

Parliamentary Privilege:

Privilege ie immunities

- Immunities:
 - o immunity of members for statements made in the course of parliamentary proceedings
 - o immunity of members from arrest for civil causes while they attend Parliament
 - o immunity of members from arrest in civil cases while acting as witnesses before the house.
- The purpose is to promote frankness in process
- S 49 of the Australian Constitution grants to the Federal Parliament the same privileges as the UK Parliament until it declares its own privileges.
 - o does not restrict the Federal Parliament to declaring its own privileges that are within the bounds of the privileges of the UK Parliament
 - o Federal Parliament has unrestricted authority to define its own powers
 - o The federal Parliament exercised the power to declare its privileges in 1987 the enactment of the Parliamentary Privilege Act 1987(Cth)
- S 9 of the Parliamentary Privileges Act now requires that any warrant emanating from Parliament that commits a person to imprisonment must set out the particulars of the matters considered to constitute the offence.
 - o This means that a decision to imprison a person for contempt of Parliament is now subject to judicial review.
- Freedom of speech and debate within parliament = parliamentary privilege
- The privilege is set out in s 16 of the Parliamentary Privileges Act.

16 Parliamentary privilege in court proceedings

(1) For the avoidance of doubt, it is hereby declared and enacted that the provisions of article 9 of the Bill of Rights, 1688 apply in relation to the Parliament of the Commonwealth and, as so applying, are to be taken to have, in addition to any other operation, the effect of the subsequent provisions of this section.

(2) For the purposes of the provisions of article 9 of the Bill of Rights, 1688 as applying in relation to the Parliament, and for the purposes of this section, proceedings in Parliament means all words spoken and acts done in the course of, or for purposes of or incidental to, the transacting of the business of a House or of a committee, and, without limiting the generality of the foregoing, includes:

(a) the giving of evidence before a House or a committee, and evidence so given;

(b) the presentation or submission of a document to a House or a committee;

(c) the preparation of a document for purposes of or incidental to the transacting of any such business; and

(d) the formulation, making or publication of a document, including a report, by or pursuant to an order of a House or a committee and the document so formulated, made or published.

(3) In proceedings in any court or tribunal, it is not lawful for evidence to be tendered or received, questions asked or statements, submissions or comments made, concerning proceedings in Parliament, by way of, or for the purpose of:

(a) questioning or relying on the truth, motive, intention or good faith of anything forming part of those proceedings in Parliament;

(b) otherwise questioning or establishing the credibility, motive, intention or good faith of any person; or

(c) drawing, or inviting the drawing of, inferences or conclusions wholly or partly from anything forming part of those proceedings in Parliament.

In response to ***R v Murphy (1986) 5 NSWLR 18***

- S 16 (2) + (3) Parliamentary Privileges Act protects Members of Parliament from legal liability for statements they make during the proceedings of parliament

Defining the boundaries of the power and immunities

Parliamentary Precincts Act 1988

12 Saving of powers, privileges and immunities

Nothing in this Act shall be taken to derogate from the powers, privileges and immunities of each House, and of the members and committees of each House, under any other law.

State parliamentary privilege

- The privileges of most State Parliaments are expressed either in their constitutions or in legislation

Powers

- Parliamentary powers derives from customs and practices of the UK Parliament and are found in part in statute such as Bill of Rights 1689 (Imp)
- These include powers to:
 - o call people before the house,
 - o require the production of documents
 - o order the arrest and imprisonment of persons whom the house has found guilty of contempt without showing any particular grounds for the arrest and imprisonment
 - o regulate its own proceedings

Control over Members

- *Ellis v Atkinson [1998] 3 VR 175* -
 - o Issue:
 - whether a person was qualified to be chosen as a member of Parliament
 - whether a member of Parliament has, since his or her election, become disqualified from continuing as a member and thus should be required to vacate his or her seat
 - o Held:
 - Parliament may decide who may be a member of Parliament
 - dismiss the plaintiff's suit for want of jurisdiction in the cause.

- It is unfortunate that the entitlement of a member of the Legislature of this State to sit and vote on matters of great public importance cannot be determined through some independent and impartial process, and may ultimately depend upon the balance of political power within the House itself.
 - The creation of some structure to enable judicial determination of issues concerning the disqualification of members of the Parliament was 'long overdue'.
- Egan v Willis (1998) 195 CLR 424
 - Facts:
 - Egan was Treasurer in the Car ALP Government in NSW, and the senior member of the government in the Legislative Council, in which the government did not have a majority.
 - The Legislative Council passed a resolution requiring Egan to table information before the house relating to a goldmine in Lake Cowal.
 - This part of a long running dispute between the government and the Legislative council in which the government became increasingly unwilling to table the government documents.
 - On this Occasion, when Egan refused to table the requested documents, the Council passed a resolution that held Egan to be in contempt and suspended him from the house for the remainder of the day
 - When Egan refused to leave the house, the Usher of the Black Rod escorted him out of the chamber and onto the footpath.
 - Held:
 - **Privileges may be justiciable when they are part of a dispute arising under general law**
 - The fact that Egan had been taken beyond the precinct of Parliament meant that he was able to claim that a trespass had been committed against him under the general law.
 - Although the NSW Supreme Court and the High Court held that the council's resolution holding Egan in contempt and suspending him from the house was valid, thus confirming the existence of this privilege.
 - Note: parliament can delegate this power to the Executive but it remains a delegation of legislative power under the exercise of executive power.
- Barnes v Purcell [1946] St R Qd 87 (FC)
 - Held:
 - suspended for calling other members "gangsters and crooks"
 - held
 - "for the proposition that Parliament has the exclusive right to **construe the standing orders** to determine the punishment which may be inflicted upon a member when he has been suspended by the House.
 - it is not within the exclusive power of Parliament to determine such punishment by its own construction of standing orders."
 - **there was court jurisdiction to review any punishment inflicted on a member by a House even when pursuant to its standing orders.**

Power to Summon and Punish for Contempt of Parliament

- R v Richards; Ex Parte Fitzpatrick & Browne (1995) 92 CLR 157
 - Prior to the parliamentary privileges act, the commonwealth parliament demonstrated the extent of its powers in 1955 in Facts:
 - The Commonwealth Parliament demonstrated the extent of its powers in 1955 when it ordered the arrest and imprisonment of Frank Browne and Raymond Fitzpatrick
 - Browne had published an article in a journal owned by Fitzpatrick making serious allegations against a member of Parliament, Charles Morgan.
 - Browne and Fitzpatrick were called before the house of Representatives and sentenced to six months imprisonment on a general warrant that did not specify the details of their offence
 - The speaker of the house of representatives commanded that the two men be taken into custody
 - Held:
 - If the warrant had set out the particulars of the allegations, it could have reviewed the terms of the allegations, but as the warrant was in general terms, it was conclusive.
 - Power to summon and punish for contempt of parliament

Immunities:

Immunities from Defamation

Acts:

- Uniform Defamation Acts - Each of the States' legislation is modelled on the proposed uniform defamation laws developed by the Standing Committee of Attorneys General.
- **Defamation Act(NSW) 27 Defence of absolute privilege**

(1) It is a defence to the publication of defamatory matter if the defendant proves that it was published on an occasion of absolute privilege.

(2) Without limiting subsection (1), matter is published on an occasion of absolute privilege if:

(a) the matter is published in the course of the proceedings of a parliamentary body, including (but not limited to):

(i) the publication of a document by order, or under the authority, of the body, and

(ii) the **publication of the debates and proceedings** of the body by or under the authority of the body or any law, and

(iii) the publication of matter **while giving evidence before the body**, and

(iv) the publication of matter while presenting or submitting a document to the body, or

(b) the matter is published in the course of the proceedings of an Australian court or Australian tribunal, including (but not limited to):

(i) the publication of matter in any document filed or lodged with, or otherwise submitted to, the court or tribunal (including any originating process), and

(ii) the publication of matter while giving evidence before the court or tribunal, and

(iii) the publication of matter in any judgment, order or other determination of the court or tribunal, or

(c) the matter is published on an occasion that, if published in another Australian jurisdiction, would be an occasion of absolute privilege in that jurisdiction under a provision of a law of the jurisdiction corresponding to this section, or

(d) the matter is published by a person or body in any circumstances specified in Schedule

S 15 Parliamentary Proceedings Broadcasting Act 1946 (Cth)

No action or proceeding, civil or criminal, **shall lie against any person for broadcasting or re-broadcasting any portion of the proceedings** of either House of the Parliament or of a joint sitting.

- 13A Recording of parliamentary proceedings
 - (1) In this section, **Corporation** means the Australian Broadcasting Corporation.
 - (2) The Corporation may make a sound recording of any proceedings of either House of the Parliament or of a joint sitting and shall make a sound recording of any such proceedings when directed so to do by the Chairman or Vice-Chairman of the Committee.
 - (2A) The Corporation may, with the consent of the Chairman or Vice-Chairman of the Committee, make a visual recording, with or without accompanying sound, of any proceedings of a joint sitting, and shall make such a recording when directed so to do by the Chairman or Vice-Chairman of the Committee.
 - (3) The Corporation shall, within such period as the Committee from time to time directs, deliver to the Chairman or Vice-Chairman of the Committee any recording made by the Corporation in pursuance of this section.
 - (4) Where the Committee considers that a recording made by the Corporation in pursuance of this section is of sufficient historic interest to justify its being permanently preserved, the Committee may make such arrangements as it thinks fit for the permanent safe keeping of the recording.
 - (5) Where the Committee does not make arrangements for the permanent safe keeping of a recording, the Committee shall cause the recording to be destroyed.
- Parliamentary Proceedings Broadcasting Act 1946 (Cth)
 - 4 Broadcasting of parliamentary proceedings
 - (1) Notwithstanding anything contained in the *Australian Broadcasting Corporation Act 1983*, the Australian Broadcasting Corporation shall broadcast the proceedings of the Senate, the House of Representatives or a joint sitting from:
 - (a) a medium-wave national broadcasting station in the capital city in each State and in the city of Newcastle in the State of New South Wales; and
 - (b) such other national broadcasting stations (including shortwave national broadcasting stations) as are prescribed;
 - upon such days and during such periods as the Committee determines.
 - (2) Notwithstanding anything contained in the *Australian Broadcasting Corporation Act 1983*, but subject to subsection (3) of this section, the Australian Broadcasting Corporation may televise the whole or a part of the proceedings of a joint sitting.
 - (3) The Committee may make determinations requiring the Australian Broadcasting Corporation to exercise its powers under subsection (2) or otherwise relating to the exercise of those powers, and the Corporation shall act in accordance with any such determination.

Cases:

- Laurance v Katter [2002] 1 Qd R 147
 - Facts:
 - In 1994, Bob Katter (QLD member of federal parliament) made allegation of misconduct on the part of Peter Laurance, a company director
 - Katter made the statements inside Parliament, and then again outside Parliament on television and radio.
 - Laurance sued Katter for defamation, Katter relied on s 16 as a defence to the defamation action
 - Held:
 - Rejected Katter's reliance on s `16.
 - Davies JA - S 16 was confined to statements made in parliament
 - Pincus JA - s 16 was invalid for infringing the implied freedom of political communication.
- Rann v Olsen (2000) 76 SASR 450
 - S 16 in similar circumstances gave it broader scope than Laurance v Katter

- Between two members of the state parliament accusing each other of telling lies – questions suggested to them by the media – about statements to a parliamentary committee
- Full court upheld the point that the proceedings of the committee were privileged even if the committee was not sitting in Parliament at the time
- Wright & Advertiser Newspapers Ltd v Lewis (1990) 53 SASR 416 (FC)
 - Facts:
 - L, a member of the South Australia House of Assembly, alleged in the House that W had obtained an advantage from his close association with a former Government.
 - W wrote to the newspaper, which published it, accusing L of abusing parliamentary privilege and of cheap political opportunism.
 - L said the letter was libelous. W pleaded justification, qualified privilege and fair comment.
 - L's integrity in making statements in the House was determinative of the action: the letter was plainly defamatory and unless the defendants could challenge the truthfulness of what the plaintiff had said in Parliament, they had no defence.
 - Held:
 - the Court was entitled to examine statements made in Parliament to determine their truthfulness or otherwise in a case where the parliamentarian making the statement sued a member of the public who accused the parliamentarian of telling defamatory lies
 - The Court held limited **parliamentary privilege does to exclude challenges to the truth or bona fides of statements made in Parliament where the maker of the statements himself initiates the proceedings.** Such a limitation on normal parliamentary privilege would not inhibit the member from exercising his freedom of speech 'because he would be aware that his actions and motives could not be examined in court unless he instituted the proceedings which rendered such examination necessary'.
- To prevent the abuse of this freedom, some Legislatures have developed standing orders that restrict what can be said about others, or have allowed a right of reply by a person named
- Rare for the courts to test the existence or the extent of Parliament's privileges as the internal affairs of Parliament have generally been regarded as 'non-justiciable'; that is, not reviewable in the courts
- However in all cases involving the exercise of government power against individuals, the courts must weigh the individual interest against the interest of the state
- Parliamentary privilege = the courts must weigh the autonomy of parliament against the protection of the individual

Immunity from arrest and attendance before the courts

- Evidence Acts (Cth) s 15(2) -

- **A member of a House of an Australian Parliament is not compellable to give evidence if the member would, if compelled to give evidence, be prevented from attending:**
 - (a) **a sitting of that House or a joint sitting of that Parliament; or**
 - (b) **a meeting of a committee of that House or that Parliament, being a committee of which he or she is a member.**

- **PARLIAMENTARY PRIVILEGES ACT 1987 - SECT 14**

Immunities from arrest and attendance before courts

(1) A member:

- (a) **shall not be required to attend** before a court or a tribunal; and
- (b) **shall not be arrested or detained in a civil cause;**

on any day:

- (c) **on which the House of which that member is a member meets;**
- (d) **on which a committee of which that member is a member meets; or**
- (e) **which is within 5 days before or 5 days after such a day referred to in paragraph**

(c) or (d).

(2) An officer of a House:

- (a) shall not be required to attend before a court or a tribunal; and
- (b) shall not be arrested or detained in a civil cause;

on any day:

- (c) **on which a House or a committee upon which that officer is required to attend meets; or**
- (d) **which is within 5 days before or 5 days after a day referred to in paragraph (c).**

(3) A person who is required to attend before a House or a committee on a day:

- (a) shall not be required to attend before a court or a tribunal; and
- (b) shall not be arrested or detained in a civil cause;

on that day.

(4) Except as provided by this section, a member, an officer of a House and a person required to attend before a House or a committee has no immunity from compulsory attendance before a court or a tribunal or from arrest or detention in a civil cause by reason of being a member or such an officer or person.

S 44 and election eligibility

Appointment

- S163 Commonwealth Electoral Act 1918 Cth

163 Qualifications for nomination

(1) A **person** who:

- (a) has reached the **age of 18 years**;
- (b) is an **Australian citizen**; and
- (c) is either:
 - (i) an **elector entitled to vote at a House of Representatives election**; or
 - (ii) a **person qualified to become such an elector**;

is qualified to be elected as a Senator or a member of the House of Representatives.

(2) A **person is not entitled to be nominated otherwise** for election as a Senator or a member of the House of Representatives unless the person is qualified under subsection (1)

- The **constitutions** of the Commonwealth and the States **place a number of further restrictions on candidates' eligibility**
- 43 Member of one House ineligible for other
 - **A member of either House of the Parliament shall be incapable of being chosen or of sitting as a member of the other House.**

Eligibility to stand for election

- 44 Disqualification

Any person who:

- (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
 - (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
 - (iii) is an **undischarged bankrupt or insolvent**; or
 - (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
 - (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;
- shall be incapable of being chosen or of sitting as a senator or a member of the House of Representatives.

But subsection (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 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.

- S 354 of the Commonwealth Electoral Act
 - The HCA was established as a Court of Disputed Returns in to hear petitions challenging election results.
 - In this capacity, it has heard several challenges to the election of candidates on the grounds of disqualification under s 44

(1) The High Court shall be the Court of Disputed Returns, and shall have jurisdiction either to try the petition or to refer it for trial to the Federal Court of Australia (the **Federal Court**).

(2) When a petition has been so referred for trial, the Federal Court shall have jurisdiction to try the petition, and shall in respect of the petition be and have all the powers and functions of the Court of Disputed Returns.

(3) The High Court may refer to the Federal Court part of a petition in respect of an election or return, being a part that consists of a question or questions of fact.

(4) Subject to any directions by the High Court, if the High Court refers part of a petition to the Federal Court under subsection (3):

(a) the Federal Court has jurisdiction to deal with the part of the petition that has been referred; and

(b) the Federal Court has, in respect of the petition, the powers and functions of the Court of Disputed Returns, other than the powers referred to in paragraphs 360(1)(v), (vi), (vii) and (viii) and in section 379; and

(c) subject to any directions by the High Court, further proceedings in relation to the part of the petition are as directed by the Federal Court.

(5) The High Court may have regard to the findings of the Federal Court in dealing with the petition and may in its discretion receive further evidence on questions of fact.

(6) The jurisdiction conferred by this section may be exercised by a single Justice or Judge.

Cases

- Sykes v Cleary (1992) 176 CLR 77-
 - Facts:
 - In 1992, Phil Cleary was elected as an independent candidate in a by-election held for the seat of Wills, after the former Prime Minister Bob Hawke resigned from Parliament.
 - Cleary was a secondary school teacher employed by the Victorian Government under the Teaching Service Act 1918 (Vic)
 - He had taken leave without pay for two years prior to the election.
 - His election was successfully challenged on the basis that he held an 'office for profit under the Crown' within the meaning of s 44(iv).
 - As well as declaring Cleary's election void, the High Court considered the eligibility of the Liberal and ALP candidates for the seat of Wills.
 - The ALP Candidate, Bill Kardamitsis, was born in Greece in 1952, migrated to Australia in 1969 and became an Australian citizen in 1975.
 - The Liberal candidate, John Delacretaz, was born in Switzerland respectively, and therefore continued to be entitled to the rights and privileges of a citizen of a foreign power contravention of s 44(i)
 - Held:
 - Where a foreign country maintains conditions for renunciation that are not unduly onerous, an Australian citizen holding citizenship of that foreign country can escape disqualification under s44(1) if he or she takes reasonable steps to achieve that renunciation
 - As a result of this case, the three most prominent candidates in the seat of Wills were declared ineligible to run for election
- Sue v Hill (1999) 199 CLR 462:
 - Facts:
 - In 1998, Heather Hill was elected as a Senator for Qld for Pauline Hanson's One Nation.
 - Hill was born in the UK in 1960 and migrated to Australia in 1971.
 - She became an Australian citizen in 1988
 - However, only after her election did Hill renounce her UK citizenship by handing over the UK passport to the British High Commission and completing a declaration of renunciation of citizenship
 - Hill's election was challenged on the basis that she owed an allegiance to the UK at the time of her election.
 - Issue: whether the UK was in fact a foreign power
 - Held: it was
 - Election invalid
 - clarified the path to Australia's independence from the UK