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**Class 7 – Qualification and Disqualification of Members of Parliament and disputed elections**

Main issue: Whether a person is eligible to be a Member of Parliament

QUALIFICATIONS to be a Member of Parliament

- ⊕ *S163 of the Commonwealth Electoral Act 1918*:
  - 18 yo or over + an Australian citizen + either an elector entitled to vote (see below) at a House of Representatives election or qualified to become such an elector
- ⊕ Exceptions: [DISQUALIFICATIONS]
  - No person can nominate for more than one election to be held on the same polling day
  - *S386 Commonwealth Electoral Act 1918*: any person convicted of election bribery or interference with the political liberty of a person, for a period of 2 years from conviction
  - *S43 Constitution*: A member of one house cannot be elected to the other house
  - *S44 Constitution*: 5 disqualifying categories (see below)
  - *S45 Constitution*: First established s44. S45 is about the place of a senator or a member of the house of representative becomes vacant if she or he becomes subject to any of the disabilities in s44 or takes the actions described in s45 (ii) and (iii)
- ⊕ 'entitled to vote':
  - *S93 Commonwealth Electoral Act 1918*:
    - 18 yo or over + an Australian citizen + not excluded from voting for being of unsound mind + not excluded from voting due to conviction and sentence

DISQUALIFICATIONS under *s44 Constitution*:

(i) is under any acknowledgment of allegiance, obedience, or adherence to a foreign power, or is a subject or a citizen or entitled to the rights or privileges of a subject or a citizen of a foreign power; or

- **Dual citizenship** (born overseas later become AUS citizen) – *Sykes v Clearly*
  - **Step 1**: STATE: dual citizenship is itself not a disqualification
  - **Step 2**: Test – *Re Canavan* para [72]
    - “A person who, at the time that he or she nominates for election, retains the status of subject or citizen of a foreign power will be disqualified by reason of s 44(i), except where the operation of the foreign law is contrary to the constitutional imperative that an Australian citizen not be irremediably prevented by foreign law from participation in representative government. Where it can be demonstrated that the person has taken all steps that are reasonably required by the foreign law to renounce his or her citizenship and within his or her power, the constitutional imperative is engaged.”
  - **Step 3**: Whether the person has taken reasonable steps to renounce the foreign citizenship?
    - Depends upon the circumstances of the case:
      - Circumstances of the individual
      - The law of the foreign state

- e.g. some countries don't allow citizenship to be renounced → reasonable steps taken  (even if the other country will not accept the renouncement)
- foreign law is not onerous. The court found there was no such irremediable impediment for Gallagher. The foreign law did not "irremediably prevents" the Australian citizen renouncing foreign citizenship. Lodging of renunciation form → not reasonable steps  –

**Re Gallagher**

- The extent of the connection between the individual and the foreign state
- The ease of access to the processes of renunciation/visibility etc.
- **Step 4:** Conclusion:
  - If reasonable steps are taken : the person may be a member of federal parliament because they recognize a constitutional imperative that an Australian citizen cannot be excluded from participating in Australia's representative government by operation of foreign law.
- **Dual citizenship** (UK citizen + AUS citizen) – **Sue v Hill**
  - **Step 1:** Whether UK was a foreign power?
    - YES. The *Australia Act 1986* completely removed any power held by the UK to exercise legislative power over Australia.
  - **Step 2:** Whether the person has taken reasonable steps to renounce the foreign citizenship?
    - Same as above
  - **Step 3:** Conclusion
    - If on the date of election, the person is still a dual national → s/he is ineligible for election

(ii) is attainted of treason, or has been convicted and is under sentence, or subject to be sentenced, for any offence punishable under the law of the Commonwealth or of a State by imprisonment for one year or longer; or

- ⊕ Sentenced + imprisonment less than 1 year → eligible for election
- ⊕ Sentenced + imprisonment for 1 year or longer → ineligible for election
- ⊕ Convicted at the date of election + not sentenced → ineligible for election  until the sentence is handed down (see if it is more/less than 1 year?)
- **Conviction annulled after the date of election – Re Culleton No 2**
  - **Step 1:** Whether the person is convicted at the date of the election?
    - YES → Step 2
      - At the point in time he was nominated and chosen, he was convicted of the offence which carried the requisite sentence – Nettle J in **Re Culleton No 2**
    - NO → eligible for election  (not disqualify)
  - **Step 2:** seriousness of the offence
    - If the offence is punishable by imprisonment for 1 year or longer → disqualify  → Step 3
    - Less than 1 year → not disqualify
  - **Step 3:** consequences if the person was not qualified when chosen

- there is a vacancy in the representation of [State e.g. Western Australia] in the Senate for the place for which the person was returned
- Election for that person's seat was invalid
- A fresh election should be held
- The person can win the seat after renouncing the foreign citizenship and quitting the post
- The Court may order a recount if this would reflect the voters true intentions

(iii) is an undischarged bankrupt or insolvent; or

- ⊕ a person needs to be declared formally bankrupt or insolvent
- ⊕ Culleton was declared bankrupt by the Federal Court → disqualify ☒ – **Re Culleton No 2**

(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; or

- **Step 1:** Requirements: (need to satisfy at least one)
  - Appointment by executive (Governor-general governor or minister)
  - Where the person is under supervision and termination by the Execution branch
  - Entitled to remuneration
  - People who are permanently employed by Government
  - E.g. public servants – **Sue v Hill** (Teacher)
  - E.g. an officer in the Royal Australian Air Force at the time she nominated for the election – **Free v Kelly**
- **Step 2:** When does the person resign the post?
  - Resign before nomination → eligible for election ☒
  - Resign after nomination – **Sue v Hill** → ineligible for election ☒ → Step 3
    - It impinges in both the independence of members of the Parliament and the maintenance of a politically neutral public service so ineligible for election.
- **Step 3:** Why need to be excluded?
  - Preventing the Executive from gaining control of parliament – MPs need to be free from influence of the Crown to hold executive to account.
  - Supporting ministerial responsibility – MPs are meant to hold Ministers accountable for the actions of the public service. If MPs are public servants they have a conflict of interest here.
  - Certain offices are incompatible with membership of parliament:
    - a) there is a risk of conflict of interests;
    - b) the office held is required to be 'apolitical'
- **Step 4:** Consequences if the person was not qualified when chosen (See above)

(v) has any direct or indirect pecuniary interest in any agreement with the Public Service of the Commonwealth otherwise than as a member and in common with the other members of an incorporated company consisting of more than twenty-five persons;

- **The Senator is a shareholder in a family company which had relevant agreements with the Public Service/CTH departments – Re Webster** [NARROW LAW]
  - **Step 1:** is the contract executory?

- Means a contract that has not yet been fully performed or fully executed. It is a contract in which both sides still have important performance remaining.
    - If executory → Step 2
  - **Step 2**: construction of the contract:
    - Disqualification relied on exchanges over ‘a substantial period of time’ and;
    - The agreement must have been one where the Crown could ‘conceivably influence the contractor in relation to parliamentary affairs by the very existence of the agreement’ or by ‘something done or refrained from being done in relation to the contract or to its subject matter’.
  - **Step 3**: Consequences if the person was not qualified when chosen (see above)
- **The Senator has an existing electoral office in a building owned by his family company. Later sold the property to his business associate’s wife in order to avoid a direct contract with the public service – *Re Day No 2* [GOOD LAW]**
  - **Step 1**: apply the narrow view from *Re Webster*
  - **Step 2**: State: HC in *Re Day No 2* declined to follow *Re Webster*
  - **Step 3**: State the wider approach from *Re Day No 2*:
    - Kiefel CJ, Ball and Edelman JJ: MPs will not seek to benefit by such agreements or to put themselves in a position where their duty to the people they represent & their own personal interests may conflict.
      - An obligation to act according to good conscience, uninfluenced by other considerations, especially personal financial considerations
      - interests: legal interest, beneficial interest, ‘an indirect interest pecuniary interest looks to the “practical effect” of the agreement in question on a person’s pecuniary interests’
      - Parliamentarians have a duty to act in the public interest
      - to question and criticise government on behalf of the people and to secure accountability
    - Nettle and Gordon JJ: a person could conceivable be influenced by the potential conduct of the executive in performing or not performing the agreement or because that person could conceivable prefer their private interests over their public duty
      - Interest need not be legal or equitable or legally enforceable
  - **Step 4**: whether the contract will be caught?
    - Not caught: if the agreement in question is one ordinary made between government and a citizen
    - Caught: every day-to-day dealing which a citizen has with government could result in the disqualification of a citizen who happens to be a parliamentarian → Step 5
  - **Step 5**: Consequences if the person was not qualified when chosen (see above)