army, 13 December 1943: NAA A472 W6512. Note that Clarence Martin was instead transferred to Land Headquarters in Melbourne and not placed in the reserves until 18 October 1945.

United States had instructed the Secretaries of War and the Navy that members of Congress could not, under the Constitution, serve in the armed forces. Curtin instructed that no action be taken to transfer all serving members of Parliament from active service to the reserves until the Attorney-General advised on the legal aspects of the matter.²⁷² It is not clear from the government files what then happened. However, it appears that the constitutional issue was not raised in court and that members did not have their seats formally vacated due to service during the war. It may simply have been that a blind eye was turned to the issue during the course of the war.

The issue did not return to public consciousness until the seat of Jackie Kelly was held to be vacated in 1996. As discussed above, Kelly was an officer in the Air Force. She had requested a transfer to the reserve forces, but it had not been processed before the date of her nomination as a candidate for Parliament. As she held a full-time office in the armed services, she held an office of profit under the Crown and was incapable of being chosen.²⁷³

Section 7 of the *Defence (Parliamentary Candidates) Act 1969* (Cth) facilitates the transfer to the reserve forces of officers of the navy, army and air force if they wish to stand for the Commonwealth, state or territory parliaments. Section 8 also provides for the discharge of any enlisted member who seeks to run for Parliament. In both cases, provision is made for the officer or enlisted member to be reinstated if he or she is not elected and in some cases reinstatement may be compulsory.²⁷⁴ This legislation was first sparked by questions concerning the eligibility of national service conscripts to run for parliament.²⁷⁵

There is still, however, some ambiguity. First, a question arises as to whether any remuneration of a member of the reserve forces would, while exempt from section 44(iv), still trigger the application of section 45(iii), which causes a vacancy in a member or senator's seat if he or she 'directly or indirectly takes or agrees to take any fee or honorarium for services rendered to the Commonwealth, or for services rendered in the Parliament to any person or State'. It has been suggested that while holding the 'office' of a member of the reserve forces may not give rise to disqualification, it might mean that the member is obliged to confine himself or herself to the receipt of reimbursed expenses for such service.²⁷⁶

Secondly, there is also a question of whether the full-term deployment of persons in the reserve forces would trigger the application of section 44(iv).²⁷⁷ Accordingly, section 9 of the *Defence (Parliamentary Candidates) Act 1969* provides for a member of the reserve forces 'who is rendering continuous full-time service' to request the termination of that full-time service so as to run for Parliament and section 12 provides for him or her to be reinstated if he or she fails to be elected.

In some states, exemptions are also made to avoid the disqualification of certain members of the armed forces, usually those in the reserve forces.²⁷⁸

The question also arises as to whether the position should be different during a time of war? Should members of parliament be entitled to serve full-time in the armed forces or take up other

272. Letter by John Curtin, Prime Minister, to Frank Forde, Minister for the Army, 21 February 1944: NAA A472 W6512.

273. *Free v Kelly* (1996) 185 CLR 296.

274. *Defence (Parliamentary Candidates) Act 1969* (Cth), sections 10-14.

275. Commonwealth, *Parliamentary Debates*, House of Representatives, 19 October 1966, 1919, regarding an earlier bill.

276. Commonwealth, Senate Standing Committee on Constitutional and Legal Affairs, *The Constitutional Qualifications of Members of Parliament*, 1981: [5.70]. See also: Gerard Carney, *Members of Parliament: Law and Ethics* (Prospect Media, 2000), p. 78.

277. See Commonwealth, House of Representatives Standing Committee on Legal and Constitutional Affairs, *Aspects of Section 44 of the Australian Constitution – Subsections 44(i) and (iv)*, 1997: [3.41] to [3.46].

278. See, eg, *Parliament of Queensland Act 2001* (Qld), subparagraph 65(6)(c)(ii); *Constitution Act 1975* (Vic), section 60; and *Constitution Acts Amendment Act 1899* (WA), subsection 36(8).

offices that involve war-work, as had occurred in the United Kingdom? In 1981 a Senate Committee discussed this issue and noted that it involved difficult questions concerning authority and conflicts of interest:

A soldier is subject to the final authority of the Executive Government and must, in any situation involving his military role, acquiesce in that authority, subject, of course, to the constraints of international law. As a member of Parliament, his responsibility is to his electorate and to the Parliament. On occasions, the demands which the Executive Government and the Parliament place on his loyalty may be in conflict. We doubt whether even the emergencies of war are such as to warrant the risk of such a conflict of interest. Indeed, it can be argued that it is especially when the nation is imperilled by war that the possibility of such conflict of interest must be avoided.

The other consideration is that, if members were able to absent themselves from the Parliament to fight in a war, their constituents would be effectively disenfranchised for the duration of their service in the armed forces. Such a situation is not really satisfactory, and inclines us to the view that, when all the factors are considered, it is generally undesirable for members of Parliament to seek leave to serve in the armed forces in time of war.²⁷⁹

The Committee noted that in World War II, at least eleven members and senators served in the armed forces and still received parliamentary allowances as well as their military pay and allowances.²⁸⁰ At least ten members and senators served in World War I. Although one lost his seat during an election while on service, many others were re-elected unopposed in their absence.²⁸¹

Judges

Disqualification in the United Kingdom

Disqualification of judges from being members of parliament is primarily based upon the doctrine of the separation of powers and the recognition that judges should be 'free from any party-political ties'.²⁸² In the United Kingdom, prior to 1707, judges of the common law courts were excluded because they were formally summoned to assist the House of Lords and therefore could not be members of the House of Commons.²⁸³ Over time, judges were disqualified as a matter of the 'law of Parliament' due to 'the growing conviction that the administration of justice ought to be removed from the influences of political controversy'.²⁸⁴ As was noted in *Erskine May*, 'while the formal ground for the exclusion of the English judges is traceable to the jealous regard of the Commons for their own privileges, the real ground is based on more modern considerations of constitutional incompatibility'.²⁸⁵

Later, judges were expressly excluded from membership of the House of Commons by statutes, such as the *Supreme Court of Judicature Act 1873* (UK), although some judicial or semi-judicial

279. Commonwealth, Senate Standing Committee on Constitutional and Legal Affairs, *The Constitutional Qualifications of Members of Parliament*, 1981, [5.66]-[5.67].

280. Ibid., [5.69]. The details of the service of the Members and their remuneration are set out in: Commonwealth *Parliamentary Debates*, Senate, 19 July 1944, pp. 183-4.

281. Martin Lumb, Scott Bennett and John Moreman, 'Commonwealth Members of Parliament who have served in war', Parliamentary Library Research Brief, 26 March 2007: <http://www.aph.gov.au/binaries/library/pubs/rb/2006-07/07rb10.pdf>.

282. UK, *Report from the Select Committee on Offices or Places of Profit Under the Crown*, HC 120, 1941, p. xxvii.

283. UK, *Report from the Select Committee on Offices or Places of Profit Under the Crown*, HC 120, 1941, p. 163, Appendix 3, Memorandum by Sir William Holdsworth.

284. UK, *Report from the Select Committee on Offices or Places of Profit Under the Crown*, HC 120, 1941, p. 147, Appendix 2, Memorandum by Sir Gilbert Campion.

285. Edward Fellowes, *Sir Thomas Erskine May's Treatise on the Law, Privileges Proceedings and Usage of Parliament* (Butterworths, 16th ed, 1957), p. 207.

office-holders have been exempted, such as recorders (other than the Recorder of London, who was regarded as disqualified by convention, if not by law).²⁸⁶ Various judicial offices, ranging from those of judges of the UK Supreme Court to district judges and certain sheriffs, are now listed as disqualifying offices under Schedule 1 of the *House of Commons Disqualification Act 1975* (UK). Such offices were excluded expressly by statute because there was some doubt as to whether judicial offices came within the category of offices of profit under the Crown. This was because even though a person was appointed to the office by the Crown, the office was independent of the supervision or direction of the Crown and the judicial office could not be removed by the Crown at will. Further, just as the office of Speaker is not under the Crown because it is an office of the legislative branch of government, the office of judge may be regarded as not falling 'under the Crown' because it is an office of the judicial branch of government.

In practice, regardless of whether the source of disqualification is statute, the law of Parliament or holding an office of profit under the Crown, appointment as a judge has been regarded in the United Kingdom as resulting in the vacation of the seat of a member of the House of Commons. Between 1900 and 2011, 103 members of the House of Commons relied upon disqualification due to appointment to the judiciary as the means of retiring from the House of Commons, given the absence of any ability to resign from service to the House.

Disqualification in the Australian states

In New South Wales in the 19th century, judges were not always precluded from being members of Parliament. Sir Alfred Stephen, while Chief Justice of the Supreme Court of New South Wales, was also President of the Legislative Council from May 1856 until January 1857, and continued to hold a seat in the House until November 1858, when judges were finally banned from sitting in Parliament. After that, appointment to judicial office was regarded as an effective means of resignation from Parliament.²⁸⁷

Due to uncertainty as to whether the office of a judge can be described as 'under the Crown', some states have express constitutional provisions that prevent judges from being members of parliament. Others have provisions in legislation concerning state judges that would prohibit them from taking up such an office while remaining a judge.

For example, Judges of the Tasmanian Supreme Court are expressly made incapable of being elected to the Tasmanian Parliament.²⁸⁸ In Queensland, the disqualification of persons from being members of Parliament extends to 'the holder of a judicial office of any jurisdiction of a State or the Commonwealth'²⁸⁹ and in South Australia it extends to a 'Judge of any court of the State'.²⁹⁰ In Victoria, section 84 of the *Constitution Act 1975* (Vic) constrains judges from accepting offices of profit within Victoria except in specified circumstances and section 44 expressly provides that a judge of a court of Victoria shall not be qualified to be elected a member of the Victorian Parliament. In Western Australia, a range of judicial offices are listed as disqualifying offices in Schedule V of the *Constitution Acts Amendment Act 1899* (WA).

Even without legislation, a judge of a state court that can exercise federal jurisdiction could not simultaneously hold the office of a member of parliament, as this would amount to incompatibility

286. UK, *Report from the Select Committee on Offices or Places of Profit Under the Crown*, HC 120, 1941, p xxviii. See the controversy concerning the appointment of a member of the House of Commons, Sir Ernest Wild, as Recorder of London in 1922.

287. See, eg, the appointment on 3 March 1859 of Robert Owen to the District Court and on 24 October 1865 of Peter Faucett as a judge of the Supreme Court of New South Wales.

288. *Constitution Act 1934* (Tas), subsection 32(3).

289. *Parliament of Queensland Act 2001* (Qld), paragraph 64(3)(b).

290. *Constitution Act 1934* (SA), section 44.

with Chapter III of the *Constitution*.²⁹¹ Further, as long as judges are appointed by the executive ‘at will’, rather than a process controlled by an independent body, the office is also likely to be regarded as one of profit that is under the Crown.²⁹²

Disqualification in the Commonwealth Parliament

At the Commonwealth level, the framers of the Constitution clearly believed that the disqualification for holding an office of profit under the Crown applied to judges—and in particular that it would apply to High Court judges. There was considerable criticism at the Adelaide Constitutional Convention in 1897 about a clause that would have banned a member or senator from accepting an office of profit under the Crown for six months after leaving the Parliament. It was argued that this would prevent a current or former member or senator being appointed a judge.²⁹³

At the 1897 Sydney Convention, an amendment was moved, at the suggestion of the Legislative Assembly of Victoria, which would have expressly exempted the appointment of a Justice of the High Court from the application of section 44(iv).²⁹⁴ This amendment was negatived in favour of instead deleting the clause concerning the 6 month ban after the end of a member’s or senator’s departure from Parliament.²⁹⁵ It had been argued that it would be inappropriate to prevent the best person from being chosen for a judicial appointment on the ground that he or she was recently a member of parliament.

Despite the belief of the framers of the Constitution concerning the application of section 44(iv), doubt remained as to whether or not it would apply to judges due to the application of the separation of powers and the independence of the office. Carney, for example, has argued that judges do not hold offices of profit under the Crown.²⁹⁶ The argument was that they hold their offices under the judicial branch of government, even though they are appointed by the executive. However, after *Re Lambie*, if a judge is appointed at will by the executive, this would appear to be sufficient to make the office of judge one that is ‘under the Crown’.²⁹⁷ In any case, the constitutional doctrine of separation of powers would prevent a federal judge from holding the office of a member of Parliament.²⁹⁸

The issue may also be addressed by legislation at the Commonwealth level. For example, section 10 of the *High Court of Australia Act 1979* (Cth) provides that a Justice of the High Court ‘is not capable of accepting or holding any other office of profit within Australia’. It is not confined to offices of profit ‘under the Crown’, but catches any office of profit at all. This would include the office of a member of Parliament. It also extends to acceptance of that office in addition to the holding of it.

Ambassadors

United Kingdom

In the United Kingdom, ambassadors were originally not regarded as disqualified from service in the House of Commons. This was in part because in earlier times they were regarded as being

291. *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1; *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 1; *Wainohu v New South Wales* (2011) 243 CLR 181.

292. *Re Lambie* [2018] HCA 6, [33] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ).

293. *Official Report of the National Australasian Convention Debates*, Adelaide 1897, 17 April 1897, pp. 749-753.

294. *Official Report of the National Australasian Convention Debates*, Sydney 1897, 21 September 1897, pp. 1028-9.

295. *Ibid.*, pp. 1033-4.

296. Gerard Carney, *Members of Parliament: Law and Ethics* (Prospect Media, 2000), p. 64.

297. *Re Lambie* [2018] HCA 6, [33] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ).

298. *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1.

engaged in temporary missions. This is no longer the case as the ambassador and diplomatic staff are resident in the country to which they are accredited for a term of years, which would be incompatible with attendance and service in the House of Commons. More significantly, however, the UK Select Committee of 1941 noted that ambassadors are subject to the directions of the government of the time and have to carry out government policy. This, in conjunction with the importance of an ambassador's duties, renders them disqualified from membership of the House of Commons 'and from all party ties', although the position may be different during time of war or emergency.²⁹⁹ To the extent that ambassadors can be regarded as being 'employed in the civil service of the Crown', they are disqualified from membership of the House of Commons due to the application of section 1 of the *House of Commons Disqualification Act 1975* (UK).

Australia

In Australia, diplomatic representation was initially undertaken by the British Government on behalf of the Empire. It was only once Australia began appointing its own diplomatic representatives that the question of whether a person could simultaneously be a member of parliament and a diplomatic representative arose.

In 1932, Stanley Bruce, who was a 'Minister without Portfolio' in the Commonwealth Government and a member of the House of Representatives, was appointed as 'Resident Minister' in London to renegotiate Australian loans and financing during the Depression. Legislation was enacted in Australia to permit him to perform the duties usually carried out by the High Commissioner³⁰⁰ while the post of High Commissioner was formally left vacant. A two year limitation was placed on the arrangement. It was noted that the post could not be permanent, because it would take a member of Parliament away from Parliament and the member's constituency for too long.³⁰¹ It was not regarded as an 'office of profit' under the Crown because at that time he was not formally appointed to a non-ministerial office and he was only remunerated by his existing parliamentary and ministerial salary plus his expenses.³⁰² In 1933, however, Bruce resigned his seat and accepted the office of High Commissioner.

Geoffrey Sawyer argued that 'an ambassadorship is *par excellence* an office of profit under the Crown, the appointee being in every sense a servant of the central executive government and paid a salary'.³⁰³ He or she is employed as a public servant by the Department of Foreign Affairs and Trade, and therefore squarely falls within the category of holders of offices of profit under the Crown. As he or she is appointed at the will of the executive government, the office is one of profit under the Crown.³⁰⁴

In 1974 the appointment of Vince Gair as Ambassador to Ireland became controversial within Australia, as the appointment was regarded as being made solely for the Government to obtain a political advantage through a change in the number of seats to be filled at the next half-Senate election in Queensland. As discussed above, this political advantage was foiled by the Queensland Governor issuing the writs for the half-Senate election before Senator Gair had resigned his office as senator. While there was a legal argument about whether or not his seat had been vacated

299. UK, *Report from the Select Committee on Offices or Places of Profit Under the Crown*, HC 120, 1941, p. xxx. Compare, however, the assertion in Erskine May in 1957 that it is 'doubtful whether Ambassadors are disqualified under the existing law': Edward Fellowes, *Sir Thomas Erskine May's Treatise on the Law, Privileges Proceedings and Usage of Parliament* (Butterworths, 16th ed, 1957), p. 209.

300. *High Commissioner Act 1932* (Cth).

301. Commonwealth, *Parliamentary Debates*, House of Representatives, 14 September 1932, p. 453.

302. Commonwealth, *Parliamentary Debates*, House of Representatives, 28 September 1932, p 868; Senate, 15 September 1932, p. 514. See also: Geoffrey Sawyer, *Australian Federal Politics and Law 1929-1949* (MUP, 1963), p. 65.

303. Geoffrey Sawyer, *Federation Under Strain* (MUP, 1977), pp. 36-7.

304. *Re Lambie* [2018] HCA 6, [33] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ).

earlier due to his acceptance of the office of profit under the Crown, it became a moot point once a double dissolution was called, because this caused all seats in the Parliament to be vacated. The appointment was also controversial in Ireland, with Irish ministers feeling resentment in being 'used' in this manner.³⁰⁵

As in recent times it has been not uncommon for the Commonwealth Government to appoint politicians to the office of ambassador or high commissioner,³⁰⁶ the question of whether a person's seat is vacated at the time he or she accepts an ambassadorial appointment or only at the time that he or she takes up that appointment, remains a live issue. For example, it was publicly revealed that Senator Brandis would become Australia's next High Commissioner to London on 17 December 2017, but Senator Brandis continued sitting and voting as a senator until he resigned on 7 February 2018. It was not until 20 March 2018 that the formal announcement was made of Brandis's appointment,³⁰⁷ to take effect in April 2018. The timing of such appointments and when disqualification occurs is discussed above in relation to the 'holding' of an office of profit and below in the part concerning timing.

Local Government

United Kingdom

In the United Kingdom, holding an office in local government, including that of mayor, has not been regarded as an office of profit under the Crown for the purposes of disqualification.³⁰⁸ Historically, this was because such offices were not remunerated and were therefore not regarded as 'offices of profit'.

Ken Livingstone, Boris Johnson and Sadiq Khan have all held office for a period as a member of the House of Commons while Mayor of London (either at the beginning or the end of their term), although all resigned from the House for most of their term. Sometimes political parties prohibit their members from holding both offices simultaneously.³⁰⁹ In the United Kingdom the holding of 'dual mandates' (being elected to the House of Commons and one of the devolved legislatures or the European Parliament) has occurred in the past, but is now largely banned by legislation.³¹⁰

Australia

In Australia, local government is established by state legislation and remains under the control of the state. State laws determine how local councillors are elected, their remuneration and the means for their dismissal. Sometimes they also deal with the situation where a person holds office both as a local councillor and as a member of the Commonwealth or state parliament.

For example, in Queensland, if a person is elected to the Queensland Parliament but holds the office of a mayor or councillor of a local government of another state, he or she must cease to

305. Cable by Keith Brennan, outgoing Ambassador to Ireland, 15 July 1974: NAA A1838 1500/2/9/10.

306. Diplomatic appointments for politicians have increased in recent times to a high point in 2015 when one-in-ten heads of mission held political appointments: Daniel Flitton, 'George Brandis, His Excellency, is still hostage to Malcolm Turnbull', *The Interpreter*, (The Lowy Institute, 19 December 2017): <https://www.loyyinstitute.org/the-interpreter/george-brandis-his-excellency-still-hostage-malcolm-turnbull>.

307. Minister for Foreign Affairs, 'High Commissioner to the United Kingdom', Media Release, 20 March 2018: https://foreignminister.gov.au/releases/Pages/2018/jb_mr_180320.aspx?w=tb1CaGpkPX%2FISOK%2Bg9ZKEg%3D%3D

308. UK, *Report from the Select Committee on Offices or Places of Profit Under the Crown*, HC 120, 1941, p. 167, Appendix 3, Memorandum by Sir William Holdsworth

309. Peter Walker, 'Dan Jarvis wins vote to run as Sheffield mayor, but can't also be an MP', *The Guardian*, 24 March 2018: <https://www.theguardian.com/politics/2018/mar/23/dan-jarvis-wins-vote-to-run-as-sheffield-mayor-but-cant-also-be-an-mp>.

310. House of Commons Library, 'Members of Parliament holding dual mandates', 26 September 2017: <http://researchbriefings.parliament.uk/ResearchBriefing/Summary/SN04101>.

hold that office before he or she can take his or her seat in the Queensland Parliament.³¹¹ If a member of the Queensland Parliament is elected or appointed as a mayor or councillor of a local government of the State or another state, his or her seat in Parliament is vacated.³¹²

Section 155 of the *Local Government Act 2009* (Qld) provides that a person cannot be a councillor while the person is a member of the Commonwealth or a state parliament or a councillor of a local government of another state. The person automatically stops being a councillor when the person becomes a member of the other parliament or council. It should be noted that the point at which the person ceases to be a councillor is when the person ‘becomes’ a member, rather than when he or she nominates as a candidate. This is important because an earlier provision, subsection 224A(b) of the *Local Government Act 1993* (Qld), was held to be invalid due to its termination of the office of a local councillor if the person was ‘declared to be a candidate’ for a Commonwealth election. A majority of the Supreme Court of Queensland held that it was invalid because it interfered with a Commonwealth election by imposing a burden on potential candidates, whereas a separate provision which disqualified a member of the Commonwealth Parliament from being a councillor was regarded as valid, as it was directed at the qualification for being a local councillor.³¹³

The Commonwealth Parliament also acted to cause a direct inconsistency with any such state legislation by inserting subsection 327(3) into the *Commonwealth Electoral Act 1918* (Cth), which provides:

A law of a State or Territory has no effect to the extent to which the law discriminates against a member of a local government body on the ground that:

- (a) the member has been, is, or is to be, nominated; or
- (b) the member has been, is or is to be, declared;

as a candidate in an election for the House of Representatives or the Senate.

Again, it is only directed at the consequences of candidacy for election—not the consequences of election and taking up the office of a member of the Commonwealth Parliament.

There has been uncertainty for a long time as to whether the office of a local councillor or mayor amounted to an office of profit under the Crown. Senator Minchin recounted to a parliamentary committee in 1997 how after candidates in his state had nominated, he had received advice that being a member of a local government could amount to an office of profit under the Crown. As eight out of the 12 candidates were local councillors, he had to arrange for their nominations to be withdrawn, for them all to resign from their local council offices, and then to re-nominate them before the close of nominations.³¹⁴

In earlier times, as councillors did not receive ‘profit’, but only the reimbursement of expenses, the argument could be made that it was not an ‘office of profit’. While local councillors in most jurisdictions still receive their remuneration in the form of ‘allowances’, it now goes significantly beyond the reimbursement of expenses, making such offices ones ‘of profit’.

311. *Parliament of Queensland Act 2001* (Qld), section 68.

312. *Parliament of Queensland Act 2001* (Qld), paragraph 72(1)(g).

313. *Local Government Association of Qld (Inc) v Queensland* [2001] QCA 517, [14] (McMurdo P); and [74] (Williams JA).

314. Commonwealth, House of Representatives Standing Committee on Legal and Constitutional Affairs, *Aspects of Section 44 of the Australian Constitution – Subsections 44(i) and (iv)*, 1997, [3.32].

The more difficult question is whether the office of a local councillor is ‘under the Crown’. This is because local councillors are elected,³¹⁵ rather than appointed by the Crown. On the other hand, they fulfil a ‘public service’ role, they are remunerated from public funds, their office may give rise to a conflict of interest if held by a member of parliament, they may in some cases be subject to direction and supervision by the Crown and they may in some cases be dismissed by the Crown and replaced by administrators. As discussed above, these factors have all been considered relevant in the past to determining whether or not an office of profit is ‘under the Crown’.

The question was finally addressed by the Court of Disputed Returns in *Re Lambie*. A majority of the Court noted that there was no dispute that the offices of mayor and councillor of a local government corporation in Tasmania amounted to an ‘office of profit’ as ‘each is a position of a public character constituted under governmental authority to which duties and emoluments are attached.’³¹⁶

As to whether the office was ‘under the Crown’, this involved an examination of the relevant legislation. Because it was not an office to which a person was appointed at the will of the executive, one instead had to assess whether the continued holding of the office or continued profiting from holding the office was dependent on the will of the executive government of the Commonwealth or of a state.³¹⁷ This involved consideration of:

- the security of the person’s tenure and remuneration
- the means by which the person might be removed or suspended from it and
- any means by which emoluments of the office might be withheld.

Consideration of those factors must then result in an assessment as to whether the executive government has ‘effective control over holding or profiting from holding the office’.³¹⁸

In Tasmania, the office of a local councillor or mayor was not regarded as ‘under the Crown’ because although there was a power in the Minister to suspend or dismiss councillors, this was only possible as the culmination of an administrative process involving findings of ‘non-compliance with a statutory norm involving a measure of misconduct or dereliction of duty’.³¹⁹ The power could not be exercised by the executive at will. There was insufficient ‘control’ by the executive to bring the office ‘under the Crown’.³²⁰ Similarly, there was insufficient control over remuneration of local councillors because although the remuneration was set by the Governor by way of subordinate legislation, it was not only disallowable but also could not be exercised for an improper purpose and was subject to judicial review.

Accordingly, under the existing Tasmanian legislation, the office of local councillor or mayor was not regarded as an office of profit ‘under the Crown’, but under different legislation or in a different jurisdiction, it remains possible that it would be caught.

315. Note that in 1949 the Solicitor-General took the view that an elected member of the Northern Territory Legislative Council did not hold an office of profit under the Crown: Kenneth Bailey, ‘Northern Territory – Whether a Member of the NT Legislative Council holds an office of profit under the Crown’, 10 October 1949: <http://legalopinions.ags.gov.au/legalopinion/opinion-1866>.

316. *Re Lambie* [2018] HCA 6, [9] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ).

317. *Re Lambie* [2018] HCA 6, [34] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ).

318. *Re Lambie* [2018] HCA 6, [34] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ).

319. *Re Lambie* [2018] HCA 6, [49] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ).

320. *Re Lambie* [2018] HCA 6, [49] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ).

Employment by a university

United Kingdom

In 1941 a UK Select Committee recommended that ‘Regius Professors of the Universities of Oxford and Cambridge, heads of colleges in Universities, the Provost of Eton and any other academic offices the appointment to which is in the hands of the Crown or a minister of the Crown’ be expressly excluded from disqualification for the holding of an office of profit under the Crown.³²¹ The Committee noted that the holders of these offices are appointed by the Crown, but not paid by the Crown and their offices had no political significance. It recognised that there was doubt as to whether they amounted to offices of profit under the Crown.³²² Accordingly, it recommended the enactment of legislation to exclude them from disqualification.

The UK Attorney-General at the time, Sir Donald Somervell, took the view that Regius Professors, while appointed by the Crown did not hold an office of profit under the Crown because the nature of their duties were not connected with the public service.³²³

Australia

In Australia, most universities are statutory corporations established by state or territory law. For example, the University of Sydney is a body corporate that was established by the *University of Sydney Act 1850* (NSW) and is continued in operation by sections 4 and 5 of the *University of Sydney Act 1989* (NSW). An exception is the Australian National University, which was established by Commonwealth legislation.³²⁴ Other exceptions include the Australian Catholic University and Bond University, which were incorporated as ordinary corporations, but recognised by statute as institutions of higher education.³²⁵

In terms of their functions, those universities established as statutory corporations could be classified as representing the Crown on the ground that they carry out governmental functions. They are also primarily funded from public money and usually have conferred upon them the power to make by-laws and non-statutory rules. For example, the Council of the Australian National University may make ‘statutes’ prescribing matters ‘necessary or convenient... for carrying out or giving effect to’ its Act. It therefore has a subordinate law-making function.³²⁶

Some universities, however, have express statements in their establishing legislation that they are not instrumentalities or agents of the Crown.³²⁷ The University of Melbourne has also been held by a court to be neither the Crown nor a body substituted for the Crown to perform a Crown or executive function. The Victorian Supreme Court observed that there ‘appears to be no reason for identifying the University [of Melbourne] with the Crown, or as a governmental agency of any kind’.³²⁸ It has been argued that it would be ‘safe to say that an Australian public university is not an instrumentality or agency of the Crown’.³²⁹

321. UK, *Report from the Select Committee on Offices or Places of Profit Under the Crown*, HC 120, 1941, p. xxi.

322. *Ibid.*, p. xxv.

323. *Ibid.*, p. 136 (Appendix 1, Third memorandum, 1 May 1941).

324. *Australian National University Act 1991* (Cth).

325. *Higher Education Funding Act 1988* (Cth), s 4, s 98AA and Sched 1. See also *Bond University Act 1987* (Qld) and *Australian Catholic University Act 1990* (NSW); *Australian Catholic University (Queensland) Act 2007* (Qld); and *Australian Catholic University (Victoria) Act 1991* (Vic).

326. *Australian National University Act 1991* (Cth), section 50.

327. See, eg: *Flinders University Act 1966*, (SA), subsection 3(7): ‘The University is not an instrumentality or agency of the Crown’.

328. *Clark v University of Melbourne (No 2)* [1979] VR 66, 73 (Young CJ, Lush and Jenkinson JJ).

329. John Orr, ‘Australian Corporate Universities and the Corporations Act’, (2012) 17(2), *International Journal of Law and Education*, pp. 123, 135.

But a public university may still be classified as a ‘public authority’ for particular purposes under particular Acts.³³⁰ Public universities fulfil public functions as public institutions but dwell in an ambiguous position on the fringe of the public sector. Both Commonwealth and state governments maintain a significant level of control over universities, both in relation to the funding and their accreditation. The Supreme Court of India noted with respect to a body corporate established to provide primary education:

Even though the incorporation of a body corporate may suggest that the statute intended it to be a statutory corporation independent of the Government it is not conclusive on the question whether it is really so independent. Sometimes the form may be that of a body corporate independent of the Government but in substance it may be just the alter ego of the Government itself. The true test of determination of the said question depends upon the degree of control the Government has over it, the extent of control exercised by the several other bodies or committees over it and their composition, the degree of its dependence on Government for its financial needs and the functional aspect, namely, whether the body is discharging any important Governmental function or just some function which is merely optional from the point of view of Government.³³¹

In 1997, in evidence to a parliamentary committee, Associate Professor David Black pointed out the uncertainty for academics as to whether or not they hold an office of profit. He observed that sometimes universities are told that they are independent from the Crown and at other times that they are government entities.³³²

In *Re Lambie*, the Court of Disputed Returns decided that the test was whether the office is held or continues to be held, or the receipt of profit from it depends, upon the will or continuing will of the executive government of the Commonwealth or a state.³³³ Staff of universities are employed by the body corporate that is created by or under a statute and declared to be university. In *Re Lambie*, the Court of Disputed Returns observed that the fact that a municipal council is a body corporate upon which government functions have been conferred is ‘sufficient to characterise it as the “State”’ but that it did not form part of the executive government of Tasmania.³³⁴ Unless a university body corporate can be regarded as part of the ‘executive government’, or at the very least a representative of it, then even though a university may be regarded more broadly as part of the public sector or the ‘State’, an office held within a university will not be an office of profit ‘under the Crown’.

Pensions

United Kingdom

In 1941 a British Select Committee noted that the disqualification for holding a pension ‘from the Crown during pleasure’ is not directed at a pension or superannuation benefit granted for services rendered. It is instead directed at a pension granted by the Crown or the executive government, otherwise than for good and valid consideration, such as services rendered, that is ‘dependent for

330. The University of Adelaide, for example, states that it is an agency under the *Freedom of Information Act 1991* (SA), the *Ombudsman Act 1972* (SA) and the *State Records Act 1997* (SA), while it is also a public authority under both the *Independent Commission Against Corruption Act 2012* (SA) and the *Public Finance and Audit Act 1987* (SA): <https://www.adelaide.edu.au/legalandrisk/integrity/public-accountability/>.

331. *Biharilal Dobray v Roshan Lal Dobray* AIR 1984 SC 385. Note, however, that in *Joti Prasad Upadhyaya v Kalka Prasad Bhatnagar* AIR 1962 All 128, the Allahabad High Court held that a Vice-Chancellor of the University of Agra did not hold an office of profit under the Government.

332. Commonwealth, House of Representatives Standing Committee on Legal and Constitutional Affairs, *Aspects of Section 44 of the Australian Constitution – Subsections 44(i) and (iv)*, 1997, [3.29].

333. *Re Lambie* [2018] HCA 6, [31] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ).

334. *Re Lambie* [2018] HCA 6, [41] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ).

its continuance on the unfettered discretion or will of the Crown or the executive government'.³³⁵ It noted that few such pensions would exist in these times. They tended to be granted to military heroes and were eventually supplanted by more regular forms of earned support.

Australia

In the Australian states, while the British terminology was often used it has since been clarified in a number of jurisdictions. In South Australia, for example, it is expressly provided that a person who has retired from employment by the Crown and has, by virtue of that employment, become entitled to a pension, shall not by reason only of the receipt of that pension be disqualified from election or sitting and voting.³³⁶ In Queensland, a pension for past service in a paid public appointment or past or existing service as a member of the reserve forces is excluded from the equivalent provision of disqualification for holding an office of profit under the Crown.³³⁷

In Tasmania, however, any member who accepts a pension payable out of the Public Account during the pleasure of the Crown has his or her seat vacated, and in New South Wales, a person having 'a pension from the Crown during pleasure or for a term of years'³³⁸ is disqualified unless the House resolves that it is satisfied that the right to the pension has ceased or been suspended while he or she is a member of the House.³³⁹ Where a pension is paid under any Act authorising superannuation to public servants, the NSW member's remuneration shall be abated by the amount received under that pension.³⁴⁰

At the Commonwealth level, pensions 'payable during the pleasure of the Crown' were regarded by Robert Garran as not including pensions to public servants payable under a statute.³⁴¹ This is consistent with the view of Sir Samuel Griffith in 1891 who asserted that the proposed clause only applied to pensions during pleasure, not those earned by service. He stated that the purpose of the provision was 'to prevent persons who are dependent for their livelihood upon the government and who are amenable to its influence, from being members of the legislature.'³⁴²

In more recent times a Senate Committee in 1981 regarded disqualifying pensions as being those that rested entirely on royal or vice-regal pleasure, which was now a category that was 'largely defunct'.³⁴³ It noted that historically such pensions were paid to highly successful military officers but they have 'no real relevance in Australia today'.³⁴⁴ A 1997 parliamentary committee agreed, but noted that some doubts still remain in relation to the meaning of section 44(iv) with regard to pensions.³⁴⁵

335. UK, *Report from the Select Committee on Offices or Places of Profit Under the Crown*, HC 120, 1941, p. xxvii. Note, however, that due to doubts about whether civil service pensions would give rise to disqualification, the *Pensioners Civil Disabilities Relief Act 1869* (UK) was enacted to confirm that this was not the case: Edward Fellowes, *Sir Thomas Erskine May's Treatise on the Law, Privileges Proceedings and Usage of Parliament* (Butterworths, 16th ed, 1957), p. 212.

336. *Constitution Act 1934* (SA), section 46A.

337. *Parliament of Queensland Act 2001* (Qld), paragraph 65(6)(c).

338. Note that in 1879 the NSW Committee of Elections and Qualifications found that Michael Fitzpatrick was validly elected despite the fact that he held a pension as a former public servant. Such a pension was not regarded as being one 'from the Crown during pleasure': NSW, *Votes and Proceedings*, Legislative Assembly, 28 March 1879, p. 53.

339. *Constitution Act 1902* (NSW), section 13B.

340. *Constitution Act 1902* (NSW), section 13D.

341. Robert Garran, 'Qualification for election to Parliament – Retired Public Servant', 3 August 1927, in J Faulkner and R Orr (eds), *Opinions of Attorneys-General of the Commonwealth of Australia 1923-1945*, Vol 3, (Commonwealth of Australia, 2013) p. 161.

342. Official Report of the National Australasian Convention Debates, Sydney 1891, 3 April 1891, 660 (Sir Samuel Griffith).

343. Commonwealth, Senate Standing Committee on Constitutional and Legal Affairs, *The Constitutional Qualifications of Members of Parliament*, 1981, [5.72].

344. *Ibid.*, [5.75].

345. Commonwealth, House of Representatives Standing Committee on Legal and Constitutional Affairs, *Aspects of Section 44 of the Australian Constitution – Subsections 44(i) and (iv)*, 1997, [3.33]-[3.34].

Timing of offices of profit and disqualification

In a dispute about disqualification by reason of holding an office of profit under the Crown, there are a number of critical dates—the date upon which the office is first ‘held’ and the dates upon which the period of being ‘chosen’ commences and ends.

Date upon which an office is held

The first is the date upon which an office of profit becomes ‘held’. As discussed above, this depends upon what it means to ‘hold’ an office. Is it enough that there has been an offer and acceptance of the office, or must the procedural steps for appointment to the office have been completed (eg approval by the Executive Council, the issue of letters patent or the gazettal of an appointment) or must the person have actually commenced the duties of the office and become entitled to be paid the ‘profit’ attached to the office? Can the purpose of section 44(iv) be thwarted by the Government offering a lucrative office to a member of Parliament, and the member accepting it, but the office not commencing until an indeterminate date in the future when the member is no longer in Parliament?

The issue was given the greatest scrutiny during the 1974 Gair affair, when the question of whether or not Gair’s seat was vacated at the time of his acceptance of the office of Ambassador or at the time that it had formally been approved by the Governor-General, was critical to the determination of the number of vacancies to be filled in a half-Senate election. The Commonwealth Government argued that Gair’s seat had either been vacated by his acceptance of the office or at the time it was approved by the Governor-General, even though the office had not yet commenced and was in fact still being filled by another person. This argument was supported by opinions by the Solicitor-General, Sir Maurice Byers, and Professor Colin Howard, General Counsel to the Attorney-General.³⁴⁶ Neither advice clearly explained how an office of profit could be ‘held’ in the circumstances.

Howard’s opinion, however, suggested that once the office was accepted this meant that the person accepting it had agreed to take a fee for services rendered to the Commonwealth, which he considered included services to be rendered in the future to the Commonwealth. This would disqualify a member under section 45(iii) of the Constitution. This suggests that a member of Parliament could be disqualified upon accepting a Commonwealth office, even though it is to commence in the future, on the ground that he or she had ‘agreed’ to take a fee for services rendered to the Commonwealth. While this might be plausible in relation to the type of appointment to a board or body where sitting fees, rather than regular remuneration, are paid, it is difficult to characterise acceptance of a future office as an ambassador as one concerning an agreement to take any fee for services rendered. A salary for paid employment would not normally be characterised as a fee.

According to *House of Representatives Practice*:

The view has been expressed that a person who accepts an office of profit under the Crown is disqualified from membership of the Parliament from the date of appointment to and acceptance of the office rather than from the time he or she commences his or her duties or receives a salary.³⁴⁷

Whether or not this is the case remains to be determined.

346. Commonwealth, *Parliamentary Debates*, Senate, 4 April 1974, p. 683.

347. Bernard Wright, *House of Representatives Practice*, p. 137.

Dates relevant to being ‘chosen’

Section 44 provides that any person who holds any office of profit under the Crown ‘shall be incapable of being chosen or of sitting as a senator or a member of the House of Representatives’. While there was always uncertainty about when a person was ‘chosen’, this was resolved in part by section 95 of the *Commonwealth Electoral Act 1902* (Cth) which provided that a person was not entitled to be ‘nominated’ unless he or she was qualified under the Constitution to be elected. Hence, nomination became, at least as a consequence of statute, the relevant date before which a person had to have terminated all disqualifications. Billy Hughes, when Commonwealth Attorney-General in 1909, therefore advised that a public servant ‘cannot be nominated until he has ceased to be a public servant – that is to say, until his resignation has been accepted by the Governor-General in Council’.³⁴⁸

The Court of Disputed Returns held in *Sykes v Cleary* that the period of being ‘chosen’ for constitutional purposes commences at the time of nomination³⁴⁹ and continues until the election is complete.³⁵⁰ Phil Cleary held an office of profit under the Crown at the nomination date but terminated it after the polling day and before the declaration of the polls. His election was still declared void. Jackie Kelly held an office of profit at the time of nomination but terminated it before polling day. Her election was also declared void.

What if a candidate is not disqualified before or upon polling day, but later becomes disqualified before the declaration of the polls, or between the declaration of the polls and the return of the writs? The declaration of the poll in an electorate usually occurs as soon as practicable after it has been determined by the relevant returning officer that a person has been elected to a seat. The return of the writs may happen at some later time.³⁵¹ In *Sykes v Cleary*, most of the attention was paid to the declaration of the poll,³⁵² rather than the return of the writ.³⁵³ In that case, as it concerned a by-election, the declaration of the poll and the return of the writ occurred on the same day,³⁵⁴ so there was no need to distinguish between the two dates.

Nonetheless, in *Re Culleton [No 2]*, a majority of the Court took the view that in *Sykes v Cleary* the Court had determined that the period of being chosen ran from the nomination date ‘until the return of the writs for the election, as that is the time at which the electoral process is

348. W M Hughes, ‘Public Servant – Whether may conduct candidature for and be nominated for Parliament’, 7 April 1909, in: P Brazil (ed), *Opinions of Attorneys-General of the Commonwealth of Australia 1901-1914*, Vol 1, (AGPS, 1981), p. 424.

349. *Sykes v Cleary* (1992) 176 CLR 77, 99-101 (Mason CJ, Toohey and McHugh JJ, with whom Brennan, Dawson and Gaudron JJ agreed on this point). Compare Deane J at 120 who considered that a person was chosen at the time of the declaration of the poll. Note also the observation by a Senate Committee that ‘no real process of choice occurs until one candidate is favoured ahead of others by receiving more votes than his opponents on the day of the poll’: Commonwealth, Senate Standing Committee on Constitutional and Legal Affairs, *The Constitutional Qualifications of Members of Parliament*, 1981, [5.21].

350. See *Re Wood* (1988) 167 CLR 145, 168 re an election not being complete when a disqualified candidate is declared to be chosen.

351. This is because the writs list the persons elected for each state or territory, so cannot be completed until all seats have been declared filled. The date of the return of a writ is the date upon which it is physically received by the person authorised to act upon it (eg the Governor-General, the Speaker in the case of a House of Representatives by-election and the Governor in the case of a Senate writ for the State).

352. *Sykes v Cleary* (1992) 176 CLR 77, 99-101 (Mason CJ, Toohey and McHugh JJ).

353. *Sykes v Cleary* (1992) 176 CLR 77, 120 (Deane J), referring to the argument that the election period finishes with ‘either the declaration of the poll or the return of the writ’. Note also that Peter Durack, when Attorney-General, considered that the process of choosing a senator is ‘complete at least by the return of the election writ to the State Governor concerned’: Letter by Senator P Durack to Senator G Evans, 21 November 1980, reproduced in: Commonwealth, Senate Standing Committee on Constitutional and Legal Affairs, *The Constitutional Qualifications of Members of Parliament*, 1981: Appendix 2, p. 99.

354. *Sykes v Cleary* (1992) 176 CLR 77, 119-20 (Deane J).

complete'.³⁵⁵ Their Honours noted that Culleton's constitutional disability 'persisted during the whole of the period from the time of nomination to the return of the writs for the election'.³⁵⁶

On that basis, it would appear that the return of the writs is the relevant date for the completion of an election, as long as the person whose name is inscribed on the writ as elected is not disqualified. However, the waters were muddied again shortly thereafter when the Court in *Re Nash* denied that there was any binding authority on the point. It then stated:

The processes of choice which the Parliament has prescribed in the Act for the purposes of ss 7 and 24 of the Constitution continue until a candidate is determined in accordance with those processes to have been chosen. They are brought to an end only with the declaration of the result of the election and of the names of the candidates elected, after which certification of those names and return of the writ is a formality.³⁵⁷

Jeannie Ferris did not hold an office of profit at the time of nomination or on polling day, but acquired an office of profit after polling day but before the return of the writs. The then Clerk of the Senate, Harry Evans, took the view that her election was void because the election of senators for the State of South Australia was not completed until the writs were certified for return.³⁵⁸

In *Re Nash*, the Court reaffirmed the position taken in *Re Wood* that a Senate election 'is not completed when an unqualified candidate is returned as elected'.³⁵⁹ The election period, being the period in which a person is 'chosen', continues until a valid election is completed. This was further affirmed in *Re Kakoschke-Moore*, where the Court of Disputed Returns unanimously concluded that 'the process of choice mandated by the Constitution and prescribed by the Act begins with nomination and is not concluded until only candidates capable of being chosen are returned as elected'.³⁶⁰ The use of the term 'returned' rather than 'declared' suggests reliance on the return of the writs as the end-point of being 'chosen'.

After the disqualification of Fiona Nash in 2017, the election of Hollie Hughes on a special recount was held void because she had taken up an office of profit under the Crown after the polling day and after the return of the writs, but while the election period continued because the person initially declared and returned as elected had not been validly chosen.³⁶¹

Where a person has been invalidly returned as a senator because he or she was disqualified at the time of nomination or otherwise during the election process, but the disqualification has been removed before a special count is held to determine how the seat is to be filled, the formerly disqualified person cannot be readmitted to the special count on the basis that he or she is no longer disqualified. This was determined by the Court of Disputed Returns in *Re Kakoschke-Moore*.³⁶² This is because the special count determines the legal effect of the original poll at which the person was disqualified from being a candidate. That original electoral process is not complete until a person capable of being chosen has been returned. A special count is not a new electoral process, unlike a by-election.³⁶³ As Ms Kakoschke-Moore was 'incapable of being chosen at the

355. *Re Culleton [No 2]* [2017] HCA 4, [13] (Kiefel, Bell, Gageler and Keane JJ). In contrast, see Carney's view that in *Sykes v Cleary*, Mason CJ, Toohey and McHugh JJ regarded polling day as the actual time of choice: Gerard Carney, *Members of Parliament: Law and Ethics* (Prospect Media, 2000), p. 74.

356. *Re Culleton [No 2]* [2017] HCA 4, [13] (Kiefel, Bell, Gageler and Keane JJ).

357. *Re Nash [No 2]* [2017] HCA 52, [38] (Kiefel CJ, Bell, Gageler, Keane and Edelman JJ).

358. Commonwealth, *Parliamentary Debates*, Senate, 29 May 1996, p. 1254.

359. *Re Nash [No 2]* [2017] HCA 52, [39] (Kiefel CJ, Bell, Gageler, Keane and Edelman JJ), quoting from *In re Wood* (1987) 167 CLR 145, 164.

360. *Re Kakoschke-Moore* [2018] HCA 10, [35] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ).

361. *Re Nash [No 2]* [2017] HCA 52, [44] (Kiefel CJ, Bell, Gageler, Keane and Edelman JJ).

362. *Re Kakoschke-Moore* [2018] HCA 10.

363. *Re Kakoschke-Moore* [2018] HCA 10, [30]-[32] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ).

election held on 2 July 2016, she [was] incapable of being chosen by the special count, the purpose of which is to complete that electoral process'.³⁶⁴

The Court of Disputed Returns has also confirmed that section 15 of the *Constitution*, which provides a means of filling casual Senate vacancies, 'operates only in the case of a senator who has been validly elected in the first place'. It does not apply in circumstances where a person was disqualified during the process of being chosen.³⁶⁵

Where there is a casual vacancy in the Senate under section 15 of the *Constitution*, the time at which disqualification is relevant for a person who seeks to fill that casual vacancy will depend upon whether that person is chosen by the Houses of Parliament of a state or, when the state parliament is not in session, is appointed by the State Governor. In Carney's view, the word 'chosen' in section 44 corresponds with the word 'choose' in section 15 in relation to the state parliament, but does not correspond with appointment by the Governor. He argued that a person is chosen by the state parliament when nominated by whatever procedure is prescribed in the state. However, he considered that a person appointed by the Governor is not subject to the section 44 disqualification requirements until such time as he or she 'sits'.³⁶⁶ As there has been no court finding on the issue, it remains contentious.

Post-parliamentary employment

In 1897 an amendment was made to the office of profit disqualification so that a member of Parliament could not hold such an office within six months of ceasing to be a member. The intention was to prevent members from being influenced by having a future office dangled before them or being influenced to resign to take up such an office. The amendment was passed,³⁶⁷ but was later removed in 1898. The absence of such a constitutional requirement means that members and senators can be effectively influenced by Government offers of post-parliamentary employment.

Effect of a court finding that a person has been elected

When a candidate has been declared to be elected and is later found by a court to be disqualified, and that court declares another person to have been elected instead, a question arises as to whether this is a complete answer to any later claim that the second person was also disqualified on another ground, or whether it is simply a case of a court making a declaration that on the evidence before it, the person is elected, subject to any later challenge concerning disqualification.

This issue has arisen in the United Kingdom. In the case of Charles Beattie, he was declared elected, even though he received fewer votes than his opponent, Thomas Mitchell, because Mitchell was not only disqualified, but was known by the voters to have been disqualified at the time of his election. This was because Mitchell was serving a sentence for treason felony at the time and had already been declared to be disqualified by the House of Commons. The Election Court held that voters had chosen to throw away their votes and, rather than holding another by-election, awarded the seat to Beattie.

The *Representation of the People Act 1949* (UK) provided that the certificate by an Election Court that someone has been elected 'shall be final to all intents and purposes'. This led to the argument that a Select Committee could not later find Beattie disqualified as the Election Court's decision in

364. *Re Kakoschke-Moore* [2018] HCA 10, [27] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ).

365. *Re Kakoschke-Moore* [2018] HCA 10, [44] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ).

366. Gerard Carney, *Members of Parliament: Law and Ethics* (Prospect Media, 2000), p. 21.

367. It was prefaced, however, by the words 'Until the Parliament otherwise provides'. *Official Report of the National Australasian Convention Debates*, Adelaide 1897, 17 April 1897, p. 753.

declaring him elected could not be questioned. This argument was rejected. The Attorney-General noted that the Court was not in the relevant proceedings concerned with Beattie's qualification or disqualification, but rather the disqualification of Mitchell. He observed that a certificate granted by the Court could not 'operate to remove from Mr Beattie any disqualification affecting him so as to make him retrospectively qualified for election to this House'.³⁶⁸

Similar issues arose in Australia in relation to persons who won a special recount after another candidate had been held to be disqualified. Questions were raised about the citizenship status of Lucy Gichuhi, who replaced Bob Day, and whether Andrew Bartlett, who replaced Larissa Waters, held an office of profit under the Crown because he was employed at a university at the time of nomination. However, as there was not sufficient evidence brought before the Court of Disputed Returns to suggest that they were disqualified, the Court made the relevant declarations as to their election. This would not prevent a future referral to the Court of Disputed Returns concerning the question of disqualification.

In the case of Hollie Hughes, who was successful on a special recount to replace Fiona Nash, and Steve Martin, who was successful on a special recount to replace Jacquie Lambie, questions were raised before the Court as to whether each of them was also disqualified because they held an office of profit under the Crown. In the case of Hughes, the Court held that she was so disqualified, but in the case of Martin, it held that he was not.

In the Hughes case, the Commonwealth Solicitor-General submitted that:

- a) An order that a person is "duly elected" conveys that, on the facts then known to the Court (including, in a case involving the Senate, the result of a special count), a particular candidate received sufficient votes to be elected.
- b) A declaration of due election says nothing as to whether or not the candidate is in fact constitutionally qualified.
- c) Although the power to make an order that a person is "duly elected" does not determine questions of qualification, the Court has a discretion as to whether to make such an order and may decline to make such an order if it considers there to be a serious question whether a candidate is disqualified.
- d) In such a case, if the Court determines that the person is disqualified, it should, in the exercise of its discretion, decline to declare the person duly elected and instead order a further special count.
- e) Alternatively, if the Court decides not to consider whether the person is qualified, or decides that the person is not disqualified, the Court should declare the person duly elected.³⁶⁹

This approach appears to be correct and the approach taken by the Court of Disputed Returns. Just because a person has been declared elected by the Court, this does not mean that he or she might not otherwise be disqualified.

Conclusion

The recent High Court judgments in *Re Lambie*, *Re Nash [No 2]* and *Re Kakoschke-Moore* have added to our knowledge about how and when the disqualification in section 44(iv) of the Constitution may be applied. The High Court has taken a narrower approach than the British authorities and other earlier cases would have suggested. This gives a degree of certainty in relation to the test to be applied to the substantive disqualification, but uncertainty continues to

368. UK, *Second Report of the Select Committee on Elections*, 15 December 1955, HC 145-I, p. 4.

369. Stephen Donaghue, Solicitor-General, 'Submissions of the Attorney-General of the Commonwealth', *Re the Hon Ms Fiona Nash* C17 of 2017, 13 November 2017, [7].

linger in relation to timing issues. In cases where the appointment to an office is not made at the will of the executive government, there may also be uncertainty as to whether the executive government maintains sufficient control over remuneration and removal to characterise the office as one that is 'under the Crown'.

Where there is uncertainty, it is prudent to err on the side of caution and ensure any potential disqualification is terminated well before a person seeks to nominate as a candidate for election to Parliament. Equally, existing members and senators should be conscious of the risks concerning the acceptance of offices, even if there is no intention to accept any remuneration from them or the remuneration comes from private sources. They should also be aware of timing risks concerning the acceptance of an office and in particular whether this might immediately vacate the member's seat.

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