HIGH COURT OF AUSTRALIA

GLEESON CJ GAUDRON, MCHUGH, GUMMOW, KIRBY, HAYNE AND CALLINAN JJ

Sue v Hill (S179/1998)
[1999] HCA 30

ORDER

1. Answer the questions reserved in each stated case as follows:

(a) Does s 354 of the Act validly confer upon the Court of Disputed Returns jurisdiction to determine the issues raised in the Petition?

Answer: Yes

(b) Was the first respondent at the date of her nomination a subject or citizen of a foreign power within the meaning of s 44(i) of the *Constitution*?

Answer: Yes

(c) Was the first respondent duly elected at the Election?

Answer: No

(d) If no to (c), was the Election void absolutely?

Answer: No

(e) If no to (d), should the second respondent conduct a recount of the ballot papers cast for the Election for the purpose of determining the candidate entitled to be declared elected to the place for which the first respondent was returned?

Answer: Inappropriate to answer.

(f) Save for those otherwise dealt with by order, who should pay the costs of the Stated Case and of the hearing of the Stated Case before the Full High Court?

Answer: The Commonwealth should pay the costs of the petitioner and the first respondent. The second respondent should bear its own costs.

Cur adv vult

The following written judgments were delivered: —

23 June 1999

GLEESON CJ, GUMMOW AND HAYNE JJ.

1. In each of the cases stated, we agree that the relief should be formulated and answers given in the terms proposed by Gaudron J.

2. The questions anterior to the determination of the relief are threefold. It is submitted for Mrs Hill that there has been no legislative conferral of jurisdiction on this Court, that, if the legislation has attempted such conferral, this would not involve the exercise of the judicial power of the Commonwealth and so would be ineffective, and that, within the meaning of s 44(i) of the *Constitution*, the United Kingdom is not a "foreign power". We will deal with the issues raised by these submissions in that order. The text of a number of the constitutional and statutory provisions which fall for consideration is set out in the reasons of Gaudron J. However, for ease of comprehension, some of these are repeated in what follows. In addition to the *Commonwealth Electoral Act 1918 Cth* (the Act) as it now stands, it will be necessary to refer to provisions of earlier legislation repealed by s 3 of the Act, in particular the *Commonwealth Electoral Act 1902 Cth* (the 1902 Act) and the *Disputed Elections and Qualifications Act 1907 Cth* (the 1907 Act).

I. Jurisdiction

3. It is submitted for Mrs Hill that the present litigation is misconceived. The contention is that, on its proper construction, Div 1 (ss 352-375A) of Pt XXII of the Act (Div 1) does not provide for the disputation by petition addressed to the Court of Disputed Returns of the validity of an election as Senator or Member of the House of Representatives (the House) where the alleged invalidity arises by reason of a disqualification imposed by s 44 of the *Constitution*. The contention is that such an issue may be tested in the Court only on a reference under Div 2 (ss 376-381) of Pt XXII (Div 2) and this requires a resolution of the chamber concerned. Section 44 states that any person who answers any of the descriptions in pars (i)-(v) "shall be incapable of being chosen" as a Senator or a Member of the House or of sitting as a Senator or Member. We would reject this submission.

4. The incapacity specified in s 44 is imposed by the Constitution itself. However, that is not to deny that a dispute as to the engagement of the constitutional provision may be entertained by the Court of Disputed Returns on a petition contesting the validity of an election or return. Rather, for such a case, the Parliament has provided, to adapt the words of Barwick CJ, the means "of resolving the facts and their legal consequences" [1] by enacting Div 1. In this operation, the Division is a law for the judicial determination of a matter arising under the Constitution or involving its interpretation, within the meaning of s 76(i) of the *Constitution*.

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(1) In re Webster (1975) 132 CLR 270 at 279.

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5. Each of the petitions in respect of the election of Mrs Hill founds upon the proposition that she was incapable of being chosen as a Senator because, within the meaning of s 44(i) of the *Constitution*, she was "a citizen of a foreign power". Any question respecting Mrs Hill's qualification as a Senator, a vacancy in the Senate and any question of her disputed election to the Senate would, if the Parliament had not otherwise provided, have been for the determination of the Senate. That would have followed from the operation of s 47 of the *Constitution*. Section 47 states:

> Until the Parliament otherwise provides, any question respecting the qualification of a senator or of a member of the House of Representatives, or respecting a vacancy in either House of the Parliament, and any question of a disputed election to either House, shall be determined by the House in which the question arises.

The question is whether the Parliament has "otherwise provided". It has done so in Div 1.

6. The contrary submission fixes upon those provisions of Div 1 which empower the Court of Disputed Returns to act by reason of a contravention of the Act or the regulations made thereunder (defined as an "illegal practice"), or a contravention of s 326 of the Act (defined as "bribery" or "corruption"), or a contravention of s 327 of the Act or s 28 of the *Crimes Act 1914 Cth* (together defined as "undue influence"). It is convenient to consider the provisions of the Constitution which support these elements in the scheme established by Div 1.

7. The phrase "[u]ntil the Parliament otherwise provides" appears throughout Ch I (ss 1-60) of the *Constitution* [2] . Sections 10 and 31 provide, respectively, that, "[u]ntil the Parliament otherwise provides" but subject to the Constitution, the laws in force in each State for the time being relating to elections for the more numerous House of Parliament of the State shall apply, as nearly as practicable, to elections of Senators or Members of the House. Sections 10 and 31 attract the operation of s 51(xxxvi) of the *Constitution*. This authorises the Parliament to make laws with respect to matters in respect of which the Constitution "makes provision until the Parliament otherwise provides". The power extends to the making of laws which regulate the conduct of persons in relation to elections [3] and thus to the making of laws proscribing bribery or corruption, illegal practices and undue influence.

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(2) *McGinty v Western Australia* (1996) 186 CLR 140 at 281

(3) *Smith v Oldham* (1912) 15 CLR 355 at 358-359, 360-361, 362-365; *McKenzie v The Commonwealth* (1984) 59 ALJR 190 at 19157 ALR 747 at 749; *Langer v The Commonwealth* (1996) 186 CLR 302 at 348-349

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8. However, the terms of ss 10 and 31 of the *Constitution* stipulate that such provision by the Parliament is "subject to this Constitution". It follows that any question respecting an election which is disputed by reason of alleged contravention of these legislative provisions in the first instance is committed by s 47 of the *Constitution* for determination by the chamber in which the question arises. As indicated earlier, that requirement of s 47 itself is subject to other provision by the Parliament. With respect to the practices which it has proscribed by statute, the Parliament has legislated under s 76(ii) of the *Constitution* to provide for the determination of matters that arise thereunder. The Parliament has made a law conferring original jurisdiction on this Court to determine matters arising under laws made by the Parliament which forbid certain electoral practices.

9. In *Hudson v Lee* [4] , the petition which disputed the election of a Member of the House asserted engagement in a practice said to be illegal but which was not one of bribery or corruption, undue influence or illegal practice as defined in s 352(1) of the Act. Gaudron J determined that s 352(1) identified exhaustively the practices, alleged engagement in which might properly found a petition under Div 1 [5] . The effect of that decision is consistent with the position established by *Chanter v Blackwood* [6] with respect to the 1902 Act, namely that the legislation does not leave room for the validity of an election or return to be disputed for a practice outside those identified in s 352. This is so even if, under the body of authority established by rulings of committees of the House of Commons before the passing of the *Parliamentary Elections Act 1868 UK* (the 1868 Act), the practice would have been recognised as bribery or undue influence. In the United Kingdom, this lex parliamentarii "still exists in certain circumstances despite the [1868] Act" [7] , and its continued operation was recognised by s 3 of the 1868 Act [8] .

(4) (1993) 177 CLR 627.
(5) *Hudson v Lee* (1993) 177 CLR 627 at 631
(6) (1904) 1 CLR 39.
(7) *Flinders Election Petition; Forde v Lonergan* [1958] Qd R 324 at 331
(8) Section 3 of the 1868 statute defined "Corrupt Practices" or "Corrupt Practice" as meaning: "Bribery, Treating, and undue Influence, or any of such Offences, as defined by Act of Parliament, or recognized by the Common Law of Parliament."

10. In addition to proscribing certain practices which may be said to go to the democratic credentials of persons whose election or return is the subject of a petition under Div 1, the Act requires certain personal qualifications. In particular, no person is capable of being elected as a Senator or a Member of the House "unless duly nominated" (s 162). Sub-section (2) of s 163 provides that a person is not entitled to be nominated for election as a Senator or a Member of the House unless qualified under sub-s (1). A person will be so qualified under sub-s (1) if that person has reached the age of eighteen years, is an Australian citizen and is either an elector entitled to vote at an election for the House or a person qualified to become such an elector. Section 8 in conjunction with s 30 of the *Constitution* had specified criteria qualifying electors but those criteria were subject to other provision by the Parliament by a law supported by s 51(xxxvi) [9] . Part VII (ss 93-97), particularly s 93, makes such provision for entitlement to vote and s 163(1) is to be read with it. Contravention of s 162 falls within the definition of illegal practice in s 352(1), thereby attracting the operation of Div 1.

(9) *R v Pearson; Ex parte Sipka* (1983) 152 CLR 254 at 260-261, 277-278.

11. Section 162 and related sections in Pt XIV (ss 162-181), which is headed "The nominations", do not go beyond the statement of qualifications by reproducing the constitutional imperative of disqualification or incapacity spelled out in s 44 of the *Constitution*. To do so would have been a work of supererogation. Yet it hardly follows that there is excluded from the operation of Div 1 the provision of judicial process to resolve facts concerning the operation of the constitutional imperative and the provision of remedies to deal with the legal consequences.

12. The oddity and inconvenience which would follow from acceptance of such a submission as to the construction of Pt XXII will be readily apparent. The oddity would be that the Parliament would have provided for the determination on a petition of objections based upon lack of the necessary statutory qualification for election but not upon concomitant questions respecting constitutional ineligibility. The inconvenience would be that an issue of constitutional ineligibility would be left for determination by the chamber in question after the person in question had taken his or her place, with or without a reference under Div 2. In the interim, such a person might participate in the passage of laws and the transaction of other business of the chamber whilst disentitled by the Constitution from doing so. Further, the Senator or Member would be at hazard of proceedings in this Court for recovery of penalties under s 3 of the *Common Informers (Parliamentary Disqualifications) Act 1975 Cth* [10] .

(10) The text of s 3(1) is set out in fn 173 in the judgment of Gaudron J. Examples of United Kingdom statutes, enacted before the 1868 Act, which provided for similar judicial proceedings in respect of members of Parliament, are collected in *Bradlaugh v Clarke* (1883) 8 AppCas 354 at 363-368.

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13. In the state of affairs as it existed with respect to elections to the House of Commons before the 1868 Act, distinctions were drawn between ineligibility by reason of statutory prohibition and ineligibility by reason of what the 1868 Act called "the Common Law of Parliament". For example in Orme, A Practical Digest of the Election Laws [11] , published in 1796, it was stated:

> "Aliens" are incapable of being members by the law of parliament, and are expressly excluded from voting by a resolution of the house. [12]

In the same work, the author referred to various statutory criteria for qualification. He also discussed [13] the procedural requirements imposed by a standing order of 21 November 1717 in respect of election petitions where objection was made for failure to satisfy the property qualifications for candidates which were then stipulated by statute [14] .

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(11) p 255.
(12) Orme identified the Commons' resolutions of 10 March 1623 and 18 February 1625.
(13) p 278.
(14) eg, by s 1 of 9 Anne c 5 (1711).

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14. Under the 1868 Act, the grounds upon which petitions were entertained by the judges included the disqualification of a candidate at the time of election on grounds, including alienage, now found in s 44 of the *Constitution* [15] .

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(15) *Royse v Birley* (1869) LR 4CP 296; County of Tipperary (1875) 3 O'M & H 19; Rogers on Elections, 16th ed (1892), Pt II, p 226.

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15. In the Australian colonies, provision approximating that of the 1868 Act was made by the *Electoral Act 1896 Tas* and the *Electoral Act 1899 WA* [16] . The establishment of the Commonwealth involved the formation of an elected bicameral federal legislature with the imposition by the Constitution itself of certain disqualifications rendering persons incapable of being chosen as Senators or Members of the House. The consequences of that constitutional imperative necessarily differed from the situation in the United Kingdom in 1900. In that country there was no federal system, no rigid constitution and an upper chamber of the legislature composed of hereditary peers (including representative peers from Scotland and Ireland) and certain bishops and judges.

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(16) See Schoff, "The Electoral Jurisdiction of the High Court as the Court of Disputed Returns", Federal Law Review, vol 25 (1997) 317, at pp 326-328.

16. The provisions for composition of the Australian Senate by popular election were, in 1900, unique in the federations in common law countries [17] . There is nothing to suggest that, in enacting the 1902 Act, the Parliament intended to keep to itself so much of the determination of disputed elections to the House or the Senate as turned not upon lack of statutory qualification from membership, but upon constitutional disqualification. Indeed, the indications of legislative intent are to the contrary.

(17) *McGinty v Western Australia* (1996) 186 CLR 140 at 271

17. The Bill for what became the 1902 Act was introduced into the Senate by Senator R E O'Connor, the Vice-President of the Executive Council [18] . In the course of debate in committee, there was a motion to amend cl 190 by omitting from it the words "a Justice of the High Court of Australia". This clause (which became s 193(1) of the 1902 Act) [19] read:

> There shall be a Court of Disputed Returns which shall be constituted by a Justice of the High Court of Australia, or a Judge of the Supreme Court of any State. [20]

Speaking of the matters which would be entertained by the courts referred to in cl 190, Senator O'Connor observed [21] :

> It is quite true that generally speaking they will be very simple matters to determine, but very frequently and at any time the courts may be called upon to interpret the Electoral Act, or the Constitution, to administer the laws by which the Commonwealth is guided. Surely the interpretation of those laws ought to be left in the hands of the Commonwealth's court?

When the Bill reached the House, the Minister having its carriage, Sir William Lyne, the Minister for Home Affairs, described as follows the intent of what became Pt XVI of the 1902 Act [22] :

> It is proposed to remove the dealing with election petitions from the control of Committees of Elections and Qualifications, to which such matters are now referred, and have them tried by the Full High Court, but until the establishment of the High Court the Supreme Court of each State will be the court of disputed returns. The High Court is to have jurisdiction either to try the petition, or refer it for trial to the Supreme Court of the State for which the election was held or the return made, and the powers conferred by the clause — 198 — may be exercised by a single Justice or Judge.

(18) Australia, Senate, Parliamentary Debates (Hansard), 31 January 1902, p 9529. Senator O'Connor was the third of the first appointments made to this Court on 5 October 1903.
(19) Sub-sections (1) and (2) of s 193 stated: "(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 Supreme Court of the State in which the election was held or return made. (2) When a petition has been so referred for trial to the Supreme Court of a State, that 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."
(20) Australia, Senate, Parliamentary Debates (Hansard), 13 March 1902, p 10950.
(21) Australia, Senate, Parliamentary Debates (Hansard), 14 March 1902, p 10953.

(22) Australia, House of Representatives, Parliamentary Debates (Hansard), 5 June 1902, pp 13359-13360.

18. These provisions are now reflected in Div 1 of the present legislation, particularly in sub-ss (1) and (2) of s 354, but with additional provision in respect of the Federal Court and Territory Supreme Courts. Further, s 192 of the 1902 Act still persists as s 353(1) of the Act. This states:

    > The validity of any election or return may be disputed by petition addressed to the Court of Disputed Returns *and not otherwise*. (Emphasis added.)

    The phrase "and not otherwise" implements the policy stated by Sir William Lyne in 1902 to remove the dealing with election petitions from the control of the Committees of Elections and Qualifications to which such matters were then referred, and to direct the petitions for trial in the Court of Disputed Returns.

19. The constitutional incapacity of an individual to be chosen as a Senator or Member of the House is a matter going to the validity of the election of that person and may be a matter going to the validity of the election process in part or in whole. In declaring, in exercise of the power conferred by s 360(1)(v) of the Act, that that person, although returned as elected, was not duly elected and in making consequential orders, the Court declares the legal consequences which flow from the operation of the Constitution. Section 374 implements such a decision by stating that the person "shall cease to be a Senator or Member of the House". In so providing, the legislation gives effect to the prohibition in s 44 of the *Constitution* upon that person sitting as a Senator or Member of the House.

20. In *Blundell v Vardon* [23] , Barton J declared absolutely void the election of the respondent as a Senator for the State of South Australia. The Parliament of that State, assuming to act under s 15 of the *Constitution*, then chose a person as Senator to fill the vacancy, that person was duly certified and sat and voted as a Senator. The dispute which then arose turned upon the question whether a vacancy existing after the declaration by the Court of Disputed Returns was a vacancy arising in the place of a Senator before the expiration of that person's term of office, within the meaning of s 15 of the *Constitution*. As the 1902 Act then stood, the dispute was not one as to the validity of an election or return within the meaning of s 192. However, in the course of the Vardon controversy, the 1902 Act was amended by s 5 of the 1907 Act. This added the following provision at the end of s 192:

    > The choice of a person to hold the place of a Senator by the Houses of Parliament of a State or the appointment of a person to hold the place of a Senator by the Governor of a State under section fifteen of the Constitution shall be deemed to be an election within the meaning of this section.

    That provision is now found in s 353(2) of the Act and is supplemented by sub-ss (3) and (4) to deal with replacements of Senators for the Australian Capital Territory and the Northern Territory.

(23) (1907) 4 CLR 1463.

21. Given the course of the Vardon dispute, part of the resolution of which involved the amendment of s 192 of the 1907 Act, it is plain that when the present statute was enacted in 1918 the Parliament proceeded on the footing that the questions of validity entrusted by Div 1 to the Court of Disputed Returns included questions depending for their resolution upon the interpretation and application of provisions of the Constitution. Both the text of s 192, and its present representative, s 353(1), and the parliamentary history lend no support to the notion that each chamber kept to itself the determination of petitions which relied upon disqualification on constitutional grounds rather than purely legislative grounds.

22. The Vardon litigation was ultimately resolved in his favour by the decision in *Vardon v O'Loghlin* [24] . It was there declared that the election of his replacement, the respondent, by the Houses of Parliament of the State of South Australia was absolutely void. Vardon had petitioned the Senate for a declaration that the respondent had not been duly chosen or selected as a Senator. The petition had been referred to the High Court under the specific terms of s 2(1) of the 1907 Act. That Act also amended the 1902 Act by introducing what is now Div 2 [25] . Division 2 includes s 376, which states:

> Any question respecting the qualifications of a Senator or of a Member of the House of Representatives or respecting a vacancy in either House of the Parliament may be referred by resolution to the Court of Disputed Returns by the House in which the question arises and the Court of Disputed Returns shall thereupon have jurisdiction to hear and determine the question.

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(24) (1907) 5 CLR 201.

(25) The provision in Div 2 for references had some counterpart in the United Kingdom. This is shown by In re Samuel [1913] AC 514. The Privy Council, upon a reference under s 4 of the *Judicial Committee Act 1833 UK* made at the instance of a Select Committee of the House of Commons, considered whether, by reason of his interest in Crown contracts, a member was disabled from sitting and voting in the House. However, s 4 had no operation with respect to "matters" falling within Ch III of the *Constitution*: *The Commonwealth v Queensland* (1975) 134 CLR 298 at 314-315, 328.

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23. It is submitted by Mrs Hill that Div 2 bears upon the construction of Div 1 by limiting what otherwise is the ordinary meaning of the terms of s 353(1). The contention is that there is removed from the grounds which may found a petition disputing validity of an election or return any question respecting the qualification of a Senator or Member of the House or respecting a vacancy in either house of the Parliament, even if those questions arise in a disputed election.

24. The expressions "qualification of a senator", "vacancy in either House" and "any question of a disputed election" appear in s 47 of the *Constitution*. It was submitted first that the expressions are mutually exclusive and the expression "any question of a disputed election" does not include any question as to disqualification. From that it was said to follow that the expression in s 353(1) "the validity of any election or return" did not include disputes by reason of constitutional ineligibility.

25. However, in *Sykes v Cleary [No 1]* [26] , Dawson J determined that there is nothing in s 47 to suggest that the three categories of questions there referred to are mutually exclusive. With Gaudron J, we would adopt what his Honour said on the point. This is fatal to the first of the sequential steps in Mrs Hill's argument.

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(26) (1992) 66 ALJR 577 at 578; 107 ALR 577 at 579.

26. Something of an argument in terrorem also was presented. It was suggested that the situation might arise where, whilst there was pending a petition under Div 1 challenging an election by reason of constitutional ineligibility of the Senator or Member in question, that Senator or Member might take his or her seat and that, despite the pendency of the petition, the relevant chamber could proceed to determine the qualification itself without waiting for the determination of the petition and without making a reference under Div 2. However, questions respecting the exercise by the chambers of the Parliament of their constitutional authority bestowed by s 47 of the *Constitution* are not to be approached by reference to some distorting possibility [27] .

(27) See *Western Australia v The Commonwealth* (1975) 134 CLR 201 at 271, 275; *Queensland v The Commonwealth* (1977) 139 CLR 585 at 604-605 *Kartinyeri v The Commonwealth* (1998) 195 CLR 337 at 379-381

27. We would reject the attack on the competency of the petition made on the footing that the validity of an election or return may not be disputed by petition under s 353(1) of the Act on the grounds of the constitutional ineligibility of the Member returned. It is necessary then to consider so much of the attack on competency as asserts that the jurisdiction under Div 1, which is invoked by these petitions, cannot be conferred upon a federal court or a court exercising federal jurisdiction consistently with Ch III of the *Constitution*.

II. The judicial power of the Commonwealth

28. Section 354(1) of the Act states that this Court "shall be the Court of Disputed Returns" and shall have jurisdiction (i) to try the petition itself or (ii) to refer the petition for trial to the Federal Court or to the Supreme Court of the State or Territory in which the election was held or the return made. Sub-section (2) confers jurisdiction upon the court to which the reference is made by this Court. In addition, sub-s (3) empowers the High Court to refer part of a petition consisting of a question or questions of fact and, subject to any directions by the High Court, jurisdiction is conferred by sub-s (4) upon the court to which reference is made by this Court to deal with that part of the petition.

29. Counsel for Mrs Hill relied upon what was said to be involved in the reasoning in the judgments in *Holmes v Angwin* [28] . Section 354, like its predecessor, s 193 in the 1902 Act, differs from the provisions of the *Electoral Act 1904 WA* which were considered in *Holmes v Angwin* . The Western Australian statute was construed as, in substance, creating a new and separate tribunal consisting of a judge of the Supreme Court of Western Australia as a persona designata. On the other hand, s 354(1) fixes upon "the High Court" and specifies two matters in respect of the High Court. First, the High Court "shall be the Court of Disputed Returns" and secondly, it "shall have jurisdiction" to try or otherwise deal with the petition. Elsewhere in Pt XXII there is reference to "the Court of Disputed Returns", "the court" and to "the High Court of Australia". To a significant degree, the rather confused drafting is a reflection of the circumstance that jurisdiction is conferred not only upon the High Court but, in the circumstances indicated above, upon the Federal Court and the Supreme Courts of the States and Territories. An example, as Gaudron J points out in her reasons for judgment, is the provision in s 373 dealing with costs.

(28) (1906) 4 CLR 297.

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30. In the oral argument, no submission for Mrs Hill to the effect that Div 1 selects the Justices of this Court as personae designatae was pressed. As already indicated, any such submission would not be well founded. It also is apparent from the first reading speeches upon the Bill for the 1902 Act, to which reference has been made in Section I of these reasons, that the legislative intention was to confer jurisdiction upon the High Court and for it to be identified, in the exercise of that jurisdiction, as the Court of Disputed Returns. This was achieved without the creation of any new federal court under ss 71 and 72 of the *Constitution*, or the selection of Justices to exercise functions as personae designatae.

31. However, it is submitted for Mrs Hill that the power invoked by the petitions in respect of her election is not the judicial power of the Commonwealth, with the result that the petitions are incompetent. The broad submission is made that the authority to determine questions of a disputed election to either chamber of the Parliament cannot be conferred upon this Court or any other court exercising the judicial power of the Commonwealth because such authority is unequivocally legislative in character. Reference was made to developments, concerning disputed elections to the House of Commons, leading to the enactment of the 1868 Act and to the discussion of the subject by Higgins J in *Holmes v Angwin* [29] . However, what emerges is that the passing of the 1868 Act was, to adapt an observation of Mason J in *Berrill v Hughes* [30] , "the product of the controversial and unsatisfactory history of Parliamentary review of disputed elections".

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(29) (1906) 4 CLR 297 at 310.
(30) (1985) 59 ALJR 64 at 66.

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32. It is true that in *Holmes v Angwin* [31] , Barton J said:

> The character of the jurisdiction which has been exercised by Parliaments as to election petitions is purely incidental to the legislative power; it has nothing to do with the ordinary determination of the rights of parties who are litigants.

Griffith CJ was of similar mind [32] . Their Honours were speaking at a time before it was recognised in this Court that, whilst some powers when entrusted to a repository other than a court may be characterised as legislative or administrative and non-judicial, when they are entrusted in an appropriate context to a court they may involve the exercise of judicial power [33] . This functional analysis appears to have been first recognised by Isaacs J in 1926.

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(31) (1906) 4 CLR 297 at 309.
(32) *Holmes v Angwin* (1906) 4 CLR 297 at 305-306
(33) *Re Ranger Uranium Mines Pty Ltd; Ex parte Federated Miscellaneous Workers' Union of Australia* (1987) 163 CLR 656 at 665-666 *Precision Data Holdings Ltd v Wills* (1991) 173 CLR 167 at 189 *Re Dingjan; Ex parte Wagner* (1995) 183 CLR 323 at 360-361 *Grollo v Palmer* (1995) 184 CLR 348 at 388-389

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33. In *Federal Commissioner of Taxation v Munro* [34] , Isaacs J included "the determination of the validity of parliamentary elections" among matters which were subject to no a priori exclusive delimitation but were capable of assignment by Parliament to more than one branch of government. Such a matter, his Honour continued, was "capable of being viewed in different aspects, that is, as incidental to legislation, or to administration, or to judicial action, according to circumstances"; to deny that proposition would be to "seriously affect the recognised working of representative government" [35] .

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(34) (1926) 38 CLR 153 at 178.
(35) *Munro* (1926) 38 CLR 153 at 179

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34. In this respect, it is important to appreciate that, in dealing with the validity of an election or a return on petition presented pursuant to Div 1 of the Act, the Court of Disputed Returns is not applying the amalgam of centuries of practice and piecemeal statutory provision which constituted "the Common Law of Parliament" referred to in the definition of Corrupt Practices in s 3 of the 1868 Act. Rather, as indicated in Section I of these reasons, what is involved in Australia, where the existence of illegal practices and the like are asserted, is contravention of the particular legislative provisions identified in s 352(1) of the Act. That is what was decided by Gaudron J in *Hudson v Lee* [36] . In issue is not the application of "the Common Law of Parliament" but the contravention of norms which owe their existence to laws made by the Parliament itself, in exercise of the power conferred by s 51(xxxvi) of the *Constitution*. Where the contravention is of qualification requirements imposed by s 44 of the *Constitution* itself, the position is even plainer. The lex parliamentarii did not know of such things.

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(36) (1993) 177 CLR 627.

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35. It should be noted that, even with respect to "the Common Law of Parliament", the view that the character of the jurisdiction exercised to try election petitions was purely incidental to legislative power, as stated by Barton J in *Holmes v Angwin* [37] , has not gone without comment in this Court. In delivering the judgment of the Court in *R v Richards; Ex parte Fitzpatrick and Browne* [38] , Dixon CJ noted the tendency to regard the privileges and powers of the House of Commons as something essential or proper for its protection rather than as strictly judicial. His Honour added [39] :

> This is not the occasion to discuss the historical grounds upon which these powers and privileges attached to the House of Commons. It is sufficient to say that they were regarded by many authorities as proper incidents of the legislative function, notwithstanding the fact that considered more theoretically — perhaps one might even say, scientifically — they belong to the judicial sphere.

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(37) (1906) 4 CLR 297 at 309.
(38) (1955) 92 CLR 157. This litigation occurred before the enactment of the *Parliamentary Privileges Act 1987 Cth*. However, s 5 thereof states: "Except to the extent that this Act expressly provides otherwise, the powers, privileges and immunities of each House, and of the members and the

committees of each House, as in force under section 49 of the *Constitution* immediately before the commencement of this Act, continue in force."

(39) *Richards* (1955) 92 CLR 157 at 167

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36. Dixon CJ was speaking in the course of considering the relationship between s 49 and Ch III of the *Constitution*. Had specific provision with respect to disputed elections not been made by s 47 of the *Constitution*, such matters may have fallen within the general provisions of s 49. This states:

> The powers, privileges, and immunities of the Senate and of the House of Representatives, and of the members and the committees of each House, shall be such as are declared by the Parliament, and until declared shall be those of the Commons House of Parliament of the United Kingdom, and of its members and committees, at the establishment of the Commonwealth.

In that event, it may be that, consistently with *R v Richards; Ex parte Fitzpatrick and Browne* [40] , questions as to "the Common Law of Parliament" would have been drawn in by s 49 and would fall outside Ch III. This would have had to have been so, even though a dispute concerning the operation of s 49 would have otherwise been a matter arising under or involving the interpretation of the Constitution within the meaning of s 76(i). But that is not the regime that the Constitution established.

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(40) (1955) 92 CLR 157.

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37. Given the terms of s 47 of the *Constitution*, the provisions in s 46 for the recovery in a court of competent jurisdiction of penalties at the suit of any person suing for them, and the existence since 1902 of comprehensive legislation regulating elections and dealing with disputed returns, no such questions arise. There is nothing in the nature of the resolution of disputed elections which places such controversies necessarily outside the exercise of the judicial power of the Commonwealth.

38. There is a further point to be noted. As indicated in Section I of these reasons, the complaint in each petition is that Mrs Hill, as a citizen of a foreign power, was rendered by s 44(i) of the *Constitution* incapable of being chosen as a Senator. It is upon that footing that the validity of her election is challenged by the petitions under s 353(1) of the Act. In this operation, s 353(1), in conjunction with s 354, constitutes a law conferring original jurisdiction on the High Court in a matter arising under the Constitution or involving its interpretation. The observations of Isaacs J in *Federal Commissioner of Taxation v Munro* [41] , applying a functional analysis to the determination of the validity of parliamentary elections, are directed to the determination of disputes as to legislatively proscribed practices in relation to elections rather than to questions of constitutional disqualification. To decide whether a person was incapable of being chosen as a Senator or Member of the House by reason of that person answering the description in one or more of the paragraphs of s 44 of the *Constitution* may involve the determination of facts. But these facts will be constitutional facts and the determination of constitutional facts is a central concern of the exercise of the judicial power of the Commonwealth. No resort in the present case to "functional analysis" is necessary to uphold the jurisdiction of the Court to determine whether Mrs Hill was not duly elected. If the Court were to exercise its power under s 360(1)(v) to declare that Mrs Hill was not duly elected, the Court thereby would recognise that which the operation of the Constitution itself brought about.

(41) (1926) 38 CLR 153 at 178-179.

39. A more focused attack was made upon the validity of Div 1 by directing attention to particular provisions. These, it was said, indicate that the powers conferred by the Division were to be exercised in a manner inconsistent with the exercise of the judicial power of the Commonwealth. Gaudron J indicates in her reasons for judgment that the provisions fall into three groups: those said to confer general discretions to be exercised without regard to legal standards; those giving directions of a kind not normally given to courts; and those relating to decisions of the Court of Disputed Returns. We agree with her Honour's analysis of these provisions.

40. We would add four points. The first concerns s 354(6). This is a law supported by s 79 of the *Constitution* and states that the jurisdiction conferred by s 354 "may be exercised by a single Justice or Judge". The provision is permissive rather than mandatory. It is consistent with the operation of s 18 of the *Judiciary Act 1903 Cth* whereby, as in the present proceedings and in *Sykes v Cleary [No 2]* [42] , cases have been stated for the Full Court of this Court. The Full Court is, of course, exercising original jurisdiction.

(42) (1992) 176 CLR 77.

41. Secondly, the availability of procedures under s 18 diminishes what otherwise would be the impact of s 368. Section 18 provides:

> All decisions of the Court shall be final and conclusive and without appeal, and shall not be questioned in any way.

As Gaudron J has pointed out, in its application to the appellate jurisdiction of this Court, s 368 is to be supported as a prescription by the Parliament of an exception within the meaning of s 73 of the *Constitution*. However, were it not for the availability of the procedures under s 18 of the *Judiciary Act*, particularly with respect to questions arising under the Constitution or involving its interpretation, a question may have arisen as to the validity of s 368. The joint judgment in *Cockle v Isaksen* [43] indicates that the power to prescribe exceptions does not extend to laws which "eat up or destroy" the general regime specified in s 73 of the *Constitution* as to the appellate jurisdiction of the High Court.

(43) (1957) 99 CLR 155 at 166. See also *Smith Kline & French Laboratories (Aust) Ltd v The Commonwealth* (1991) 173 CLR 194 at 216-217 *Carson v John Fairfax & Sons Ltd* (1991) 173 CLR 203 at 216 *Re McJannet; Ex parte Minister for Employment, Training and Industrial Relations (Q)* (1995) 184 CLR 620 at 651

42. Thirdly, s 364 should be noted. This states:

> The Court shall be guided by the substantial merits and good conscience of each case without regard to legal forms or technicalities, or whether the

evidence before it is in accordance with the law of evidence or not.

Provisions of this type are not inimical to the exercise of the judicial power of the Commonwealth. They do not exonerate the Court from the application of substantive rules of law and are consistent with, and indeed require the application of, the rules of procedural fairness [44] .

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(44) *British Imperial Oil Co Ltd v Federal Commissioner of Taxation* (1925) 35 CLR 422 at 438-441 *Peacock v Newtown Marrickville and General Co-operative Building Society No 4 Ltd* (1943) 67 CLR 25 at 36, 46, 47.

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43. Finally, a reference should be made to s 360(2) of the Act. This provides:

> The Court may exercise all or any of its powers under this section on such grounds as the Court in its discretion thinks just and sufficient.

The powers in question are set out in pars (i)-(x) of s 360(1). Paragraphs (i)-(iv) deal with such matters as adjournments, the compulsory attendance of witnesses and production of documents and the taking of evidence. There is nothing hostile to the exercise of the judicial power of the Commonwealth in providing for the exercise of the discretion involved in such matters in accordance with what the Court thinks just and sufficient. So also with respect to the power to award costs conferred by par (ix) of s 360(1), supplemented by s 360(4).

44. Paragraphs (v)-(viii) of s 360(1) confer powers to dispose of a petition by declaratory and other orders dismissing or upholding the petition in whole or in part. Where there has been a finding that a successful candidate has committed or has attempted to commit bribery or undue influence, s 362(1) requires the Court to declare the election void. Provision is made by s 362(3) which directs the Court as to what should be done where other malpractices have been found. Thus, s 362 operates to limit what otherwise might have been thought to be the width of the discretion under s 360(2) and the words "just and sufficient" therein. Where what is involved is ineligibility by reason of contravention of s 44 of the *Constitution*, justice and sufficiency would, as in this case, at least require a declaration that the person who was returned as elected was not duly elected, within the meaning of s 360(1)(v). The reasons of Gaudron J in the present case illustrate that what further or other relief should be given depends upon the circumstances disclosed by the particular case.

45. In the context in which s 360(2) appears in the Act, it does not confer some uncontrolled discretion exercisable by recourse to other than legal norms. Like that considered by Kitto J in *R v Commonwealth Industrial Court; Ex parte Amalgamated Engineering Union, Australian Section* [45] , the discretion involved is "not so indefinite as to be insusceptible of strictly judicial application" [46] . Indeed, as Mason and Murphy JJ remarked in *R v Joske; Ex parte Shop Distributive and Allied Employees' Association* [47] :

> [T]here are countless instances of judicial discretions with no specification of the criteria by reference to which they are to be exercised — nevertheless they have been accepted as involving the exercise of judicial power. [48]

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(45) (1960) 103 CLR 368.
(46) Commonwealth Industrial Court (1960) 103 CLR 368 at 383.

(47) (1976) 135 CLR 194 at 215-216.
(48) See *Cominos v Cominos* (1972) 127 CLR 588

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46. We turn now to consider the substantive question, respecting the construction and application of s 44(i) of the *Constitution*.

III. Foreign power

47. At the material time, Mrs Hill was regarded as a British citizen by the statute law of the United Kingdom which is identified by Gaudron J in her reasons for judgment. In construing s 44(i) of the *Constitution*, the Court should apply the classification given to Mrs Hill under United Kingdom law [49] . The question then is whether, at the material time, the United Kingdom answered the description of "a foreign power" in s 44(i).

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(49) cf *Sykes v Cleary [No 2]* (1992) 176 CLR 77 at 112-114, 135-136.

A foreign power

48. The expression "a foreign power" in s 44 does not invite attention to the quality of the relationship between Australia and the power to which the person is said to be under an acknowledgment of allegiance, obedience or adherence or of which that person is a subject or a citizen or entitled to the rights and privileges of a subject or citizen. That is, the inquiry is not about whether Australia's relationships with that power are friendly or not, close or distant, or meet any other qualitative description. Rather, the words invite attention to questions of international and domestic sovereignty [50] .

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(50) As to which see Hart, The Concept of Law (1961), p 218, in which the author urges caution in any uncritical use of the idea of sovereignty.

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49. Further, because the question is whether, at the material time, the United Kingdom answered the description of "a foreign power" in s 44(i), it is not useful to ask whether that question could have been easily answered at some earlier time, any more than it is useful to ask whether it is easily answered now. No doubt individuals will be directly affected by the answer that is given and, to that extent, their rights, duties and privileges may be affected. But any difficulty in deciding whether the United Kingdom did answer the description at the material time, or in deciding when it first answered that description, does not relieve this Court of the task of answering the question that now is presented.

Constitutional interpretation

50. In *Bonser v La Macchia* [51] , Windeyer J referred to Australia having become "by international recognition competent to exercise rights that by the law of nations are appurtenant to, or attributes of, sovereignty". His Honour regarded this state of affairs as an instance where "[t]he law has followed the facts" [52] . It will be apparent that

these facts, forming part of the "march of history" [53] , received judicial notice [54] . They include matters and circumstances external to Australia but in the light of which the Constitution continues to have its effect and, to repeat Windeyer J's words [55] , "[t]he words of the Constitution must be read with that in mind".

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(51) (1969) 122 CLR 177 at 224.
(52) *Bonser* (1969) 122 CLR 177 at 223
(53) *Bonser* (1969) 122 CLR 177 at 223
(54) A point made by McLelland J in *McM v C* [1980] 1 NSWLR 27 at 44
(55) *Bonser* (1969) 122 CLR 177 at 223

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51. There is nothing radical in doing as Windeyer J said; it is intrinsic to the Constitution. What has come about is an example of what Story J foresaw (and Griffith CJ repeated [56]) with respect to the *United States Constitution* [57] :

> The instrument was not intended to provide merely for the exigencies of a few years, but was to endure through a long lapse of ages, the events of which were locked up in the inscrutable purposes of Providence.

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(56) *Baxter v Commissioner of Taxation (NSW)* (1907) 4 CLR 1087 at 1105 Inglis Clark wrote to similar effect in Studies in Australian Constitutional Law (1901), pp 19-22.
(57) *Martin v Hunter's Lessee* (1816) 1 Wheat 304 at 326[14 US 141 at 151].

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52. The changes to which Windeyer J referred did not require amendment to the text of the Constitution. Rather, they involved [58] :

> in part, the abolition of limitations on constitutional power that were imposed from outside the Constitution, such as the *Colonial Laws Validity Act 1865 Imp* and restricting what otherwise would have been the proper interpretation of the Constitution, by virtue of Australia's status as part of the Empire. When the Empire ended and national status emerged, the external restrictions ceased, and constitutional powers could be given their full scope.

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(58) Final Report of the Constitutional Commission (1988), vol 1, par 2.130.

Changes in the United Kingdom

53. So also with respect to changes in the constitutional arrangements in the United Kingdom itself. The condition of those arrangements at any one time may be difficult to perceive by reason of the lack of any single instrument answering the description of a written constitution. Nevertheless, it is readily apparent from judicial decisions in the United Kingdom that the constitutional arrangements of that country have changed

since 1900 in at least two respects which are relevant to the issues debated in argument in the present litigation.

54. The first concerns the identity of "the Crown of the United Kingdom of Great Britain and Ireland" which is identified in the preamble to *The Commonwealth of Australia Constitution Act 1898* (the Constitution Act) [59] and "the United Kingdom", the sovereignty of which determines, under covering cl 2 thereof, the identity of the person identified throughout the Constitution itself as "the Queen".

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(59) 63 & 64 Vict, c 12 (Imp).

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55. The United Kingdom of Great Britain and Ireland had come into existence in 1801. In Earl of Antrim's Petition [60] , Lord Reid explained the position as follows:

> Prior to 1707 the Kingdoms of England, Scotland and Ireland were separate kingdoms. In 1707 the Kingdoms of England and Scotland were united to form the Kingdom of Great Britain but Ireland remained a separate Kingdom. In 1801 the Kingdoms of Great Britain and of Ireland were united to form the United Kingdom of Great Britain and Ireland.

His Lordship went on to refer to the *Irish Free State (Agreement) Act 1922 UK* which established the Irish Free State with "Dominion Status" and to the *Ireland Act 1949 UK* which declared the Irish Free State to have ceased to be part of "[h]is Majesty's dominions" [61] . The result was twofold, that "Ireland as a whole no longer exist[ed] politically" [62] and the right of Irish peers to elect representatives from among their number no longer existed.

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(60) [1967] 1 AC 691 at 712.
(61) Earl of Antrim's Petition [1967] 1 AC 691 at 716.
(62) Earl of Antrim's Petition [1967] 1 AC 691 at 716.

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56. The result cannot be that, because the present sovereign has never been Queen of Great Britain and Ireland, the Australian Constitution miscarries for the reason, in Lord Reid's language, that "the state of things on which its existence depended has ceased to exist" [63] . Rather, and consistently with the reasoning of Windeyer J in *Bonser v La Macchia* , at least since 1949 the text of the Constitution, in referring to "the Queen", has to be read so as to follow these changed constitutional circumstances in the United Kingdom. Those circumstances may change again [64] , and with similar consequences.

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(63) Earl of Antrim's Petition [1967] 1 AC 691 at 716.
(64) See as to the status of Northern Ireland, Ex parte Molyneaux [1986] 1 WLR 331.

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57. The second matter is that in 1982 it was settled in the United Kingdom by the decision of the English Court of Appeal in *R v Foreign Secretary; Ex parte Indian Association* [65] as a "truism" that, whilst "there is only one person who is the Sovereign within the British Commonwealth in matters of law and government the Queen of the United Kingdom, for example, is entirely independent and distinct from the Queen of Canada" [66] . In addition to those remarks by May LJ, Kerr LJ observed [67] :

   > It is settled law that, although Her Majesty is the personal sovereign of the peoples inhabiting many of the territories within the Commonwealth, all rights and obligations of the Crown — other than those concerning the Queen in her personal capacity — can only arise in relation to a particular government within those territories. The reason is that such rights and obligations can only be exercised and enforced, if at all, through some governmental emanation or representation of the Crown.

   It is to be noted that these conclusions were expressed in the United Kingdom even before the enactment by its Parliament of the *Canada Act 1982 UK* and the *Australia Act 1986 UK* (the 1986 UK Act).

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(65) [1982] QB 892. A petition to appeal against the decision of the Court of Appeal was refused by the House of Lords on the ground that the principal argument sought to be advanced by the applicant was "simply not arguable": Ex parte Indian Association [1982] QB 892 at 937.
(66) Ex parte Indian Association [1982] QB 892 at 928.
(67) Ex parte Indian Association [1982] QB 892 at 920-921.

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58. The construction of provisions of the Constitution is a matter for Australian courts, in particular this Court. However, the position of the United Kingdom as seen by its courts is a relevant matter to which regard has been had by this Court in construing legislative power with respect to "aliens" in s 51(xix) [68] . So also with respect to the provisions of s 44(i). In effect, the submissions for Mrs Hill seek to have this Court ascribe to the United Kingdom, for the purposes of Australian constitutional law, a character which the United Kingdom courts themselves deny to the United Kingdom for the purposes of its constitutional law.

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(68) *Nolan v Minister for Immigration and Ethnic Affairs* (1988) 165 CLR 178 at 184

United Kingdom institutions and the Constitution

59. It may be accepted that the United Kingdom may not answer the description of "a foreign power" in s 44(i) of the *Constitution* if Australian courts are, as a matter of the fundamental law of this country, immediately bound to recognise and give effect to the exercise of legislative, executive and judicial power by the institutions of government of the United Kingdom. However, whatever once may have been the situation with respect to the Commonwealth and to the States, since at least the commencement of the *Australia Act 1986 Cth* this has not been the case. The provisions of that statute make it largely unnecessary to rehearse what are now the matters of history recounted in the judgments in *New South Wales v The Commonwealth* [69] , *Kirmani v Captain Cook Cruises Pty Ltd [No 1]* [70] and *Nolan v Minister for Immigration and Ethnic Affairs* [71] .

(69) (1975) 135 CLR 337 at 372-374, 469-470, 498.
(70) (1985) 159 CLR 351 at 373-379, 398-419, 420-424, 433-434.
(71) (1988) 165 CLR 178 at 183-186, 191-192.

Legislative power

60. As to the further exercise of legislative power by the Parliament of the United Kingdom, s 1 of the *Australia Act* states:

> No Act of the Parliament of the United Kingdom passed after the commencement of this Act shall extend, or be deemed to extend, to the Commonwealth, to a State or to a Territory as part of the law of the Commonwealth, of the State or of the Territory.

61. The recital to the *Australia Act* indicates that it was enacted in pursuance of s 51(xxxviii) of the *Constitution*, the Parliaments of all the States having requested the Parliament of the Commonwealth to enact the statute. Section 51(xxxviii) empowers the Parliament, subject to the Constitution, to make laws for the peace, order and good government of the Commonwealth with respect to:

> [t]he exercise within the Commonwealth, at the request or with the concurrence of the Parliaments of all the States directly concerned, of any power which can at the establishment of this Constitution be exercised only by the Parliament of the United Kingdom or by the Federal Council of Australasia.

The *Australia Act* was enacted before s 51(xxxviii) had been construed in *Port MacDonnell Professional Fishermen's Assn Inc v South Australia* [72] . Apparently out of a perceived need for abundant caution, legislation of the Westminster Parliament was sought and passed as the 1986 UK Act [73] .

(72) (1989) 168 CLR 340.
(73) See Zines, Constitutional Change and the Commonwealth (1989), pp 20-21.

62. The effect of s 51(xxxviii) is to empower the Parliament "to make laws with respect to the local exercise of any legislative power which, before federation, could not be exercised by the legislatures of the former Australian colonies" [74] . It represents an actual enhancement of the legislative powers of the States because "it confers, by implication, power upon the Parliament of a State to participate in the legislative process which the paragraph requires, namely request (or concurrence) by a State Parliament and enactment by the Commonwealth Parliament" [75] . There is a potential enhancement of State legislative powers because the Parliaments of the States are the potential recipients of legislative power under a law made pursuant to the paragraph [76] . Any room for an inhibition against giving to the grant in s 51(xxxviii) its full scope and effect by reason of what was once the status of the Commonwealth itself within the British Empire no longer applies [77] .

(74) *Port MacDonnell Professional Fishermen's Assn Inc v South Australia* (1989) 168 CLR 340 at 378
(75) *Port MacDonnell Professional Fishermen's Assn Inc v South Australia* (1989) 168 CLR 340 at 379
(76) *Port MacDonnell Professional Fishermen's Assn Inc v South Australia* (1989) 168 CLR 340 at 379
(77) *Port MacDonnell Professional Fishermen's Assn Inc v South Australia* (1989) 168 CLR 340 at 378

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63. Section 1 of the *Australia Act* does not purport to exclude, as a matter of the law of the United Kingdom, the effect of statutes thereafter enacted at Westminster. Rather, it denies their efficacy as part of the law of the Commonwealth, the States and the Territories. Section 51(xxxviii) extends to the actual execution within this country of a power of the sort described in that paragraph. The scope of the phrase "within the Commonwealth" in s 51(xxxviii) includes the exercise of legislative power with effect upon the political structures with authority over the geographical area of the Commonwealth, the States and the Territories and the areas provided for in the *Seas and Submerged Lands Act 1973 Cth* [78] . It follows that s 1 of the *Australia Act* was validly enacted under that paragraph.

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(78) See *New South Wales v The Commonwealth* (1975) 135 CLR 337cf *Oteri v The Queen* [1976] 1 WLR 1272 at 1275-1276

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64. The expression in s 1 of the 1986 UK Act "[n]o Act of the Parliament of the United Kingdom passed shall extend, or be deemed to extend" was used in s 4 of the *Statute of Westminster 1931 UK* [79] . Provisions such as s 1 may present doctrinal questions for the constitutional law of the United Kingdom, in particular for the dogma associated with Dicey's views as to the sovereignty of the Parliament at Westminster. Professor Sir William Wade pointed out more than forty years ago [80] that Dicey never explained how he reconciled his assertions that Westminster could destroy or transfer sovereignty [81] and the proposition that it could not bind future Parliaments. The effect in the United Kingdom of any amendment or repeal by the United Kingdom Parliament of s 1 would be for those adjudicating upon the constitutional law of that country. But whatever effect the courts of the United Kingdom may give to an amendment or repeal of the 1986 UK Act, Australian courts would be obliged to give their obedience to s 1 of the statute passed by the Parliament of the Commonwealth.

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(79) This stated: "No Act of Parliament of the United Kingdom passed after the commencement of this Act shall extend, or be deemed to extend, to a Dominion as part of the law of that Dominion, unless it is expressly declared in that Act that that Dominion has requested, and consented to, the enactment thereof."
(80) Wade, "The Basis of Legal Sovereignty" [1955] Cambridge Law Journal 172, at p 196.
(81) A matter noted by Harrison Moore, The Constitution of the Commonwealth of Australia, 2nd ed (1910), pp 603-604.

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65. It follows that, at least since 1986 with respect to the exercise of legislative power, the United Kingdom is to be classified as a foreign power.

Judicial power

66. The *Australia Act* also provided, in s 11, for the termination of appeals from or in respect of any decision of an Australian court brought to the Privy Council, whether by virtue of any Act of the Parliament of the United Kingdom, the Royal Prerogative or otherwise. When this legislation is taken with the *Privy Council (Limitation of Appeals) Act 1968 Cth* and the *Privy Council (Appeals from the High Court) Act 1975 Cth*, the result is to leave only that avenue for appeal to the Privy Council which is identified in s 74 of the *Constitution*. With a certificate from this Court, s 74 permits appeals from a decision of this Court upon any question as to the limits inter se of the constitutional powers of the Commonwealth and those of any State or States or as to the limits inter se of the constitutional powers of any two or more States. The last in a series of unsuccessful applications for certificates appears to have been made in 1985 [82] . In refusing the certificate sought in *Kirmani v Captain Cook Cruises Pty Ltd [No 2]* [83] , the Court said in its joint judgment:

> Although the jurisdiction to grant a certificate stands in the Constitution, such limited purpose as it had has long since been spent. The march of events and the legislative changes that have been effected — to say nothing of national sentiment — have made the jurisdiction obsolete.

In any event, before that date, it had become settled doctrine that the Privy Council was part of the judicial system of the country whence appeals came and that it was not an institution of the United Kingdom [84] . It follows that no institutions of government of the United Kingdom exercise any judicial powers with respect to this country.

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(82) *Kirmani v Captain Cook Cruises Pty Ltd [No 2]* (1985) 159 CLR 461
(83) (1985) 159 CLR 461 at 465.
(84) *Ibralebbe v The Queen* [1964] AC 900 at 921-922 *Southern Centre of Theosophy Inc v South Australia* (1979) 145 CLR 246 at 258-259

The Crown and the executive power

67. The submissions for Mrs Hill concentrated upon the consequences of the incorporation in the Constitution of principles both of constitutional monarchy and of federalism, a system of government first devised in the United States. In particular, attention was drawn to the vesting of the executive power of the Commonwealth by s 61 in the Queen and the inclusion of the Queen, with the Senate and the House of Representatives, as constituting the Parliament of the Commonwealth in which the legislative power of the Commonwealth is vested by s 1. Reference also was made to covering cl 2 of the *Constitution*. This, as indicated above, identifies the provisions of the Constitution Act, including the Constitution set out in covering cl 9 thereof, which refer to the Queen, as extending "to Her Majesty's heirs and successors in the sovereignty of the United Kingdom".

68. The expression "the Queen" also is used in covering cl 5 and in the Constitution in ss 2-4, 44, 58-60, 64, 66, 68, 74, 117, 122, 126 and 128, together with the Schedule. Section 42 of the *Constitution* obliges every Senator and every Member of the House before taking his or her seat to make and subscribe an oath or affirmation of allegiance in the form set out in that Schedule. The Schedule requires an oath or affirmation that the Senator or Member will be faithful and bear true allegiance to the person identified in the Schedule by " *[t]he name of the King or Queen of the United Kingdom of Great Britain and Ireland for the time being* ".

69. Given these provisions, it is submitted that the United Kingdom cannot answer the description of "a foreign power" in s 44(i) so as to render a citizen of the United Kingdom incapable of being chosen as a Senator or Member of the House.

70. The sovereign, being a constitutional monarch, acts, as the term indicates, in accordance with the limitations developed over time as part of what is identified as the British Constitution. In Australia, this involves, save in limited matters of personal choice [85] and in the exceptional circumstances associated with the contentious question of "reserved powers" (a subject which it is not necessary here to discuss), the sovereign acting upon the advice of Ministers, in particular the Prime Minister or Premier.

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(85) Markesinis, "The Royal Prerogative Re-visited" [1973] Cambridge Law Journal 287, at pp 289-292.

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71. Advice in relation to the exercise of all the regal powers and functions "in respect of a State shall be tendered by the Premier of the State". Section 7(5) of the *Australia Act* so provides. The effect of s 10 thereof is that, since 1986, Her Majesty's Government in the United Kingdom has had no responsibility for the government of any State.

72. That was not always so. Attempts in the 1890s to include, in what became the Constitution, a requirement that all references and communications between a State Governor and the Queen, or from the Queen to a State Governor, be through the Governor-General failed [86] . Until 1986, the monarch took advice from the United Kingdom Government on such matters as the appointment of State Governors or the making of orders or proclamations under Imperial legislation relating to the States [87] . Further, s 1 of the *Australian States Constitution Act 1907 Imp* (the States Constitution Act) required a reservation, for the signification of the sovereign's pleasure thereon, that is to say on advice of British Ministers, of certain Bills passed by the legislature of any State, and without prejudice to the reservation of Bills in accordance with instructions given to the Governor of the State. This statute may well have been impliedly repealed by ss 8 and 9 of the 1986 UK Act [88] , as well as by the general provision in s 10 that the United Kingdom Government was to have no further responsibility for the government of any State. In any event, the States Constitution Act, in so far as it remained effective as a law of the United Kingdom, was repealed by the *Statute Law (Repeals) Act 1989 UK* (s 1(1), Sch 1, Pt VI).

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(86) Harrison Moore, The Constitution of the Commonwealth of Australia (1902), pp 287-288.
(87) Zines, Constitutional Change and the Commonwealth (1989), p 10.
(88) Sections 8 and 9 stated: "8 An Act of the Parliament of a State that has been assented to by the Governor of the State shall not, after the commencement of this Act, be subject to disallowance by Her Majesty, nor shall its operation be suspended pending the signification of Her Majesty's pleasure thereon. 9(1) No law or instrument shall be of any force or effect in so far as it purports to require the Governor of a State to withhold assent from any Bill for an Act of the State that has been passed in such manner and form as may from time to time be required by a law made by the Parliament of the State. (2) No law or instrument shall be of any force or effect in so far as it purports to require the reservation of any Bill for an Act of a State for the signification of Her Majesty's pleasure thereon."

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73. The constitution of each State, as it stood at the establishment of the Commonwealth, continues until altered in accordance with that constitution. The Constitution so provides in s 106. This state of affairs is, in the terms of s 106 itself, "subject to this

Constitution", and thus to the exercise of power under s 51(xxxviii) to enact the provisions of the *Australia Act* to which we have referred [89] .

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(89) No question arises with respect to the manner and form, or entrenchment, provision in s 15 of the *Australia Act*: see Zines, The High Court and the Constitution, 4th ed (1997), p 312.

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74. We turn now to the position of the Crown in relation to the government of the Commonwealth. Section 2 of the *Constitution* states:

> A Governor-General appointed by the Queen shall be Her Majesty's representative in the Commonwealth, and shall have and may exercise in the Commonwealth during the Queen's pleasure, *but subject to this Constitution*, such powers and functions of the Queen as Her Majesty may be pleased to assign to him. (Emphasis added.)

It has been accepted, at least since the time of the appointment of Sir Isaac Isaacs in 1931, that in making the appointment of a Governor-General the monarch acts on the advice of the Australian Prime Minister [90] . The same is true of the exercise of the power vested by s 4 of the *Constitution* in the monarch to appoint a person to administer the government of the Commonwealth and the power given to the monarch by s 126 to authorise the Governor-General to appoint deputies within any part of the Commonwealth.

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(90) Cunneen, King's Men — Australia's Governors-General from Hopetoun to Isaacs (1983), pp 173-182.

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75. Section 58 makes provision for the Governor-General to reserve a "proposed law passed by both Houses of the Parliament" for the Queen's pleasure, in which event the law shall not have any force unless and until, in the manner prescribed by s 60, the Governor-General makes known the receipt of the Queen's assent. Further, s 59 provides for disallowance by the Queen of any law within one year of the Governor-General's assent. The text of the Constitution is silent as to the identity of the Ministers upon whose advice the monarch is to act in these respects.

76. As indicated when dealing earlier in these reasons with the former position of the States, provisions in colonial constitutional arrangements for reservation and disallowance had been designed to ensure surveillance of colonial legislatures by the Imperial Government. The convention in 1900 was that the monarch, in relation to such matters, would act on the advice of a British Minister. That advice frequently was given after consultation between the Colonial Office and the Ministry in the colony in question [91] . With respect to the Commonwealth, the whole convention, like that respecting the appointment of Governors-General, changed after the Imperial Conference of 1926 [92] .

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(91) Inglis Clark, Studies in Australian Constitutional Law (1901), p 323.
(92) Final Report of the Constitutional Commission, (1988) vol 1, pars 2.122-2.123.

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77. As early as 1929, it was stated in the Report of the Royal Commission on the Constitution [93] with reference to the provisions of ss 58 and 59 of the *Constitution* that "in virtue of the equality of status which, from a constitutional as distinct from a legal point of view, now exists between Great Britain and the self-governing Dominions as members of the British Commonwealth of Nations, and on the principles which are set out in the Report submitted by the Inter-Imperial Relations Committee to the Imperial Conference in 1926", for "British Ministers to tender advice to the Crown against the views of Australian Ministers in any matter appertaining to the affairs of the Commonwealth" would "not be in accordance with constitutional practice".

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(93) p 70.

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78. Whilst the text of the Constitution has not changed, its operation has. This reflects the changed identity of those upon whose advice the sovereign accepts that he or she is bound to act in Australian matters by reason, among other things, of the attitude taken since 1926 by the sovereign's advisers in the United Kingdom. The Constitution speaks to the present and its interpretation takes account of and moves with these developments. Hence the statement by Gibbs J in *Southern Centre of Theosophy Inc v South Australia* [94] , with reference to the *Royal Style and Titles Act 1973 Cth*, that:

> [i]t is right to say that this alteration in Her Majesty's style and titles was a formal recognition of the changes that had occurred in the constitutional relations between the United Kingdom and Australia.

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(94) (1979) 145 CLR 246 at 261.

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79. It remains to consider the provision in s 122 of the *Constitution* whereby the Parliament may make laws, among other things, "for the government of any territory placed by the Queen under the authority of and accepted by the Commonwealth". The requirement of acceptance by the Commonwealth and, earlier in s 122, the reference to the surrender of territory by a State and the acceptance thereof by the Commonwealth serve to confirm the placement "by the Queen" of a territory under the authority of the Commonwealth as being a dispositive act by the Crown acting on other than Australian advice.

80. For example, what had been the Crown Colony of British New Guinea was by Imperial instruments placed under the authority of the Commonwealth after the Senate and the House had passed resolutions authorising the acceptance of British New Guinea as a territory of the Commonwealth [95] . The procedures adopted for the acquisition of Christmas Island and the Cocos (Keeling) Islands reflected the *Statute of Westminster Adoption Act 1942 Cth*. They involved, as a first step, the passage of the *Christmas Island (Request and Consent) Act 1957 Cth* and the *Cocos (Keeling) Islands (Request and Consent) Act 1954 Cth*. The Parliament of the Commonwealth thereby requested and consented to an enactment by the Parliament of the United Kingdom enabling the Queen to place the respective islands under the authority of the Commonwealth. There followed the passage of the *Cocos Islands Act 1955 UK* and the *Christmas Island Act 1958 UK* [96] .

(95) *Strachan v The Commonwealth* (1906) 4 CLR 455 at 461-463, 464-465. See also the recitals to the *Papua Act 1905 Cth*.
(96) See the recitals to the *Christmas Island Act 1958 Cth* and the *Cocos (Keeling) Islands Act 1955 Cth*.

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81. The point is that the reference to "the Queen" in s 122 to distinguish the sovereign from "the Commonwealth" indicates within the structure of the Constitution itself a recognition of the involvement of the Crown in distinct bodies politic.

82. Nevertheless, it is submitted for Mrs Hill that the reference in the preamble to the Constitution Act to unification "in one indissoluble Federal Commonwealth under the Crown of the United Kingdom of Great Britain and Ireland, and under the Constitution hereby established" and the identification in covering cl 2 to the heirs and successors of Queen Victoria in the sovereignty of the United Kingdom have a special and immutable significance for the construction of s 44(i) of the *Constitution*. This is said to be so notwithstanding, as we have indicated, that in the regal capacities for which provision is made by the constitutions of the Commonwealth and the States, the sovereign acts on Australian ministerial advice.

The meaning of "the Crown" in constitutional theory

83. Accordingly, it is necessary to say a little as to the senses in which the expression "the Crown" is used in constitutional theory derived from the United Kingdom. In its oldest and most specific meaning, "the Crown" is part of the regalia which is "necessary to support the splendour and dignity of the Sovereign for the time being", is not devisable and descends from one sovereign to the next [97] . The writings of constitutional lawyers at the time show that it was well understood in 1900, at the time of the adoption of the Constitution, that the term "the Crown" was used in several metaphorical senses. "We all know", Lord Penzance had said in 1876, "that the Crown is an abstraction" [98] , and Maitland, Harrison Moore, Inglis Clark and Pitt Cobbett, amongst many distinguished constitutional lawyers, took up the point.

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(97) Chitty, Prerogatives of the Crown (1820), Ch XI, Section III.
(98) *Dixon v London Small Arms Co* (1876) 1 AppCas 632 at 652.

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84. The first use of the expression "the Crown" was to identify the body politic. Writing in 1903, Professor Pitt Cobbett [99] identified this as involving a "defective conception" which was "the outcome of an attempt on the part of English law to dispense with the recognition of the State as a juristic person, and to make the Crown do service in its stead". The Constitution, in identifying the new body politic which it established, did not use the term "the Crown" in this way. After considering earlier usages of the term in England and in the former American colonies, Maitland rejoiced in the return of the term "the Commonwealth" to the statute book. He wrote in 1901 [100] :

> There is no cause for despair when "the people of New South Wales, Victoria, South Australia, Queensland and Tasmania, humbly relying on the blessing of Almighty God, have agreed to unite in one indissoluble Federal Commonwealth under the Crown of the United Kingdom of Great Britain and Ireland". We may miss the old words that were used of Connecticut and Rhode Island: "one body corporate and politic in fact and name"; but "united in a Federal Commonwealth under the name of the Commonwealth of Australia"

seems amply to fill their place. And a body politic may be a member of another body politic.

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(99) " "The Crown" as Representing "the State" ", Commonwealth Law Review, vol 1 (1903) 23, at p 30. See also Hogg, Liability of the Crown, 2nd ed (1989), pp 9-13; Law Reform Commission of Canada, The Legal Status of the Federal Administration, Working Paper 40 (1985), pp 24-28.
(100) "The Crown as Corporation", Law Quarterly Review, vol 17 (1901) 131, at p 144 (footnote omitted).

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85. The second usage of "the Crown" is related to the first and identifies that office, the holder of which for the time being is the incarnation of the international personality of a body politic, by whom and to whom diplomatic representatives are accredited and by whom and with whom treaties are concluded. The Commonwealth of Australia, as such, had assumed international personality at some date well before the enactment of the *Australia Act*. Differing views have been expressed as to the identification of that date [101] but nothing turns upon the question for present purposes. Since 1987, the Executive branch of the Australian Government has applied s 61 of the *Constitution* (which extends to the maintenance of the Constitution) consistently with the views of Inglis Clark expressed over eighty years before [102] and the Governor-General has exercised the prerogative powers of the Queen in regard to the appointment and acceptance, or recall, of diplomatic representatives and the execution of all instruments relating thereto [103] .

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(101) *Victoria v The Commonwealth (Industrial Relations Act Case)* (1996) 187 CLR 416 at 477-478
(102) Inglis Clark, Studies in Australian Constitutional Law (1901), pp 65-66.
(103) Instrument dated 1 December 1987, Commonwealth of Australia Gazette, S270, 9 September 1988; see Starke, "Another residual constitutional link with the United Kingdom terminated; diplomatic letters of credence now signed by Governor-General", Australian Law Journal, vol 63 (1989) 149.

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86. In *State Authorities Superannuation Board v Commissioner of State Taxation (WA)* [104] , McHugh and Gummow JJ said:

> Questions of foreign state immunity and of whether an Australian law, upon its true construction, purports to bind a foreign state now should be approached no differently as regards those foreign states which share the same head of state than it is for those foreign states which do not [105] . This is consistent with the reasoning and outcome in *Nolan v Minister for Immigration and Ethnic Affairs* [106] .

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(104) (1996) 189 CLR 253 at 289.
(105) See, generally, *Foreign States Immunities Act 1985 Cth*, ss 9-22.
(106) (1988) 165 CLR 178 at 183-186.

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87. Thirdly, the term "the Crown" identifies what Lord Penzance in *Dixon* called "the Government" [107] , being the executive as distinct from the legislative branch of

government, represented by the Ministry and the administrative bureaucracy which attends to its business. As has been indicated, under the Constitution the executive functions bestowed upon "the Queen" are exercised upon Australian advice.

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(107) *Dixon* (1876) 1 AppCas 632 at 651.

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88. The fourth use of the term "the Crown" arose during the course of colonial development in the nineteenth century. It identified the paramount powers of the United Kingdom, the parent state, in relation to its dependencies. At the time of the establishment of the Commonwealth, the matter was explained as follows by Professor Pitt Cobbett in a passage which, given the arguments presented in the present matters, merits full repetition [108] :

> In England the prerogative powers of the Crown were at one time personal powers of the Sovereign; and it was only by slow degrees that they were converted to the use of the real executive body, and so brought under control of Parliament. In Australia, however, these powers were never personal powers of the King; they were even imported at a time when they had already to a great extent passed out of the hands of the King; and yet they loom here larger than in the country of their origin. The explanation would seem to be that, in the scheme of colonial government, the powers of the Crown and the Prerogative really represent, — not any personal powers on the part of the Sovereign, — but those paramount powers which would naturally belong to a parent State in relation to the government of its dependencies; although owing to the failure of the common law to recognise the personality of the British "State" these powers had to be asserted in the name and through the medium of the Crown. This, too, may serve to explain the distinction, subsequently referred to, between the "general" prerogative of the Crown, which is still wielded by Ministers who represent the British State, and who are responsible to the British Parliament, — and what we may call the "colonial" prerogative of the Crown, which, although consisting originally of powers reserved to the parent State, has with the evolution of responsible government, been gradually converted to the use of the local executive, and so brought under the control of the local Legislature, except on some few points where the Governor [109] is still required to act not as a local constitutional Sovereign but as an imperial officer and subject to an immediate responsibility to his imperial masters [110] .

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(108) "The Crown as Representing the State", Commonwealth Law Review, vol 1 (1904) 145, at pp 146-147.
(109) Who, legally [represented] the King, but really [represented] the British "State".
(110) As with regard to the reservation of Bills and the exercise of the power of pardon in matters affecting imperial interests.

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89. What Isaacs J called the "Home Government" ceased before 1850 to contribute to the expenses of the colonial government of New South Wales [111] . On the grant of responsible government, certain prerogatives of the Crown in the colony, even those of a proprietary nature, became vested "in the Crown in right of the colony", as Jacobs J put it in *New South Wales v The Commonwealth* [112] . Debts might be payable to the

exchequer of one government but not to that of another and questions of disputed priority could arise [113] . Harrison Moore, writing in 1904, observed [114] :

> So far as concerns the public debts of the several parts of the King's dominions, they are incurred in a manner which indicates the revenues out of which alone they are payable, generally the Consolidated Revenue of the borrowing government; and the several Colonial Statutes dealing with suits against the government generally limit the jurisdiction of the Court to "claims against the Colonial Government," or to such claims as are payable out of the revenue of the colony concerned

Section 105 of the *Constitution* provided for the Parliament to take over from the States their public debts "as existing at the establishment of the Commonwealth" [115] .

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(111) *Williams v Attorney-General (NSW)* (1913) 16 CLR 404 at 448
(112) (1975) 135 CLR 337 at 494.
(113) *Federal Commissioner of Taxation v Official Liquidator of E O Farley Ltd* (1940) 63 CLR 278 at 302-303
(114) "The Crown as Corporation", Law Quarterly Review, vol 20 (1904) 351, at p 357.
(115) Words of limitation omitted in 1910, after a successful referendum: *Constitution Alteration (State Debts) Act 1909 Cth*.

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90. The expression "the Crown in right of " the government in question was used to identify these newly created and evolving political units [116] . With the formation of federations in Canada and Australia it became more difficult to continue to press "the Crown" into service to describe complex political structures. Harrison Moore identified "the doctrine of unity and indivisibility of the Crown" as something "not persisted in to the extent of ignoring that the several parts of the Empire are distinct entities" [117] . He pointed to the "inconvenience and mischief" which would follow from rigid adherence to any such doctrine where there were federal structures and continued [118] :

> The Constitutions themselves speak plainly enough on the subject. Both the *British North America Act* and the *Commonwealth of Australia Constitution Act* recognise that "Canada" and the "Provinces" in the first case, the "Commonwealth" and the "States" in the second, are capable of the ownership of property, of enjoying rights and incurring obligations, of suing and being sued; and this not merely as between the government and private persons, but by each government as distinguished from and as against the other — this in fact is the phase of their personality with which the Constitutions are principally concerned. Parliament has unquestionably treated these entities as distinct persons, and it is only by going behind the Constitution that any confusion of personalities arises.

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(116) Evatt, The Royal Prerogative (1987), p 63.
(117) "The Crown as Corporation", Law Quarterly Review, vol 20 (1904) 351, at p 358. See also Harrison Moore, "Law and Government", Commonwealth Law Review, vol 3 (1906) 205, at p 207.
(118) "The Crown as Corporation", Law Quarterly Review, vol 20 (1904) 351, at p 359.

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91. It may be thought that in this passage lies the seed of the doctrine later propounded by Dixon J in *Bank of New South Wales v The Commonwealth* [119] , and applied in

authorities including *Crouch v Commissioner for Railways (Q)* [120] and *Deputy Commissioner of Taxation v State Bank (NSW)* [121] , that the Constitution treats the Commonwealth and the States as organisations or institutions of government possessing distinct individuality. Whilst formally they may not be juristic persons, they are conceived as politically organised bodies having mutual legal relations and are amenable to the jurisdiction of courts exercising federal jurisdiction. The employment of the term "the Crown" to describe the relationships inter se between the United Kingdom, the Commonwealth and the States was described by Latham CJ in 1944 [122] as involving "verbally impressive mysticism". It is of no assistance in determining today whether, for the purposes of the present litigation, the United Kingdom is a "foreign power" within the meaning of s 44(i) of the *Constitution*.

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(119) (1948) 76 CLR 1 at 363.
(120) (1985) 159 CLR 22 at 28-29, 39.
(121) (1992) 174 CLR 219 at 230-231.
(122) *Minister for Works (WA) v Gulson* (1944) 69 CLR 338 at 350-351

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92. Nearly a century ago, Harrison Moore said that it was likely that Australian draftsmen would be likely to avoid use of the term "Crown" and use instead the terms "Commonwealth" and "State" [123] . Such optimism has proved misplaced. That difficulties can arise from continued use of the term "the Crown" in State legislation is illustrated by *The Commonwealth v Western Australia* [124] . However, no such difficulties need arise in the construction of the Constitution.

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(123) "The Crown as Corporation", Law Quarterly Review, vol 20 (1904) 351, at p 362.
(124) (1999) 196 CLR 392 at 410-411, 421, 429-436, 467-471.

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93. The phrases "under the Crown" in the preamble to the Constitution Act and "heirs and successors in the sovereignty of the United Kingdom" in covering cl 2 involve the use of the expression "the Crown" and cognate terms in what is the fifth sense. This identifies the term "the Queen" used in the provisions of the Constitution itself, to which we have referred, as the person occupying the hereditary office of Sovereign of the United Kingdom under rules of succession established in the United Kingdom. The law of the United Kingdom in that respect might be changed by statute. But without Australian legislation, the effect of s 1 of the *Australia Act* would be to deny the extension of the United Kingdom law to the Commonwealth, the States and the Territories.

94. There is no precise analogy between this state of affairs and the earlier development of the law respecting the monarchy in England, Scotland and Great Britain. It has been suggested [125] :

> The Queen as monarch of the United Kingdom, Canada, Australia and New Zealand is in a position resembling that of the King of Scotland and of England between 1603 and 1707 when two independent countries had a common sovereign.

But it was established that a person born in Scotland after the accession of King James I to the English throne in 1603 was not an alien and thus was not disqualified from holding lands in England. That was the outcome of Calvin's Case [126] . Nor does the

relationship between Britain and Hanover between 1714 and 1837 present a precise analogy, if only because there was lacking the link of a common law of succession [127] .

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(125) Zines, The High Court and the Constitution, 4th ed (1997), p 314.
(126) (1606) 7 Co Rep 1a [77 ER 377]. Coke's report of the litigation was "a massive achievement of ponderous learning": Tanner, English Constitutional Conflicts in the Seventeenth Century 1603-1689 (1957), p 269.
(127) *Nolan v Minister for Immigration and Ethnic Affairs* (1988) 165 CLR 178 at 192-193 *In re Stepney Election Petition; Isaacson v Durant* (1886) 17 QBD 54 at 59-60

IV. Conclusions

95. Almost a century has passed since the enactment of the Constitution Act in the last year of the reign of Queen Victoria. In 1922, the Lord Chancellor [128] observed that doctrines respecting the Crown often represented the results of a constitutional struggle in past centuries, rather than statements of a legal doctrine. The state of affairs identified in Section III of these reasons is to the contrary. It is, as Gibbs J put it [129] , "the result of an orderly development — not the result of a revolution". Further, the development culminating in the enactment of the *Australia Act* (the operation of which commenced on 3 March 1986) [130] has followed paths understood by constitutional scholars writing at the time of the establishment of the Commonwealth.

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(128) Viscount Birkenhead LC in Viscountess Rhondda's Claim [1922] 2 AC 339 at 353.
(129) *Southern Centre of Theosophy Inc v South Australia* (1979) 145 CLR 246 at 261
(130) Commonwealth of Australia Gazette, S85, 2 March 1986, p 1.

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96. The point of immediate significance is that the circumstance that the same monarch exercises regal functions under the constitutional arrangements in the United Kingdom and Australia does not deny the proposition that the United Kingdom is a foreign power within the meaning of s 44(i) of the *Constitution*. Australia and the United Kingdom have their own laws as to nationality [131] so that their citizens owe different allegiances. The United Kingdom has a distinct legal personality and its exercises of sovereignty, for example in entering military alliances, participating in armed conflicts and acceding to treaties such as the Treaty of Rome [132] , themselves have no legal consequences for this country. Nor, as we have sought to demonstrate in Section III, does the United Kingdom exercise any function with respect to the governmental structures of the Commonwealth or the States.

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(131) *Nolan v Minister for Immigration and Ethnic Affairs* (1988) 165 CLR 178
(132) See *European Communities Act 1972 UK*, *European Communities (Amendment) Act 1986 UK*, *European Communities (Amendment) Act 1993 UK* and *R v Secretary of State for Transport; Ex parte Factortame Ltd* [1990] 2 AC 85 *R v Secretary of State for Foreign and Commonwealth Affairs; Ex parte Rees-Mogg* [1994] QB 552 *R v Employment Secretary; Ex parte Equal Opportunities Commission* [1995] 1 AC 1

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97. As indicated earlier in these reasons, we would give an affirmative answer to the question in each stated case which asks whether Mrs Hill, at the date of her nomination, was a subject or citizen of a foreign power within the meaning of s 44(i) of the *Constitution*.

GAUDRON J.

98. In each of these matters a case has been stated for the consideration of the Full Court pursuant to s 18 of the *Judiciary Act 1903 Cth* [133] . Each matter arises out of the 1998 election for the return of six Senators for the State of Queensland to serve in the Parliament of the Commonwealth. The writ for the election was issued on 31 August 1998. Pursuant to the writ, nominations were made on or before 10 September and the election was held on 3 October 1998. Following the counting of votes, the Governor of Queensland certified, on 26 October 1998, that Mrs Heather Hill, the first respondent in each matter, was duly elected as the third Senator. Messrs Ludwig, Mason and Woodley were certified as duly elected as the fourth, fifth and sixth Senators respectively.

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(133) In the first matter the case was stated by Gleeson CJ, in the second by Callinan J.

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99. The cases have been stated in separate proceedings commenced by the petitioners, Mr Sue and Mr Sharples. They invoke the jurisdiction purportedly conferred on this Court by s 354 of the *Commonwealth Electoral Act 1918 Cth* (the Act). I say "purportedly conferred" because question (a) in each of the cases stated asks:

> Does s 354 of the Act validly confer upon the Court of Disputed Returns jurisdiction to determine the issues raised in the Petition?

Necessarily, that question must be answered first. Before turning to that question, however, it is convenient to refer to the nature of the challenge made by the petitioners and the facts by reference to which each challenge is made.

Nature of the challenge

100. Each petitioner challenges Mrs Hill's election on the basis that, at the time of her nomination, she did not satisfy the requirements of s 44(i) of the *Constitution*. Section 44 relevantly provides:

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

Facts relevant to the challenge

101. It appears from each of the cases stated that Mrs Hill was born in the United Kingdom of Great Britain and Northern Ireland (the United Kingdom) on 9 August 1960. By virtue of her birth she was a citizen of the United Kingdom and Colonies [134] . Presumably,

she became a British citizen on the commencement of the *British Nationality Act 1981 UK* [135] . She migrated to Australia with her parents in 1971 and, except for four trips abroad, has lived and worked here ever since. She married an Australian citizen in 1981 and has two children from the marriage. Both children were born and reside in Australia [136] .

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(134) In 1960, s 4 of the *British Nationality Act 1948 UK* provided, subject to exceptions which are not presently relevant, that: " every person born within the United Kingdom and Colonies after the commencement of this Act shall be a citizen of the United Kingdom and Colonies by birth."

(135) Section 11(1) provides: "Subject to subsection (2), a person who immediately before commencement — (a) was a citizen of the United Kingdom and Colonies; and (b) had the right of abode in the United Kingdom under the Immigration Act 1971 as then in force, shall at commencement become a British citizen." By s 2(1)(a) of the *Immigration Act 1971 UK* a citizen of the United Kingdom and Colonies whose birth was registered in the United Kingdom has the right of abode in the United Kingdom.

(136) Presumably, both are Australian citizens by force of s 10(2) of the *Australian Citizenship Act 1948 Cth*. Subject to exceptions which do not appear to be material, that section provides that: " a person born in Australia after the commencement of the *Australian Citizenship Amendment Act 1986* shall be an Australian citizen by virtue of that birth if and only if: (a) a parent of the person was, at the time of the person's birth, an Australian citizen or a permanent resident."

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102. Except for a return journey from New Zealand in February 1998, on the occasions that Mrs Hill travelled abroad she used a British passport. In January 1998, she applied for and was granted Australian citizenship. Mrs Hill then applied for an Australian passport. Before it was issued, however, she travelled to New Zealand. An Australian passport was issued while she was there and she used that passport for her return journey.

103. At the time Mrs Hill was granted Australian citizenship, the *Australian Citizenship Act 1948 Cth* contained no requirement for the renunciation of foreign citizenship [137] . Nor, apparently, was there any practice whereby citizenship was renounced [138] , the recipient of Australian citizenship being required only to pledge his or her "loyalty to Australia and its people, whose democratic beliefs I share, whose rights and liberties I respect, and whose laws I will uphold and obey".

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(137) Compare the position of Mr Kardamitsis, considered in *Sykes v Cleary [No 2]* (1992) 176 CLR 77 at 128, per Deane J; at 133, per Gaudron J. On becoming an Australian citizen in 1975, he was required by the *Australian Citizenship Act* as it then stood to formally renounce all other allegiance.

(138) Compare the position of Mr Delacretaz, also considered in *Sykes v Cleary [No 2]* (1992) 176 CLR 77 at 103, per Mason CJ, Toohey and McHugh JJ; at 139-140, per Gaudron J. On becoming an Australian citizen in 1960, he renounced all other allegiance although this was not required by the *Australian Citizenship Act* as it then stood.

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104. It was not until 18 November 1998, nearly a month after her election was certified, that Mrs Hill became aware of steps that could be taken to renounce her British citizenship. The following day, she contacted the British High Commission, completed a declaration of renunciation, paid a fee of $135 and handed over her British passport. By s 12 of the *British Nationality Act 1981 UK*, British citizenship ceases upon registration of a declaration of renunciation. It does not appear from either stated case whether registration has yet occurred. However, it does appear that Mrs Hill understood that, at all relevant times from the grant of citizenship, her sole loyalty was to Australia.

Questions relevant to election

105. It is in the context of s 44(i) of the *Constitution* and the facts recounted above that the following questions are asked in each of the cases stated:

> (b) Was the first respondent at the date of her nomination a subject or citizen of a foreign power within the meaning of s 44(i) of the *Constitution*?
>
> (c) Was the first respondent duly elected at the Election?

Jurisdiction: meaning of "disputed election"

106. As already indicated, it is necessary to consider the question of jurisdiction before turning to the other questions in the cases stated. That consideration must commence with s 47 of the *Constitution* which provides:

> Until the Parliament otherwise provides, any question respecting the qualification of a senator or of a member of the House of Representatives, or respecting a vacancy in either House of the Parliament, and any question of a disputed election to either House, shall be determined by the House in which the question arises.

107. Other constitutional provisions which bear on jurisdiction are ss 51(xxxvi) and 76(ii). Section 51(xxxvi) confers legislative power on the Parliament with respect to "matters in respect of which this Constitution makes provision until the Parliament otherwise provides". And by s 76(ii), the Parliament may make laws conferring original jurisdiction on this Court in any matter "arising under any laws made by the Parliament". It follows that, subject only to express or implied constitutional prohibitions, the Parliament may make laws with respect to the subjects specified in s 47 — relevantly, questions as to disputed elections — and confer jurisdiction on this Court with respect to matters arising under those laws.

108. In exercise of its powers under s 51(xxxvi) of the *Constitution*, the Parliament enacted Pt XXII of the Act. Part XXII, which is headed "Court of Disputed Returns", has two Divisions: Div 1, headed "Disputed Elections and Returns", and Div 2, headed "Qualifications and Vacancies". Section 353(1), which is in Div 1, provides:

> The validity of any election or return may be disputed by petition addressed to the Court of Disputed Returns and not otherwise.

And s 354(1), which is also in Div 1, provides:

> 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 or to the Supreme Court of the State or Territory in which the election was held or return made.

By s 354(2), a court to which a petition is referred under s 354(1) "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".

109. Section 376, which is in Div 2 of Pt XXII of the Act, provides:

> Any question respecting the qualifications of a Senator or of a Member of the House of Representatives or respecting a vacancy in either House of the Parliament may be referred by resolution to the Court of Disputed Returns by the House in which the question arises and the Court of Disputed Returns shall thereupon have jurisdiction to hear and determine the question.

110. Two separate jurisdictional arguments were advanced on behalf of Mrs Hill. The first of the arguments advanced at the hearing was that s 376 of the Act provides exclusively and exhaustively as to the Court's jurisdiction to determine questions relating to the qualification of a senator or member of the House of Representatives. And that section provides that such questions are to be determined on reference from the House concerned. There having been no reference, according to the argument, there is no jurisdiction to determine the issue.

111. The argument as to the exhaustive nature of s 376 was put on two distinct grounds. It was contended that, in s 47 of the *Constitution*, the expressions "qualification of a senator", "vacancy in either House" and "disputed election" are mutually exclusive. And being mutually exclusive, it was argued, the expression "disputed election" in s 47 refers to the process involving the casting and counting of votes but does not include any question as to the disqualification of a candidate. That being its constitutional meaning, it was said, similar expressions in the Act — for example, an "election may be disputed" in s 353(1) — must be similarly construed.

112. Section 47 must be construed in its constitutional setting. In particular, it must be construed in the context of s 44 which stipulates, in its concluding words, that a person who is disqualified by reason of any matter specified in that section "shall be incapable of being *chosen* or of sitting as a senator or a member of the House of Representatives" (emphasis added). Once it is appreciated that disqualification is a matter affecting a candidate's capacity to be elected and not merely his or her capacity to sit in the Parliament, it follows that "disputed election" in s 47 of the *Constitution* includes an election which is disputed on the basis of a candidate's ability to be chosen.

113. Moreover, as a matter of ordinary language, the expressions "qualification of a senator", "vacancy in either House" and "disputed election" are not mutually exclusive. As Dawson J pointed out in *Sykes v Cleary [No 1]* :

> Obviously a question of qualifications may arise in a context other than that of a disputed election. Conversely, a disputed election may involve a question of the qualification of a person to be chosen as a senator or member. Similarly, while in some circumstances the question of a vacancy may arise in connection with a disputed election, in other circumstances it may arise independently of such an election. [139]

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(139) *Sykes v Cleary [No 1]* (1992) 66 ALJR 577 at 578107 ALR 577 at 579.

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114. Given its constitutional setting and given the considerations referred to by Dawson J in *Sykes v Cleary [No 1]* [140] , it follows, as this Court held in In re Wood [141] , that "[t]he categories of questions mentioned in s 47 of the *Constitution* are not mutually exclusive". That being so, s 47 provides no basis for treating those questions as mutually exclusive in the Act.

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(140) (1992) 66 ALJR 577; 107 ALR 577.
(141) (1988) 167 CLR 145 at 160.

115. The second argument as to the exclusive and exhaustive nature of s 376 of the Act was made by reference to the nature of the inquiry involved when an election is disputed and, also, by reference to the terms of the Act. It was put that, traditionally, questions as to the qualifications of members have been the exclusive province of the House of Parliament concerned. That being so, it was said, Parliament should not be taken to have surrendered its authority with respect to those matters unless it has made its intention in that regard clear either by express words or as a matter of necessary implication. Additionally, it was put that, not only had Parliament not made clear its intention to abrogate its power with respect to the qualifications of Senators and members of the House of Representatives, but it was clear from the terms of the Act, particularly ss 362 and 376, that it intended otherwise.

116. It is not in doubt that, historically, the House of Commons did assert exclusive authority to determine questions with respect to the qualifications of its members and, also, with respect to disputed elections [142] . However, that position changed with the passage of the *Parliamentary Elections Act 1868 UK* [143] . That Act provided for petitions to be presented in "[o]ne of Her Majesty's Superior Courts of Common Law at *Westminster* or *Dublin* " [144] to "determine whether the Member whose Return or Election is complained of, or any and what other Person, was duly returned or elected, or whether the Election was void" (s 11(13)). And under that Act, petitions might be based on the disqualification of the candidate concerned [145] . Moreover, various statutory provisions dating from 1715 allowed that the question whether a member was disqualified on a ground specified in the relevant legislation was justiciable at the suit of any person who brought an action to recover the penalty provided by that legislation [146] .

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(142) See Rogers on Elections, 16th ed (1892), vol 2, p 223; Quick and Garran, The Annotated Constitution of the Australian Commonwealth (1901), p 496; May, The Law, Privileges, Proceedings and Usage of Parliament (May's Parliamentary Practice), 22nd ed (1997), p 35; Schoff, "The Electoral Jurisdiction of the High Court as the Court of Disputed Returns: Non-judicial Power and Incompatible Function?", Federal Law Review, vol 25 (1997) 317, at p 324; Walker, "Disputed Returns and Parliamentary Qualifications: Is the High Court's Jurisdiction Constitutional?", University of New South Wales Law Journal, vol 20 (1997) 257, at p 263.

(143) 31 & 32 Vict c 125.

(144) Section 11(1). Section 11(2) required a rota to be formed from judges of "each of the Courts of Queen's Bench, Common Pleas and Exchequer in *England* and *Ireland* " for the purpose of hearing election petition cases.

(145) See, eg, County of Tipperary (1875) 3 O'M & H 19 (disqualification on the grounds of status as an alien and conviction for treason-felony); Borough of Cheltenham (1880) 3 O'M & H 86 (disqualification on the ground of status as an alien); Western Division of the Borough of Belfast (1886) 4 O'M & H 105 (disqualification on the ground that candidate had already been elected and returned as member for another constituency).

(146) See, eg, s 2 of the *Crown Pensioners Disqualification Act 1715* (1 Geo I c 56) (persons disqualified for receiving Crown pensions); s 2 of the *House of Commons Disqualification Act 1742* (15 Geo II c 22) (persons disqualified for holding a particular office, including the office of lord high treasurer, the commissioners of the exchequer, etc); s 9 of the *House of Commons (Disqualification) Act 1782* (22 Geo III c 45) (persons disqualified for having any direct or indirect pecuniary interest in any contract or agreement with the Crown); s 2 of *House of Commons (Clergy Disqualification) Act 1801* (41 Geo III c 63) (persons disqualified for being a member of the clergy); s 2 of the *House of Commons Disqualifications Act 1821* (1 & 2 Geo IV c 44) (persons disqualified for holding certain judicial offices in Ireland); s 33(5) of the *Corrupt and Illegal Practices Prevention Act 1883* (46 & 47 Vict c 51) (persons disqualified for failing to submit certain required declarations and returns in respect of their election expenses).

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117. Section 46 of the *Constitution* seemingly has its origins in United Kingdom legislation of the kind to which reference was last made. That section provides:

> Until the Parliament otherwise provides, any person declared by this Constitution to be incapable of sitting as a senator or as a member of the

House of Representatives shall, for every day on which he so sits, be liable to pay the sum of one hundred pounds to any person who sues for it in any court of competent jurisdiction. [147]

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(147) Since the commencement of the *Common Informers (Parliamentary Disqualifications) Act 1975 Cth*, on 23 April 1975, no suit may now be instituted under s 46 of the *Constitution*; s 4. Instead, s 3(1) of that Act provides that: "Any person who, whether before or after the commencement of this Act, has sat as a senator or as a member of the House of Representatives while he was a person declared by the Constitution to be incapable of so sitting shall be liable to pay to any person who sues for it in the High Court a sum equal to the total of: (a) $200 in respect of his having so sat on or before the day on which the originating process in the suit is served on him; and (b) $200 for every day, subsequent to that day, on which he is proved in the suit to have so sat." A suit under that Act must be brought within twelve months after the sitting of the senator or member to which the suit relates, s 3(2). Section 5 confers original jurisdiction on the High Court in suits brought under the Act, and stipulates that no other court has jurisdiction.

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118. It was put in the course of argument that s 46 is to be construed as applying only to a person who sits after the relevant House has determined that he or she is not qualified so to do. However, constitutional provisions are to be read broadly and according to their terms: more significantly for present purposes, they are not to be read as subject to limitations which their terms do not require [148] . Accordingly, s 46 is not to be construed as applying only in the event that it has been determined by the House of Parliament concerned that the person in question is not qualified to sit in that House [149] .

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(148) *R v Public Vehicles Licensing Appeal Tribunal (Tas); Ex parte Australian National Airways Pty Ltd* (1964) 113 CLR 207 at 225See also *Actors and Announcers Equity Association v Fontana Films Pty Ltd* (1982) 150 CLR 169 at 207, per Mason J (with whom Aickin J agreed); *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 at 223-224, per Mason J; *The Commonwealth v Tasmania* (the Tasmanian Dam Case) (1983) 158 CLR 1 at 127-128, per Mason J; *Street v Queensland Bar Association* (1989) 168 CLR 461 at 527-528, per Deane J; *Polyukhovich v The Commonwealth (War Crimes Act Case)* (1991) 172 CLR 501 at 695, per Gaudron J; at 713, per McHugh J; *Owners of Shin Kobe Maru v Empire Shipping Co Inc* (1994) 181 CLR 404 at 424

(149) Note also that in proceedings under the legislation referred to in fn (148) the Courts themselves determined whether the person concerned was disqualified, not merely whether he had voted when disqualified. See, eg, *Thompson v Pearce* (1819) 1 Brod& B 25 [129 ER 632]; *Forbes v Samuel* [1913] 3 KB 706 *Burnett v Samuel* (1913) 29 TLR 583 *Bird v Samuel* (1914) 30 TLR 323 *Tranton v Astor* (1917) 33 TLR 383

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119. In the light of the practice that had developed in England by the late nineteenth century and in light of the clear words of s 46 of the *Constitution*, it is impossible to say that historical considerations require the Act to be construed on the basis that the Houses of Parliament are not to be taken to have surrendered their exclusive authority to determine questions as to the qualification of their members unless an intention to that effect is made clear either by express words or as a matter of necessary implication. Rather, given that, as a matter of ordinary usage, the expression "disputed election" includes an election disputed on the basis that a candidate is not capable of being chosen, the question is whether there is anything in the Act to indicate that it does not bear that meaning.

120. As already indicated, the argument that, in the Act, expressions relating to disputed elections are to be read as not including an election which is disputed on the basis of a candidate's qualification was put by reference to ss 362 and 376 of the Act. Section 362 relevantly provides:

> (1) If the Court of Disputed Returns finds that a successful candidate has committed or has attempted to commit bribery or undue influence, the election of the candidate shall be declared void.
>
> (3) The Court of Disputed Returns shall not declare that any person returned as elected was not duly elected, or declare any election void:
>
> (a) on the ground of any illegal practice committed by any person other than the candidate and without the knowledge or authority of the candidate; or
>
> (b) on the ground of any illegal practice other than bribery or corruption or attempted bribery or corruption;
>
> unless the Court is satisfied that the result of the election was likely to be affected, and that it is just that the candidate should be declared not to be duly elected or that the election should be declared void.
>
> (4) The Court of Disputed Returns must not declare that any person returned as elected was not duly elected, or declare any election void, on the ground that someone has contravened the *Broadcasting Services Act 1992* or the *Radiocommunications Act 1992*.

"Illegal practice" is defined in s 352(1) of the Act to mean "a contravention of [the] Act or the regulations".

121. It was argued on behalf of Mrs Hill, by reference to *Hudson v Lee* [150] and *Webster v Deahm* [151] , that s 362 is an exhaustive statement of the grounds on which an election may be declared void or a person declared not to have been duly elected. In *Hudson v Lee* [152] the question was whether the Court could declare an election void or a person not to have been duly elected by reason of conduct which was said to be illegal but which was not dealt with by the Act. It was said in that case that "s 362 provides exhaustively as to the general grounds on which an election may be invalidated or declared void". In context, however, it is clear that what were being referred to were grounds relating to the casting and counting of votes, as distinct from the question whether a candidate was qualified to be chosen. The case is of no assistance in the present matter. Moreover, the argument for the first respondent is not supported by *Webster v Deahm* [153] . In that case, the possibility that an election might be invalidated or declared void by reason that the candidate was not qualified to be chosen was specifically acknowledged [154] .

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(150) (1993) 177 CLR 627.
(151) (1993) 67 ALJR 781; 116 ALR 223.
(152) (1993) 177 CLR 627 at 631, per Gaudron J.
(153) (1993) 67 ALJR 781; 116 ALR 223.
(154) See *Webster v Deahm* (1993) 67 ALJR 781 at 782116 ALR 223 at 225, where it was said: "In general terms, and leaving aside the situation in which a person was prevented from voting or in which a candidate was not eligible to stand (neither of which is claimed in this case), [the requirement of s 355(a) of the Act] can only be satisfied by an assertion that goes to or bears upon the casting or counting of votes."

122. Section 362 of the Act is not to be construed in isolation. Rather, it is to be construed in the context of s 360 which relevantly provides:

> (1) The Court of Disputed Returns shall sit as an open Court and its powers shall include the following:
>
> (v) To declare that any person who was returned as elected was not duly elected;
>
> (vi) To declare any candidate duly elected who was not returned as elected;
>
> (vii) To declare any election absolutely void;
>
> (2) The Court may exercise all or any of its powers under this section on such grounds as the Court in its discretion thinks just and sufficient.
>
> (3) Without limiting the powers conferred by this section, it is hereby declared that the power of the Court to declare that any person who was returned as elected was not duly elected, or to declare an election absolutely void, may be exercised on the ground that illegal practices were committed in connection with the election.

123. As will later appear, s 360(2) of the Act does not have the effect that the power to invalidate an election or declare it void is entirely at large. That aside, when s 362 is read in the context of s 360, it is clear that s 362 governs the grant of relief when an election is challenged on the ground of bribery, corruption, undue influence or illegal practice. But neither its context nor its terms require it to be construed as confining a petition to the grounds with which s 362 deals. That being so, s 362 provides no basis for concluding that an election may not be challenged under Div 1 of Pt XXII on grounds going to a candidate's qualifications.

124. Further and contrary to the submission that s 362 of the Act indicates that an election cannot be challenged under Div 1 of Pt XXII on the ground that a candidate is not eligible to be chosen, that very issue may be raised by an allegation of "illegal practice", a matter with which s 362 is directly concerned. As already indicated, "illegal practice" is defined in s 352(1) of the Act to include "a contravention of [the] Act". That expression means failure to comply with a provision of the Act [155] . It does not mean the commission of an offence.

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(155) See *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Amalgamated Engineering Union, Australian Section* (1953) 89 CLR 636 at 649, per Dixon CJ, Webb, Fullagar and Kitto JJ; *Marriott v Coleman* (1963) 109 CLR 129 at 137, per McTiernan, Menzies and Owen JJ.

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125. The relevance of qualifications to "illegal practice" emerges from a consideration of ss 170 and 339(3) of the Act. Section 170 requires, amongst other things, that a candidate for election state in his or her nomination paper that he or she "is qualified under the Constitution to be elected as a Senator or a member of the House of Representatives, as the case may be". And s 339(3) provides:

> A person must not:
>
> (a) make a statement in his or her nomination paper that is false or misleading in a material particular; or

(b) omit from a statement in his or her nomination paper any matter or thing without which the statement is misleading in a material particular.

Penalty: Imprisonment for 6 months. [156]

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(156) Note, by s 339(4) there is a defence to a prosecution under s 339(3), if the person concerned proves that he or she did not know and could not reasonably have been expected to know that the statement was false or misleading.

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126. It is a basic rule of construction that statutory definitions are not to be read as subject to exceptions or limitations which their terms do not require [157] . That being so, a candidate's qualifications can be put in issue in a petition under Div 1 of Pt XXII of the Act alleging a contravention of s 339(3)(a) of the Act in relation to the statement required by s 170 with respect to his or her qualifications. Accordingly, it is clear that s 362 cannot be read as confining the jurisdiction conferred under Div 1 of Pt XXII of the Act to elections which are challenged on a ground relating to the casting or counting of votes as distinct from the candidate's ability to be chosen. It remains to be considered whether s 376, which is in Div 2 of Pt XXII, has that effect.

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(157) See *Owners of Shin Kobe Maru v Empire Shipping Co Inc* (1994) 181 CLR 404 at 420See also *Australian Softwood Forests Pty Ltd v Attorney-General (NSW); Ex rel Corporate Affairs Commission* (1981) 148 CLR 121 at 130, per Mason J; *Slonim v Fellows* (1984) 154 CLR 505 at 513, per Wilson J; *PMT Partners Pty Ltd (In liq) v Australian National Parks and Wildlife Service* (1995) 184 CLR 301 at 310, per Brennan CJ, Gaudron and McHugh JJ; *Police v Thompson* [1966] NZLR 813 at 818, per North P.

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127. It was argued on behalf of Mrs Hill that s 376 of the Act, which is concerned with the reference of questions with respect to the qualifications of senators and members of the House of Representatives, is to be construed as evincing an intention that, notwithstanding the apparent width of ss 360 and 362, questions as to qualifications are to be dealt with under s 376 and not otherwise. The argument was put by reference to the rule of construction discussed in *Anthony Hordern & Sons Ltd v Amalgamated Clothing and Allied Trades Union of Australia* [158] . In that case it was said:

> When the Legislature explicitly gives a power by a particular provision which prescribes the mode in which it shall be exercised and the conditions and restrictions which must be observed, it excludes the operation of general expressions in the same instrument which might otherwise have been relied upon for the same power. [159]

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(158) (1932) 47 CLR 1.

(159) Anthony Hordern & Sons Ltd (1932) 47 CLR 1 at 7, per Gavan Duffy CJ and Dixon J. See also *R v Wallis* (1949) 78 CLR 529 at 550, per Dixon J.

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128. The rule discussed in Anthony Hordern & Sons Ltd is that embodied in the Latin maxim generalia specialibus non derogant. The rule applies only when the general provision would otherwise encompass the matter dealt with by the special or more limited provision. However, s 376 is not a provision dealing with a special matter that would otherwise fall within the general provisions of Div 1 of Pt XXII of the Act. Divisions 1 and 2 each deal with separate topics: Div 1 with elections which are challenged by petition under s 353(1) and Div 2 with questions as to qualifications or respecting a vacancy which are raised otherwise than by petition under Div 1. That being so, there is no basis for construing s 376 in a manner which would restrict the ordinary and natural meaning of the provisions of Div 1 of Pt XXII of the Act.

129. As neither Div 1 nor Div 2 of Pt XXII of the Act is to be construed in a manner that would deny jurisdiction in these matters, it is necessary to turn to the second jurisdictional argument advanced on behalf of Mrs Hill.

Jurisdiction: judicial power

130. As already indicated, the Parliament's power to confer jurisdiction on this Court with respect to disputed elections is subject to any express or implied constitutional prohibition in that regard. It is well settled that Ch III of the *Constitution* is the source of an implied prohibition which prevents the conferral of any power on this or any other federal court which is not judicial power or a power ancillary or incidental to the exercise of judicial power [160] . It was contended on behalf of Mrs Hill that the power purportedly conferred by Pt XXII of the Act is not judicial power and, in consequence, the provisions of that Part are invalid.

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(160) See *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 289, per Dixon CJ, McTiernan, Fullagar and Kitto JJ. See also In re Judiciary and Navigation Acts (1921) 29 CLR 257 at 264-265, per Knox CJ, Gavan Duffy, Powers, Rich and Starke JJ; *Victorian Stevedoring and General Contracting Co Pty Ltd and Meakes v Dignan* (1931) 46 CLR 73 at 97-98, per Dixon J; *R v Federal Court of Bankruptcy; Ex parte Lowenstein* (1938) 59 CLR 556 at 586-587, per Dixon and Evatt JJ; *Polyukhovich v The Commonwealth (War Crimes Act Case)* (1991) 172 CLR 501 at 606-607, per Deane J; at 703, per Gaudron J; *Leeth v The Commonwealth* (1992) 174 CLR 455 at 469, per Mason CJ, Dawson and McHugh JJ; *Nicholas v The Queen* (1998) 193 CLR 173 at 207, per Gaudron J; *Gould v Brown* (1998) 193 CLR 346 at 385-386, per Brennan CJ and Toohey J; at 400-401, per Gaudron J; at 419, per McHugh J; at 440, per Gummow J; at 499-500, per Kirby J.

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131. Before turning to the argument, it is convenient to say something as to the nature of judicial power. The difficulties associated with defining "judicial power" are well known [161] . However, it has two aspects: the first is concerned with the nature or purpose of the power, the second with the manner of its exercise. So far as is relevant to this case, the nature of the power may be described as that brought to bear for the purpose of "making binding determinations as to rights, liabilities, powers, duties or status put in issue in justiciable controversies" [162] . The second aspect of judicial power is that it must be exercised in accordance with the judicial process [163] . The provisions of Pt XXII of the Act are challenged by reference to the nature of the power involved as well as the manner of its exercise.

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(161) See, eg, *R v Davison* (1954) 90 CLR 353 at 366, per Dixon CJ and McTiernan J; *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361 at 394, per Windeyer J; *Re Nolan; Ex parte Young* (1991) 172 CLR 460 at 497, per Gaudron J; *Polyukhovich v The Commonwealth (War Crimes Act Case)* (1991) 172 CLR 501 at 532, per Mason CJ; *Precision Data Holdings Ltd v Wills* (1991) 173 CLR 167 at 188 *Leeth v The Commonwealth* (1992) 174 CLR 455 at

501, per Gaudron J; *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245 at 257, per Mason CJ, Brennan and Toohey JJ; at 267, per Deane, Dawson, Gaudron and McHugh JJ; *Nicholas v The Queen* (1998) 193 CLR 173 at 207, per Gaudron J; at 273, per Hayne J; *Gould v Brown* (1998) 193 CLR 346 at 403, per Gaudron J.

(162) *Nicholas v The Queen* (1998) 193 CLR 173 at 207, per Gaudron J. See also *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330 at 357, per Griffith CJ; *Waterside Workers' Federation of Australia v J W Alexander Ltd* (1918) 25 CLR 434 at 463, per Isaacs and Rich JJ; *R v Davison* (1954) 90 CLR 353 at 369, per Dixon CJ and McTiernan J; *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361 at 374, per Kitto J; *Re Ranger Uranium Mines Pty Ltd; Ex parte Federated Miscellaneous Workers' Union of Australia* (1987) 163 CLR 656 at 666 *Harris v Caladine* (1991) 172 CLR 84 at 147, per Gaudron J; *Re Nolan; Ex parte Young* (1991) 172 CLR 460 at 497, per Gaudron J; *Precision Data Holdings Ltd v Wills* (1991) 173 CLR 167 at 188 *Gould v Brown* (1998) 193 CLR 346 at 404, per Gaudron J.

(163) See *Nicholas v The Queen* (1998) 193 CLR 173 at 207, per Gaudron J. See also *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361 at 374, per Kitto J; *Harris v Caladine* (1991) 172 CLR 84 at 150, per Gaudron J; *Re Nolan; Ex parte Young* (1991) 172 CLR 460 at 496, per Gaudron J; *Polyukhovich v The Commonwealth (War Crimes Act Case)* (1991) 172 CLR 501 at 703-704, per Gaudron J; *Leeth v The Commonwealth* (1992) 174 CLR 455 at 502, per Gaudron J.

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132. So far as concerns the first aspect of judicial power, there are some powers which are inherently judicial and which the Parliament can confer only on a court [164] . The power to determine guilt or innocence is one [165] . There are other powers which are inherently non-judicial and which cannot be conferred on a court. The power to determine what the future rights or liabilities of people in particular relationships should be is a power of that kind [166] . And some powers are such that they take their character from the body or tribunal in which they are reposed. It will later be necessary to deal in more detail with powers of the last-mentioned kind.

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(164) See *R v Bevan; Ex parte Elias and Gordon* (1942) 66 CLR 452 at 466, per Starke J; *R v Cox; Ex parte Smith* (1945) 71 CLR 1 at 23, per Dixon J; *Polyukhovich v The Commonwealth (War Crimes Act Case)* (1991) 172 CLR 501 at 537, per Mason CJ; at 607, per Deane J. These include the power to compel the appearance of persons (*Waterside Workers' Federation of Australia v J W Alexander Ltd* (1918) 25 CLR 434 at 442, per Griffith CJ), the power to determine questions of excess of legislative and executive power (*Re Tracey; Ex parte Ryan* (1989) 166 CLR 518 at 580, per Deane J) and the power to adjudicate on existing legal rights and liabilities between persons (*Waterside Workers' Federation of Australia v J W Alexander Ltd* (1918) 25 CLR 434 at 442, per Griffith CJ; at 464-465, per Isaacs and Rich JJ; *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518 at 580, per Deane J; *Polyukhovich v The Commonwealth (War Crimes Act Case)* (1991) 172 CLR 501 at 607, per Deane J).

(165) See *R v Bevan; Ex parte Elias and Gordon* (1942) 66 CLR 452 at 466, per Starke J; *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518 at 580, per Deane J; *Polyukhovich v The Commonwealth (War Crimes Act Case)* (1991) 172 CLR 501 at 607-608, per Deane J; at 685, per Toohey J; at 705-706, per Gaudron J; *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 98-99, per Toohey J; at 107, per Gaudron J; at 122, per McHugh J; at 131-132, per Gummow J; *Liyanage v The Queen* [1967] 1 AC 259 at 289

(166) See *R v Gallagher; Ex parte Aberdare Collieries Pty Ltd* (1963) 37 ALJR 40 at 43, per Kitto J; *Re Ranger Uranium Mines Pty Ltd; Ex parte Federated Miscellaneous Workers' Union of Australia* (1987) 163 CLR 656 at 666 *Precision Data Holdings Ltd v Wills* (1991) 173 CLR 167 at 189

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133. It was put on behalf of Mrs Hill that the power to determine disputed elections is a power that is intractably legislative in character and, thus, one which Parliament cannot confer on a court. That contention must be rejected. The power is not a law-making power, that being the essence of legislative power. Rather, it is a power which s 47 of the *Constitution* allows that the Houses of Parliament may exercise, presumably in recognition of the fact that the power had been traditionally so exercised. But if and when the power is so exercised, it is exercised as an incident of the status of the relevant House as one of the Houses of Parliament. If it is to be characterised, it is

more properly characterised as a power which, when exercised by the Houses of Parliament, is incidental or ancillary to the exercise of legislative power. But that says nothing as to its character when exercised by some other body or tribunal.

134. It is well settled that some powers bear a "double aspect" [167] so that they may be conferred on a court or on some other body and, when conferred, they take their character from the body in which they are reposed [168] . Thus, it was said in *R v Hegarty; Ex parte City of Salisbury* :

> It is recognised that there are functions which may be classified as either judicial or administrative, according to the way in which they are to be exercised. A function may take its character from that of the tribunal in which it is reposed. Thus, if a function is entrusted to a court, it may be inferred that it is to be exercised judicially; it is otherwise if the function be given to a non-judicial tribunal, for then there is ground for the inference that no exercise of judicial power is involved. [169]

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(167) See *R v Davison* (1954) 90 CLR 353 at 368-369, per Dixon CJ and McTiernan J. See also *Gould v Brown* (1998) 193 CLR 346 at 403, per Gaudron J.
(168) See *Federal Commissioner of Taxation v Munro* (1926) 38 CLR 153 at 177, per Isaacs J; *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 278-279, per Dixon CJ, McTiernan, Fullagar and Kitto JJ; *R v Hegarty; Ex parte City of Salisbury* (1981) 147 CLR 617 at 628, per Mason J; at 631-632, per Murphy J; *Re Ranger Uranium Mines Pty Ltd; Ex parte Federated Miscellaneous Workers' Union of Australia* (1987) 163 CLR 656 at 665 *Harris v Caladine* (1991) 172 CLR 84 at 122, per Dawson J; at 147-148, per Gaudron J; *Precision Data Holdings Ltd v Wills* (1991) 173 CLR 167 at 189
(169) *R v Hegarty; Ex parte City of Salisbury* (1981) 147 CLR 617 at 628, per Mason J referring to *R v Spicer; Ex parte Australian Builders' Labourers' Federation* (1957) 100 CLR 277 at 305, per Kitto J.

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135. In *Federal Commissioner of Taxation v Munro* [170] , Isaacs J observed that "the determination of the validity of parliamentary elections" was an instance of a function "capable of assignment to more than one branch of government" because it was "capable of being viewed in different aspects, that is, as incidental to legislation, or to administration, or to judicial action, according to circumstances". However, it may be that it is not a function that can validly be conferred on an administrative tribunal.

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(170) (1926) 38 CLR 153 at 178-179.

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136. What is put in issue when the validity of an election is challenged is the right of the person concerned to sit and vote in the Senate or in the House of Representatives. That is a legal right "arising from the operation of the law upon past events or conduct" [171] . And, prima facie, the making of a binding determination with respect to that right involves the exercise of judicial power unless it is made by the relevant House of Parliament under s 47 of the *Constitution* or some person or tribunal acting as its delegate. However, that issue need not be explored.

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(171) *R v Gallagher; Ex parte Aberdare Collieries Pty Ltd* (1963) 37 ALJR 40 at 43, per Kitto J.

137. If not an absolute criterion of judicial power [172] , the "giving of decisions in the nature of adjudications upon disputes as to rights or obligations arising from the operation of the law upon past events or conduct" is the essence of what is involved in its exercise. At least that is so if the decisions are binding. There are, however, two matters which suggest that determination of a reference under Div 2 of Pt XXII of the Act may not involve a binding determination as to legal rights and, thus, may not involve the exercise of judicial power.

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(172) See *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245 at 268, per Deane, Dawson, Gaudron and McHugh JJ referring to *Re Cram; Ex parte Newcastle Wallsend Coal Co Pty Ltd* (1987) 163 CLR 140 at 149, per Mason CJ, Brennan, Deane, Dawson and Toohey JJ.

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138. The first matter that bears on the nature of the power conferred by Div 2 of Pt XXII of the Act is that s 376 allows for the reference of "[a]ny question respecting the qualifications of a Senator or of a Member of the House of Representatives". Were that section to be construed as permitting the reference of discrete questions isolated from the ultimate question whether the person concerned had the right to sit and vote in the relevant House of Parliament, the reference of a question of that kind would not require the determination of any legal right [173] . The second matter is that, although, by the combined force of ss 381 and 368, decisions are to be final and conclusive, there is no provision ensuring that a decision will be given effect except where the question referred relates to the election of a Senator or Member of the House of Representatives and, thus, s 374 applies [174] . Again, this issue need not be explored as Div 2 of Pt XXII of the Act is clearly severable.

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(173) See, with respect to advisory opinions, In re Judiciary and Navigation Acts (1921) 29 CLR 257; *North Ganalanja Aboriginal Corporation v Queensland* (1996) 185 CLR 595 *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334

(174) Section 381 relevantly provides that s 374 applies "so far as applicable" to proceedings on a reference under Pt XXII. Section 374 provides for the giving of effect to decisions with respect to disputed elections.

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139. The matters which bear on the validity of Div 2 of Pt XXII of the Act have no relevance to proceedings disputing the validity of an election under Div 1. A challenge to the validity of an election necessarily puts in issue the right of a person to sit and vote in one of the Houses of Parliament. And by s 374 of the Act, effect is to be given to the decision as follows:

(i) If any person returned is declared not to have been duly elected, the person shall cease to be a Senator or Member of the House of Representatives;

(ii) If any person not returned is declared to have been duly elected, the person may take his or her seat accordingly;

(iii) If any election is declared absolutely void a new election shall be held.

140. Provided that the power to determine the validity of an election is conferred in a way that involves the giving of a binding decision as to the right of a person to sit and vote in the House of Parliament to which he or she was returned, as is the case with the power conferred by Div 1 of Pt XXII of the Act, there is no reason why that power cannot be conferred on a court, as it has been in this country for very many years [175] .

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(175) At a federal level, since the enactment of the *Commonwealth Electoral Act 1902 Cth*, Pt XVI of which contained provisions in substantially similar terms to Div 1 of Pt XXII of the Act.

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141. It is necessary now to turn to the question whether the provisions of Div 1 of Pt XXII have the effect that the power to determine the validity of a disputed election is one that is to be exercised other than in accordance with the judicial process. For present purposes it is sufficient to note that, in general terms, the judicial process is one that involves the independent and impartial application of the law to facts found on evidence which is probative of those facts [176] and the observance of procedures that enable the parties to put their case and to answer the case made against them [177] .

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(176) See *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361 at 374, per Kitto J; *Harris v Caladine* (1991) 172 CLR 84 at 150, per Gaudron J; *Re Nolan; Ex parte Young* (1991) 172 CLR 460 at 496, per Gaudron J; *Polyukhovich v The Commonwealth (War Crimes Act Case)* (1991) 172 CLR 501 at 703-704, per Gaudron J.

(177) See, eg, *Re Nolan; Ex parte Young* (1991) 172 CLR 460 at 496, per Gaudron J (procedures include open public inquiry and the application of the rules of natural justice) and *Nicholas v The Queen* (1998) 193 CLR 173 at 207-208, per Gaudron J (procedures include granting an adjournment, making procedural rulings or ruling on the admissibility of evidence).

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142. The submission that Div 1 of Pt XXII of the Act does not and was not intended to confer judicial power, in the sense of a power to be exercised in accordance with the judicial process, was made by reference to ss 354(1) and (6), 360(2), 361(1), 363, 363A, 364, 368, 369, 373 and 374. Additionally, it was pointed out that no provision of Div 1 of Pt XXII confers power on the Court to enforce its decisions. So far as concerns s 354(1), the argument concentrated on that sub-section's statement that "[t]he High Court shall be the Court of Disputed Returns" [178] . It was put that jurisdiction was not conferred on the High Court as such. Rather, it was contended that the High Court was conscripted to act as a special electoral tribunal. And according to the argument, that was confirmed by the unusual nature of the other provisions upon which the argument relied.

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(178) cf the situation considered in *Holmes v Angwin* (1906) 4 CLR 297where the power to determine disputed elections was conferred on a single Judge of the Supreme Court of Western Australia, but not on that Court.

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143. It may be that s 354(1) of the Act could have been better expressed. However, its terms are capable of explanation on the basis that Parliament, not surprisingly, perceived that

it was conferring a special jurisdiction on the Court and, for the exercise of that jurisdiction, the Court should be granted special status as "the Court of Disputed Returns". Moreover, it is apparent from the terms of s 360(1) that the jurisdiction was not intended to be reposed in a special tribunal whose functions the High Court was conscripted to perform but, instead, was conferred on the Court as an additional, special jurisdiction with powers considered appropriate to its exercise.

144. Sub-section (1) of s 360 of the Act provides that the powers of the "Court of Disputed Returns shall include" the powers thereafter specified. In context, the words "shall include" constitute legislative recognition that the Court is possessed of other powers, including those conferred by the *Judiciary Act*, and confirm, as earlier suggested, that Parliament intended to confer additional jurisdiction on the Court and not to conscript it as a special electoral tribunal.

145. The various provisions by reference to which it was contended that the powers conferred by Div 1 of Pt XXII of the Act are to be exercised otherwise than in accordance with the judicial process fall into three broad groups. In the first are those which, it is contended, confer broad, general discretions to be exercised without regard to legal standards; in the second are those which give directions of a kind not normally given to courts; and the third comprises provisions with respect to the effect of decisions.

146. The first group of provisions comprises ss 360(2) and 364 of the Act. Section 360(2) provides:

> The Court may exercise all or any of its powers under this section on such grounds as the Court in its discretion thinks just and sufficient.

The powers to which s 360(2) refers include the power to declare a candidate who was returned not to have been duly elected (s 360(1)(v)), to declare another candidate duly elected (s 360(1)(vi)) and to declare an election absolutely void (s 360(1)(vii)), as well as ancillary powers with respect to the adjournment of proceedings, the attendance and examination of witnesses etc (s 360(1)(i), (ii), (iii), (iv)).

147. Section 364 provides:

> The Court shall be guided by the substantial merits and good conscience of each case without regard to legal forms or technicalities, or whether the evidence before it is in accordance with the law of evidence or not.

148. Notwithstanding the terms of s 360(2) of the Act, the power to invalidate an election is not at large. As has been seen, it is confined by s 362 of the Act. It is also confined by ss 365 and 366 [179] . Even allowing that the power to invalidate an election is confined by ss 362, 365 and 366, ss 360(2) and 364 are, perhaps, more appropriate to an administrative tribunal than to a court. However, in a context in which power is conferred on a court, they are to be construed on the basis that the powers in question are to be exercised judicially [180] .

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(179) Section 365 provides that certain immaterial errors, relating to the pre-election process and the conduct of the poll, shall not vitiate an election if they did not affect the result of that election. Section 366 provides that the Court of Disputed Returns shall not invalidate an election by reason only that an error was made relating to the printing of party affiliations on the ballot papers.

(180) See *R v Hegarty; Ex parte City of Salisbury* (1981) 147 CLR 617 at 628, per Mason J.

149. When s 360(2) of the Act is construed on the basis that the power to invalidate an election is to be exercised judicially, it follows that the power is to be exercised only on relevant legal grounds, specifically those recognised by the Constitution, the Act and, to the extent that it is not otherwise excluded, the common law. Section 364 is to be similarly construed. Indeed, a court would be acting neither in accordance with the substantial merits of the case nor in good conscience if it were to determine the issues raised otherwise than by application of the relevant law to the facts. Nor would it be acting in good conscience if it were to find facts other than on evidence probative of them, evidence which may or may not accord with the rules of evidence. Construed in this way, neither s 360(2) nor s 364 has the consequence that the power conferred by s 360 of the Act is not judicial in character.

150. Of that group of provisions which, it is said, contain directions of a kind not usually associated with the exercise of judicial power, it is convenient to deal first with ss 354(6) and 368. Sub-section (6) of s 354 provides:

> The jurisdiction conferred by this section may be exercised by a single Justice or Judge.

And s 368 states:

> All decisions of the Court shall be final and conclusive and without appeal, and shall not be questioned in any way.

151. The effect of s 368 is that, if a petition is heard and determined by a single Justice or a single Judge of a court to which a petition may be referred pursuant to s 354(1) of the Act, there is no appeal. Nor is there an appeal if the jurisdiction is exercised by a court comprised of more than one Justice or Judge. That consequence is entirely consistent with s 73 of the *Constitution* by which appellate jurisdiction is relevantly conferred on this Court with respect to judgments and orders of a single Justice and other courts exercising federal jurisdiction but "with such exceptions and subject to such regulations as the Parliament prescribes" [181] . That being so, the absence of appellate review says nothing as to the character of the power conferred by s 360 of the Act.

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(181) See *Smith Kline & French Laboratories (Aust) Ltd v The Commonwealth* (1991) 173 CLR 194 at 210, 213. See also *Watson v Federal Commissioner of Taxation* (1953) 87 CLR 353 at 372 *Cockle v Isaksen* (1957) 99 CLR 155 at 165, per Dixon CJ, McTiernan and Kitto JJ; at 167-168, per Williams J; at 173, per Webb J; at 175, per Taylor J.

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152. Other provisions which, it was argued, contain directions not usually associated with the exercise of judicial power are ss 361(1), 363, 363A and 369. Sub-section (1) of s 361 requires a court exercising jurisdiction under s 354 of the Act to "inquire whether or not the petition is duly signed". And s 363A requires that such a court "make its decision as quickly as is reasonable in the circumstances". Neither provision is inconsistent with the exercise of judicial power.

153. Sections 363 and 369 impose obligations on the Chief Executive and Principal Registrar of this Court. By s 363, he is to report any finding of illegal practices to the relevant Minister; and by s 369, he is required, forthwith after the filing of a petition, to send copies of the petition to the Clerk of the House of Parliament affected and either the Governor-General [182] or the Speaker of the House of Representatives [183] . The imposition of these duties on the Chief Executive and Principal Registrar in no way affects the independence of the Court or the manner in which it exercises jurisdiction under the Act. That being so, ss 363 and 369 do not have the consequence that the power to invalidate an election is not judicial in character.

(182) In the case of a general election or an election for the House of Representatives the writ for which was issued by the Governor-General, s 369(b).
(183) In the case of an election for the House of Representatives the writ for which was not issued by the Governor-General, s 369(c).

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154. The final group of provisions to which reference should be made comprises ss 373 and 374 of the Act. Section 373 relevantly provides that "costs awarded by the Court shall be recoverable as if the order of the Court were a judgment of the High Court of Australia, and such order may be entered as a judgment of the High Court of Australia, and enforced accordingly". That section is to be read in the context of s 354(2). By that sub-section:

> When a petition has been referred for trial to the Federal Court of Australia or to the Supreme Court of a State or Territory, that 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.

Doubtless, s 373 of the Act could have been better drafted. In the context of s 354(2), however, it is clear that its purpose is to deal with costs whether the petition is tried in this Court, the Federal Court or a State or Territory Supreme Court. That being so, it says nothing as to the nature of the power exercised under Div 1 of Pt XXII of the Act.

155. The terms of s 374 have already been noted. In short, s 374 operates to give a decision invalidating an election or return the force of law but does not give the Court power to enforce its own decisions. It is contended that, there being no power in the Court to enforce its own decisions, s 374 indicates that the power involved in the hearing and determination of electoral petitions was not intended to be judicial power.

156. It has long been accepted that the power to enforce decisions by execution is an important indicator of judicial power [184] . However, it was pointed out in *Brandy v Human Rights and Equal Opportunity Commission* that "it is not essential to the exercise of judicial power that the tribunal should be called upon to execute its own decision" [185] . In that case, reference was made to the execution of the orders of courts of petty sessions "by means of a warrant granted by a justice of the peace as an independent administrative act" [186] . The position is even plainer where, as here, the decision is given the force of law. In that situation, enforcement powers are quite unnecessary.

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(184) See, eg, *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330 at 357, per Griffith CJ; *Waterside Workers' Federation of Australia v J W Alexander Ltd* (1918) 25 CLR 434 at 451, per Barton J; *Federal Commissioner of Taxation v Munro* (1926) 38 CLR 153 at 176, per Isaacs J; *Rola Co (Australia) Pty Ltd v The Commonwealth* (1944) 69 CLR 185 at 198-199, per Latham CJ.
(185) *Brandy* (1995) 183 CLR 245 at 269, per Deane, Dawson, Gaudron and McHugh JJ.
(186) *Brandy* (1995) 183 CLR 245 at 269, per Deane, Dawson, Gaudron and McHugh JJ referring to the *Local Courts (Civil Claims) Act 1970 NSW*, s 58.

Jurisdiction: conclusion

157. The arguments advanced in support of the contention that this Court lacks jurisdiction to hear and determine the petitions filed by Messrs Sue and Sharples are without

substance. It follows that, in each of the stated cases, question (a) should be answered "Yes".

Citizenship of a foreign power

158. It is not in issue that the requirements of s 44 of the *Constitution* must be satisfied at the time of nomination [187] . Nor is it in issue that, at that time, Mrs Hill had taken no step to renounce her British citizenship. The issue presented for decision is whether she had to. In this regard, it was put that, by reason of the special relationship between Australia and the United Kingdom, the latter is not a "foreign power" for the purposes of s 44(i) of the *Constitution*. Alternatively, it was put that having taken out Australian citizenship, nothing further was required of Mrs Hill to renounce her British citizenship.

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(187) See *Sykes v Cleary [No 2]* (1992) 176 CLR 77 at 100, per Mason CJ, Toohey and McHugh JJ (with whom Brennan J (at 108), Dawson J (at 130) and Gaudron J (at 132), agreed). See also *Free v Kelly* (1996) 185 CLR 296 at 301, per Brennan CJ.

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159. It may be accepted that, at federation, the United Kingdom was not a foreign power for the purposes of s 44(i) of the *Constitution* [188] . In this regard, the Commonwealth of Australia was brought into being by an Act of the Parliament of the United Kingdom, namely, the *Commonwealth of Australia Constitution Act 1900 Imp* (the Constitution Act). And it was brought into being as "one indissoluble Federal Commonwealth under the Crown of the United Kingdom of Great Britain and Ireland" [189] (now the United Kingdom of Great Britain and Northern Ireland). Moreover, the Commonwealth remains under the Crown, as is readily seen from s 1 of the *Constitution*. By that section, the legislative power of the Commonwealth is "vested in a Federal Parliament, which shall consist of the Queen, a Senate, and a House of Representatives". Further, the Governor-General is appointed by the Queen [190] , proposed laws may be reserved by the Governor-General "for the Queen's pleasure" [191] and laws may be disallowed by the Queen [192] . And by s 61 of the *Constitution*, "[t]he executive power of the Commonwealth is vested in the Queen".

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(188) See *Kirmani v Captain Cook Cruises Pty Ltd [No 1]* (1985) 159 CLR 351 at 437, per Deane J; at 458, per Dawson J; *Nolan v Minister for Immigration and Ethnic Affairs* (1988) 165 CLR 178 at 183-184, per Mason CJ, Wilson, Brennan, Deane, Dawson and Toohey JJ.
(189) Preamble to the Constitution Act.
(190) Section 2 of the *Constitution*. See also ss 3 and 4 and s 3 of the Constitution Act.
(191) Section 58 of the *Constitution*.
(192) Section 59 of the *Constitution*.

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160. One other matter relevant to the position at federation should be noted. At federation and for some considerable time thereafter, the people of Australia were subjects of the Queen [193] . And they remain so described in various provisions of the Constitution, including in s 34 which provided as to the qualifications of a member of the House of Representatives until the Parliament legislated to different effect [194] . By s 34(ii), a candidate for election to the House of Representatives was required to be "a subject of the Queen, either natural-born or for at least five years naturalized under a law of the United Kingdom, or of a Colony which has become or becomes a State, or of the Commonwealth, or of a State" [195] .

(193) See, eg, s 1(1)(a) of the *British Nationality and Status of Aliens Act 1914 UK* which provided that "[a]ny person born within His Majesty's dominions and allegiance" was deemed to be a "natural-born British subject". The Commonwealth of Australia was listed as a "dominion" in the First Schedule to that Act.

(194) See also s 117 of the *Constitution*, which prohibits discrimination against a "subject of the Queen, resident in any State", in any other State.

(195) Note that it is provided in s 16 of the *Constitution* that "[t]he qualifications of a senator shall be the same as those of a member of the House of Representatives".

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161. It is in the context of the constitutional provisions referred to above that the question arises whether the United Kingdom is a foreign power. As a matter of ordinary language, a foreign power is any sovereign state other than the state for whose purposes the question of the other's status is raised. That being so, the first question that arises is whether, in s 44(i) of the *Constitution*, "foreign power" bears its ordinary meaning or is used in some special sense which forever excludes the United Kingdom. And if it bears its ordinary meaning, the further question arises whether the relationship between the United Kingdom and the Commonwealth has been so transformed that the United Kingdom is now a foreign power.

162. It would be surprising if "foreign power" is used in any special sense in s 44(i) of the *Constitution*. After all, it appears in a foundational document which was clearly intended to serve the Australian people well into the future [196] . Moreover, and as the Solicitor-General for the Commonwealth who appeared in the interests of petitioners submitted, "foreign power" is an abstract concept apt to describe different nation states at different times according to their circumstances. For example, Papua Nuigini would not properly have been described as a "foreign power" prior to the grant of independence, although it now is.

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(196) See *The Commonwealth v Kreglinger & Fernau Ltd and Bardsley* (1926) 37 CLR 393 at 413, per Isaacs J; *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 at 196-197, per McHugh J.

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163. Given that the phrase "foreign power" may refer to different nation states at different times according to their circumstances, there would need to be some clear indication in the Constitution that, in s 44(i), "foreign power" is used in a sense that permanently excludes the United Kingdom before that conclusion could be reached. The only matters which might indicate that the United Kingdom is permanently excluded are the constitutional references to "the Crown of the United Kingdom of Great Britain and Ireland", "the Queen" and "subjects of the Queen" to which reference has already been made. There are two considerations which tell against their constituting an indication of that kind.

164. The first consideration which tells against the United Kingdom not being permanently excluded from the concept of "a foreign power" in s 44(i) of the *Constitution* is that the Constitution, itself, acknowledges the possibility of change in the relationship between the United Kingdom, on the one hand, and the Commonwealth of Australia and the Australian States, on the other. Thus, for example, s 34 acknowledges that Parliament may alter the qualifications for election so as to eliminate the requirement that candidates be subjects of the Queen. Of greater significance is that, by s 51(xxxviii) of the *Constitution*, the Commonwealth has power to legislate with respect to "the exercise within the Commonwealth, at the request or with the concurrence of the Parliaments of all the States directly concerned, of any power which can at the

establishment of this Constitution be exercised only by the Parliament of the United Kingdom or by the Federal Council of Australasia". It was pursuant to s 51(xxxviii) that the Parliament of the Commonwealth enacted the *Australia Act 1986 Cth*, to which further reference will shortly be made.

165. The second consideration is that, although the notion of "the divisibility of the Crown" may not have been fully developed at federation, that notion is implicit in the Constitution. It is implicit in the existence of the States as separate bodies politic with separate legal personality, distinct from the body politic of the Commonwealth with its own legal personality. The separate existence and the separate legal identity of the several States and of the Commonwealth is recognised throughout the Constitution, particularly in Ch III (see esp ss 75(iii), (iv), 78).

166. Once it is accepted that the divisibility of the Crown is implicit in the Constitution and that the Constitution acknowledges the possibility of change in the relationship between the United Kingdom and the Commonwealth, it is impossible to treat the United Kingdom as permanently excluded from the concept of "foreign power" in s 44(i) of the *Constitution*. That being so, the phrase is to be construed as having its natural and ordinary meaning.

167. As has already been made clear, the phrase "foreign power" is apt to describe different nation states at different times or, as was said in *Nolan v Minister for Immigration and Ethnic Affairs* [197] in relation to the word "aliens" in s 51(xix) of the *Constitution*, "developments necessarily produce[] different reference points". To acknowledge that, in some constitutional provisions, some words and phrases are capable of applying to different persons or things at different times is not to change the meaning of those provisions. It is simply to give them their proper meaning and effect [198] .

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(197) (1988) 165 CLR 178 at 186, per Mason CJ, Wilson, Brennan, Deane, Dawson and Toohey JJ.

(198) See, eg, *Cheatle v The Queen* (1993) 177 CLR 541 at 560-561, where the Court accepted that "jury" in the phrase "trial by jury" in s 80 of the *Constitution* could no longer be read as excluding women and unpropertied persons; *McGinty v Western Australia* (1996) 186 CLR 140 at 200-201, per Toohey J; at 221-222, per Gaudron J and *Langer v The Commonwealth* (1996) 186 CLR 302 at 342, per McHugh J, suggesting that the expression "chosen by the people" in ss 7 and 24 of the *Constitution* should be read as guaranteeing the right to vote to all adults, not only men.

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168. It is necessary, at this point, to consider whether there has been such a change in the relationship between the United Kingdom and Australia that the former is now a foreign power. In this regard, a change in that relationship has been noted by this Court on several occasions. Thus, for example, Barwick CJ observed in *New South Wales v The Commonwealth* [199] that "[t]he progression [of the Commonwealth] from colony to independent nation was an inevitable progression, clearly adumbrated by the grant of such powers as the power with respect to defence and external affairs" and the Commonwealth "in due course matured [into independent nationhood] aided in that behalf by the Balfour Declaration and the Statute of Westminster and its adoption".

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(199) (1975) 135 CLR 337 at 373.

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169. The changed nature of the relationship between the United Kingdom and Australia was also noted in *Nolan* . It was said in that case:

> The transition from Empire to Commonwealth and the emergence of Australia and other Dominions as independent sovereign nations within the Commonwealth inevitably changed the nature of the relationship between the United Kingdom and its former colonies and rendered obsolete notions of an indivisible Crown. [200]

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(200) *Nolan* (1988) 165 CLR 178 at 184, per Mason CJ, Wilson, Brennan, Deane, Dawson and Toohey JJ. See also *China Ocean Shipping Co v South Australia* (1979) 145 CLR 172 at 195, per Gibbs J; at 208-213, per Stephen J; *Joosse v Australian Securities and Investment Commission* (1998) 73 ALJR 232 at 235-236159 ALR 260 at 264-265, per Hayne J.

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170. For present purposes, it is necessary to mention only three developments in the transformation of the relationship between the United Kingdom and Australia. The first is the *Statute of Westminster 1931 Imp* and the *Statute of Westminster Adoption Act 1942 Cth*. The effect of those Acts, as Gibbs J observed in *Southern Centre of Theosophy Inc v South Australia* [201] , was that "the Commonwealth finally cast off its colonial status".

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(201) (1979) 145 CLR 246 at 257.

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171. The second development to which reference should be made is the process by which British subjects became citizens of the independent nation states into which the British Empire was transformed. Part of that process is to be seen in the steps whereby, in the United Kingdom, the status of a British subject was transformed, first, into that of a "citizen of the United Kingdom and Colonies" and later "British citizen" [202] . In this country, there was a similar process. The concept of citizenship was first introduced by the *Nationality and Citizenship Act 1948 Cth* [203] , later known as the *Citizenship Act 1948 Cth* [204] and currently called the *Australian Citizenship Act 1948 Cth* [205] . Initially, by s 7(1) of that Act, however, an Australian citizen was also a British subject. In 1969, the Act was amended so that an Australian citizen was described as having the status of a British subject [206] . Finally, by amendment in 1984 (taking effect from 1 May 1987) all reference to the "status of British subject" was removed in favour of the status of Australian citizen [207] . That process, both in this country and the United Kingdom, renders the constitutional references to "a subject of the Queen" of little or no significance in determining whether the United Kingdom is now a foreign power.

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(202) At common law, and pursuant to s 1(1)(a) of the *British Nationality and Status of Aliens Act 1914 UK*, any person born within the dominions (including Australia) of the Crown of the United Kingdom had the status of a "natural-born British subject". Section 1 of the *British Nationality Act 1948 UK* created two categories of British subject: those who were "citizen[s] of the United Kingdom and Colonies" and those who were citizens of any country mentioned in s 1(3), including, relevantly, Australia. The status of British subject was, for the purposes of British law, withdrawn from Australian citizens by the *British Nationality Act 1981 UK*, s 11(1) of which provided that only persons who were "citizen[s] of the United Kingdom and Colonies" with a right of abode in the United Kingdom would be granted the status of "British citizen".

(203) The *Nationality and Citizenship Act 1948 Cth* provided for the acquisition of Australian citizenship after the commencement of the Act by birth (s 10), by descent (s 11), by registration upon application by a person who was a citizen of certain specified Commonwealth countries, including the United Kingdom (ss 12-13), or by naturalisation (ss 14-16). It also contained transitional provisions, which provided for the acquisition of Australian citizenship by certain persons born prior to the commencement of the Act (s 25).
(204) *Citizenship Act 1969 Cth*, s 1(3).
(205) *Australian Citizenship Act 1973 Cth*, s 1(3).
(206) *Citizenship Act 1969 Cth*, s 6.
(207) *Australian Citizenship Amendment Act 1984 Cth*, ss 7-12.

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172. The final matter which should be mentioned is the enactment of the *Australia Act 1986 Cth* and the *Australia Act 1986 UK* (together referred to as "the *Australia Acts* "), the long title of the former of which is:

> An Act to bring constitutional arrangements affecting the Commonwealth and the States into conformity with the status of the Commonwealth of Australia as a sovereign, independent and federal nation.

By s 1 of each of the *Australia Acts*, it is provided that:

> No Act of the Parliament of the United Kingdom passed after the commencement of this Act shall extend, or be deemed to extend, to the Commonwealth, to a State or to a Territory as part of the law of the Commonwealth, of the State or of the Territory.

By other provisions of the *Australia Acts*, the States are authorised to legislate repugnantly to the laws of the United Kingdom [208] and the responsibility of the United Kingdom government in relation to the States was terminated [209] , as were appeals to the Privy Council [210] .

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(208) Section 3 of the *Australia Act 1986 Cth*, s 3 of the *Australia Act 1986 UK*.
(209) Section 10 of the *Australia Act 1986 Cth*, s 10 of the *Australia Act 1986 UK*.
(210) Section 11 of the *Australia Act 1986 Cth*, s 11 of the *Australia Act 1986 UK*.

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173. At the very latest, the Commonwealth of Australia was transformed into a sovereign, independent nation with the enactment of the *Australia Acts*. The consequence of that transformation is that the United Kingdom is now a foreign power for the purposes of s 44(i) of the *Constitution*.

174. The remaining issue to be considered in relation to Mrs Hill's ability to be chosen as a Senator is whether, as was contended on her behalf, her acquisition of Australian citizenship was sufficient to bring her British citizenship to an end. It is not in doubt that it did not have that effect under the law of the United Kingdom. However, it was contended that that was its effect in Australian law.

175. It is clear that an Australian court may, in some circumstances, refuse to apply the law of another country in determining whether a person is or is not a citizen of that country. Thus, as was pointed out in *Sykes v Cleary [No 2]* [211] , it may refuse to "apply a foreign citizenship law which does not conform with established international norms or which involves gross violation of human rights". However, the question whether a person is a citizen of a foreign country is, as a general rule, answered by reference to the law of that country. Moreover, the question whether a person has or has not renounced

foreign citizenship is to be determined in a context in which the possibility of dual citizenship is recognised by the common law [212] , and, as a matter of necessary implication, is recognised by the *Australian Citizenship Act 1948 Cth* in the case of naturalised Australians [213] .

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(211) (1992) 176 CLR 77 at 135-136, per Gaudron J referring to *Oppenheimer v Cattermole* [1976] AC 249 at 277-278, per Lord Cross of Chelsea; at 282-283, per Lord Salmon; *R v Home Secretary; Ex parte L* [1945] KB 7 at 10, per Viscount Caldecote CJ (with whom Humphreys and Wrottesley JJ agreed); *Lowenthal v Attorney-General* [1948] 1 All ER 295 at 299, per Romer J.

(212) See with respect to the common law of England, *Oppenheimer v Cattermole* [1976] AC 249 at 263-264, per Lord Hailsham of St Marylebone; at 278-279, per Lord Cross of Chelsea; *Kramer v Attorney-General* [1923] AC 528 at 537, per Viscount Cave LC (with whom Lord Shaw of Dunfermline agreed).

(213) The Act, however, provides for the loss of citizenship if an Australian citizen takes out foreign citizenship, s 17(1).

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176. Given that a naturalised Australian may have dual citizenship, it is necessary that he or she take some step to renounce his or her former citizenship before he or she can be treated under Australian law as having renounced it. At least that is so if foreign citizenship is not automatically brought to an end by the law of the country concerned. Once it is accepted that a person must take some step to renounce his or her foreign citizenship, it follows, as was held in *Sykes v Cleary [No 2]* [214] , that it is necessary that he or she take reasonable steps to do so. Mrs Hill took no such steps prior to her nomination for election to the Senate. It follows that, at that time, she was still a British citizen. Accordingly, question (b) in each of the cases stated for the consideration of the Full Court should be answered "Yes" and question (c) in each of the cases stated should be answered "No".

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(214) (1992) 176 CLR 77 at 107, per Mason CJ, Toohey and McHugh JJ; at 113, per Brennan J; at 128, per Deane J; at 131, per Dawson J; at 139, per Gaudron J.

Relief

177. Three questions are asked with respect to relief in the cases stated. They are:

> (d) If no to (c), was the Election void absolutely?
>
> (e) If no to (d), should the [Australian Electoral Commission] conduct a recount of the ballot papers cast for the Election for the purpose of determining the candidate entitled to be declared elected to the place for which the first respondent was returned?
>
> (f) Save for those otherwise dealt with by order, who should pay the costs of the Stated Case[s] and of the hearing of the Stated Case[s] before the Full High Court?

178. In In re Wood [215] , this Court considered whether, in the case of the return of a candidate who lacked the qualifications to be elected, the Senate election in question should be declared absolutely void and a new election ordered, on the one hand, or a

recount ordered on the other. In that case it was held that, "no effect [could] be given for the purpose of the poll to the placing of a figure against the name of a candidate who [was] not qualified to be chosen", but nonetheless, "[t]hat [was] no reason for disregarding the other indications of the voter's preference as invalid" [216] . In the result, a recount was ordered, the recount to be conducted in the same manner as required by s 273(27) of the Act where a vote is cast for a deceased candidate. That was because, "the true legal intent of the voters [could thereby] be ascertained" [217] . So it is in this case. That being so, there is no basis for declaring the election absolutely void. Accordingly question (d) in each of the cases stated should be answered "No".

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(215) (1988) 167 CLR 145.
(216) In re Wood (1988) 167 CLR 145 at 165-166.
(217) In re Wood (1988) 167 CLR 145 at 166.

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179. Although nothing was put to suggest that the true intention of the voters cannot be ascertained by a recount, it emerged at the hearing that there was a real question as to the manner in which the recount should be conducted. As formulated, question (e) posits that a recount should be conducted only for the third Senate position. However, it is possible that a recount of all votes might have consequences for the persons returned as the fourth, fifth and sixth Senators. Those persons were not represented at the hearing. It may be that that was because, having regard to the terms of question (e), they were of the view that their positions would not be affected by a recount. In the circumstances, the appropriate course is to answer question (e) in each of the cases stated "Inappropriate to answer", leaving the issue to be determined by a single Justice after hearing such submissions, if any, as the persons returned as the fourth, fifth and sixth Senators wish to make.

180. So far as concerns the question of costs, the argument before the Full Court was directed, in the main, to the provisions of the Act and the constitutional issues thereby raised. In the circumstances, the costs of the petitioner and the first respondent in each of the cases stated should be paid by the Commonwealth. The Australian Electoral Commission, the second respondent in each matter, should bear its own costs.

Answers to questions

181. The questions in each stated case should be answered as follows: Question (a): Does s 354 of the Act validly confer upon the Court of Disputed Returns jurisdiction to determine the issues raised in the Petition? Answer: Yes. Question (b): Was the first respondent at the date of her nomination a subject or citizen of a foreign power within the meaning of s 44(i) of the *Constitution*? Answer: Yes. Question (c): Was the first respondent duly elected at the Election? Answer: No. Question (d): If no to (c), was the Election void absolutely? Answer: No. Question (e): If no to (d), should the second respondent conduct a recount of the ballot papers cast for the Election for the purpose of determining the candidate entitled to be declared elected to the place for which the first respondent was returned? Answer: Inappropriate to answer. Question (f): Save for those otherwise dealt with by order, who should pay the costs of the Stated Case and of the hearing of the Stated Case before the Full High Court? Answer: The Commonwealth should pay the costs of the petitioner and the first respondent. The second respondent should bear its own costs.

MCHUGH J.

182. Gleeson CJ and Callinan J, sitting as judges of the Court of Disputed Returns, have each stated a case to the Full Court of this Court asking the Court to answer six

questions arising out of petitions filed in the Court of Disputed Returns. Each petition challenges the declaration of the Australian Electoral Officer for Queensland, made on 23 October 1998 pursuant to s 283 of the *Commonwealth Electoral Act 1918 Cth* (the Electoral Act), that Mrs Heather Hill was duly elected as a Senator for the State of Queensland. The petitions claim that she was not capable of being chosen as a member of the Senate at the election held on 3 October 1998. They assert that at the time of nomination Mrs Hill was a British subject or citizen and was therefore a citizen of a foreign power within the meaning of s 44(i) of the *Constitution* and constitutionally incapable of being chosen or sitting as a Senator of the Parliament of the Commonwealth.

183. Mrs Hill concedes that she was a British citizen at the time of her nomination for election to the Senate but she denies that it follows that she was incapable of being chosen or sitting as a Senator. In addition, she contends that the Court of Disputed Returns had no jurisdiction to determine whether she was qualified to be chosen as a Senator. She contends that, upon the proper construction of the Electoral Act, the Parliament of the Commonwealth has not referred issues concerning the qualifications of members to the Court of Disputed Returns and that, if such issues have been referred, it is an invalid attempt to confer non-judicial power on the Court.

Jurisdiction

184. In my opinion, the Electoral Act does not purport to give the Court of Disputed Returns jurisdiction to hear an election petition which raises the bare question whether a member of the federal Parliament was constitutionally qualified to stand for election. That question may arise on a referral by one of the Houses of Parliament to the Court of Disputed Returns after a person has been elected. It may also arise incidentally in determining whether an election should be set aside on the ground that the elected person has committed an "illegal practice" [218] by falsely declaring that he or she was "qualified under the Constitution and the laws of the Commonwealth to be elected as a Senator or a member of the House of Representatives" [219] . But in my opinion the bare question of a member's constitutional qualification cannot arise on an election petition presented under Div 1 of Pt XXII of the Electoral Act.

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(218) Electoral Act, s 352(1).
(219) Electoral Act, s 170(1)(b)(i).

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185. The petition filed by Mr Sue does not allege that Mrs Hill had engaged in any illegal practice in connection with the election. Mr Sharples' petition did make such an allegation. But in this Court he withdrew it [220] . That being so, the Court of Disputed Returns had no jurisdiction to decide the question of Mrs Hill's qualification for election to the Senate.

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(220) He said: (Transcript of proceedings; 13 May 1999, at p 285) "Probably, to be fair, I do not suggest at all that the respondent — and I say it publicly — did anything illegal. I do not suggest that she attempted to misrepresent deliberately, and I retract those words out of my petition but, nevertheless, her nomination form which was tendered to the Australian Electoral Commission, the Queensland electoral officer, which is in the stated case — it is page 20. Clearly, she signed that and ticked the appropriate boxes and made those declarations."

The Court of Disputed Returns

186. Under the Westminster system of government, the houses of parliament have inherent jurisdiction to determine whether their members are qualified to be or were duly elected as members of the parliament. That right was established as the result of the proceedings in *Goodwin v Fortescue* [221] after King James I had issued a proclamation which ordered, inter alia, that no bankrupt or outlaw should be elected to Parliament and that election returns should be sent to Chancery [222] . The King claimed that the "house ought not to meddle with Returns, being all made into the Chancery, and are to be corrected or reformed by that court only" [223] . Although the House agreed to a new election in that case, its privilege to decide the matter was thereafter not disputed [224] . Nor was any right in the Chancery further asserted [225] .

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(221) (1604) 2 St Tri 91.
(222) The basis of the King's claim was well founded. Sir William Anson (Law and Custom of the Constitution, 4th ed (1909), vol 1, p 168) has pointed out that: "[o]riginally the writ addressed to the sheriff was returnable to Parliament: an Act of the 7th Henry IV provided that it should be returned to Chancery; if the return was disputed the matter was decided by the King, assisted by the Lords, though an Act of 1410 gave jurisdiction in the matter to the Judges of Assize." (Footnote omitted.)
(223) *Goodwin v Fortescue* (1604) 2 StTri 91 at 98.
(224) Holdsworth, A History of English Law, 2nd ed (1937), vol 6, p 96.
(225) Anson, Law and Custom of the Constitution, 4th ed (1909), vol 1, p 170.

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187. The privileges of the Senate and the House of Representatives to decide the validity of disputed elections to or the qualification of members of those Houses are recognised in s 47 of the *Constitution* which provides:

> Until the Parliament otherwise provides, any question respecting the qualification of a senator or of a member of the House of Representatives, or respecting a vacancy in either House of the Parliament, and any question of a disputed election to either House, shall be determined by the House in which the question arises.

188. Pursuant to the powers conferred by the opening words of s 47 and by s 51(xxxvi) and (xxxix) of the *Constitution* [226] , the Parliament has enacted the Electoral Act which regulates the holding of elections for the Senate and the House of Representatives and provides for a Court of Disputed Returns to determine challenges to the election of members of those Houses. It also provides for the Senate and the House of Representatives to refer any question respecting the qualification of a Senator or a member or respecting a vacancy to the Court of Disputed Returns.

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(226) Which provide: "The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to: (xxxvi) matters in respect of which this Constitution makes provision until the Parliament otherwise provides; (xxxix) matters incidental to the execution of any power vested by this Constitution in the Parliament or in either House thereof, or in the Government of the Commonwealth, or in the Federal Judicature, or in any department or officer of the Commonwealth."

Division 1 of Pt XXII

189. Relevantly, Div 1 of Pt XXII of the Electoral Act provides:

353 Method of disputing elections

(1) The validity of any election or return may be disputed by petition addressed to the Court of Disputed Returns and not otherwise.

354 The Court of Disputed Returns

(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 or to the Supreme Court of the State or Territory in which the election was held or return made.

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

355 Requisites of petition

Subject to section 357, every petition disputing an election or return in this Part called the petition shall:

(a) set out the facts relied on to invalidate the election or return;

(aa) subject to subsection 358(2), set out those facts with sufficient particularity to identify the specific matter or matters on which the petitioner relies as justifying the grant of relief;

(b) contain a prayer asking for the relief the petitioner claims to be entitled to;

(c) be signed by a candidate at the election in dispute or by a person who was qualified to vote thereat, or, in the case of the choice or the appointment of a person to hold the place of a Senator under section 15 of the *Constitution* or section 44 of this Act, by a person qualified to vote at Senate elections in the relevant State or Territory at the date of the choice or appointment;

358 No proceedings unless requirements complied with

(1) Subject to subsection (2), no proceedings shall be had on the petition unless the requirements of sections 355, 356 and 357 are complied with.

360 Powers of Court

(1) The Court of Disputed Returns shall sit as an open Court and its powers shall include the following:

(v) To declare that any person who was returned as elected was not duty elected;

(vi) To declare any candidate duly elected who was not returned as elected;

(vii) To declare any election absolutely void;

(viii) To dismiss or uphold the petition in whole or in part;

(ix) To award costs;

(2) The Court may exercise all or any of its powers under this section on such grounds as the Court in its discretion thinks just and sufficient.

(3) Without limiting the powers conferred by this section, it is hereby declared that the power of the Court to declare that any person who was returned as elected was not duly elected, or to declare an election absolutely void, may be exercised on the ground that illegal practices were committed in connexion with the election.

(4) The power of the Court of Disputed Returns under paragraph (1)(ix) to award costs includes the power to order costs to be paid by the Commonwealth where the Court considers it appropriate to do so.

363A Court must make its decision quickly

The Court of Disputed Returns must make its decision on a petition as quickly as is reasonable in the circumstances.

364 Real justice to be observed

The Court shall be guided by the substantial merits and good conscience of each case without regard to legal forms or technicalities, or whether the evidence before it is in accordance with the law of evidence or not.

368 Decisions to be final

All decisions of the Court shall be final and conclusive and without appeal, and shall not be questioned in any way.

370 Representation of parties before Court

A party to the petition may appear in person or be represented by counsel or solicitor.

371 Costs

The Court may award costs against an unsuccessful party to the petition.

374 Effect of decision

Effect shall be given to any decision of the Court as follows:

(i) If any person returned is declared not to have been duly elected, the person shall cease to be a Senator or Member of the House of Representatives;

(ii) If any person not returned is declared to have been duly elected, the person may take his or her seat accordingly;

(iii) If any election is declared absolutely void a new election shall be held.

Division 2 of Pt XXII of the Electoral Act

190. Division 2 of Pt XXII of the Electoral Act relevantly declares:

376 Reference of question as to qualification or vacancy

Any question respecting the qualifications of a Senator or of a Member of the House of Representatives or respecting a vacancy in either House of the Parliament may be referred by resolution to the Court of Disputed Returns by the House in which the question arises and the Court of Disputed Returns shall thereupon have jurisdiction to hear and determine the question.

379 Powers of Court

On the hearing of any reference under this Part the Court of Disputed Returns shall sit as an open Court and shall have the powers conferred by section 360 so far as they are applicable, and in addition thereto shall have power:

(a) to declare that any person was not qualified to be a Senator or a Member of the House of Representatives;

(b) to declare that any person was not capable of being chosen or of sitting as a Senator or a Member of the House of Representatives; and

(c) to declare that there is a vacancy in the Senate or in the House of Representatives.

380 Order to be sent to House affected

After the hearing and determination of any reference under this Part the Chief Executive and Principal Registrar of the High Court shall forthwith forward to the Clerk of the House by which the question has been referred a copy of the order or declaration of the Court of Disputed Returns.

381 Application of certain sections

The provisions of sections 364, 368, 370, 371, 373, 374 and 375 shall apply so far as applicable to proceedings on a reference to the Court of Disputed Returns under this Part.

191. On its face, Pt XXII appears to treat questions concerning disputed returns and the qualifications of Senators and members of the House of Representatives as separate issues. In theory, there is no reason why issues concerning the qualification of the person elected could not be raised on a petition challenging the return of that person as duly elected. Certainly, the House of Commons decided such issues in cases of disputed returns [227] . Nevertheless, disputed returns are more concerned with the effect of conduct on voting than the qualifications of candidates. Thus, disputed returns have tended to deal with conduct affecting the procedures of the election such as bribery, treating, undue influence, impersonation of voters and illegal practices. Issues of qualification, on the other hand, although they could be, and were, raised on petitions to the House of Commons to set aside an election, can arise after the election and during the life of the Parliament as well as at election time.

(227) Orme, A Practical Digest of the Election Laws (1796), p 278.

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192. Section 47 of the *Constitution* recognises the distinction between disputed returns and the qualifications of candidates by referring separately to "qualification", "vacancy" and "disputed election". Indeed, during the constitutional debates at the Adelaide Convention, Mr Wise said [228] :

> [T]here are two questions involved here, which ought to be kept distinct. There is the qualification of a member or the question as to vacancies on the one side, and the question of a disputed return, which is a matter of altogether a different character. I apprehend that only questions of disputed returns should be dealt with by the Supreme Court.

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(228) Official Report of the National Australasian Convention Debates (Adelaide), 15 April 1897, p 681.

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193. Later, Mr Edmund Barton moved to insert a new clause to follow cl 48 of the Commonwealth of Australia Bill [229] . The proposed new clause provided that "[u]ntil the Parliament otherwise provides all questions of disputed elections arising in the Senate or House of Representatives shall be determined by a Court exercising federal jurisdiction" [230] . Eventually, however, s 47 empowered the Parliament to legislate for some other body or court to determine questions concerning qualifications and vacancies as well as disputed returns.

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(229) As the document which was to become the Constitution was then known.
(230) Official Report of the National Australasian Convention Debates (Adelaide), 22 April 1897, p 1150.

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194. The question which then arises is whether, in enacting Div 1 and Div 2, Parliament intended Div 2 to be the only source of power for the Court of Disputed Returns to decide issues concerning the qualifications of members.

The history of the Electoral Act

195. The history of the Electoral Act is not conclusive. But in my opinion it does point against Div 1 giving the Court jurisdiction to hear a petition alleging an election was void because the person elected was not constitutionally qualified.

196. Part XVI of the *Commonwealth Electoral Act 1902 Cth* set up a Court of Disputed Returns (s 193) with power to declare that any person returned was not duly elected (s 197(iv)) or that any person duly elected who was not returned was in fact elected (s 197(v)). That Act made no reference at all to questions concerning qualifications or vacancies. The *Commonwealth Electoral Act 1905 Cth* also made no reference to qualifications or vacancies. But it did amend the 1902 Act by adding s 198A which empowered the Court to set aside an election where "a candidate has committed or has attempted to commit bribery or undue influence". That tends to confirm that the 1902 Act gave the Court jurisdiction with respect to matters affecting voting rather than the constitutional qualifications of candidates.

197. Questions concerning qualifications and vacancies were first specifically introduced into federal law by the *Disputed Elections and Qualifications Act 1907 Cth*. Part XVI of the 1902 Act was amended inter alia by the adoption of a Div 1 entitled "Disputed Elections and Returns" and a Div 2 entitled "Qualifications and Vacancies". Like Div 2 of Pt XXII of the Electoral Act, Div 2 of Pt XVI of the 1902 Act provided that any question respecting the qualification of a Senator or member might be referred to the Court of Disputed Returns by a resolution of the relevant House.

198. Senator Best moved the Second Reading of the 1907 Bill when it was in the Senate. After referring to the disqualifications contained in s 44 of the *Constitution*, he said [231] :

> The spirit of this section is that a candidate for either House *must be discharged of these qualifications at the time his election takes place, and in the case of any question arising with respect to any of these qualifications or disqualifications*, we provide that the Senate or the House of Representatives shall have power, by resolution, to refer the matter to the High Court. Honorable senators may ask why such cases should not automatically be referred, and why we propose to reserve a discretion to the Houses of the Parliament to refer them. The reason is that there are many cases where, for instance, a man is an undischarged bankrupt, or has been guilty of a crime, or holds an office of profit — obvious cases involving no possible question of law — and it would be absurd to send such cases to the High Court for decision, as they would depend on facts easily ascertained. (Emphasis added.)

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(231) Australia, Senate, Parliamentary Debates (Hansard); 1 November 1907, p 5471.

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199. This passage strongly suggests that the intention of the Parliament was that questions of constitutional qualification for the Parliament — including those existing at election time — were to be dealt with, and could only be dealt with, by the Court of Disputed Returns after a reference from the House concerned.

200. This conclusion is further supported by the history of the litigation in this Court concerning Senator Vardon. In *Blundell v Vardon* [232] , Barton J, sitting as the Court of Disputed Returns, declared the election of Senator Vardon as a Senator for South Australia absolutely void. Purporting to act under the then s 15 of the *Constitution*, the Parliament of South Australia nominated another person to fill the "vacancy". Mr Vardon then applied for a writ of mandamus directing the Governor of the State of South Australia to hold a new election for a Senator for that State. This Court held that mandamus would not lie to the Governor of a State to compel him to do an act in his capacity as Governor [233] . Mr Vardon then petitioned the Senate to declare that the person nominated had not been duly chosen or elected as a Senator. His petition was referred to this Court under the *Disputed Elections and Qualifications Act 1907*. The Court held in *Vardon v O'Loghlin* [234] that the appointment of the person nominated by the Parliament to fill the "vacancy" was null and void because the vacancy existing after the declaration of the Court in *Blundell v Vardon* [235] was not one which fell within the then s 15 of the *Constitution*.

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(232) (1907) 4 CLR 1463.
(233) *R v Governor of South Australia* (1907) 4 CLR 1497
(234) (1907) 5 CLR 201.
(235) (1907) 4 CLR 1463.

201. The 1907 Act had added a new paragraph to s 192 of the 1902 Act which provided:

> The choice of a person to hold the place of a Senator by the Houses of Parliament of a State or the appointment of a person to hold the place of a Senator by the Governor of a State under section fifteen of the Constitution shall be deemed to be an election within the meaning of this section.

That section is replicated in s 353(2) of the Electoral Act. Sections 353(3) and (4) deal with the replacement of Senators for the Australian Capital Territory and the Northern Territory.

202. Thus in the case of appointments arising under s 15 of the *Constitution* — which, of course, involve the issue of qualification to be a member of the Senate — the Parliament expressly decided in 1907 that an appointment under s 15 is to be deemed to be an election and therefore the subject of a petition under Div 1 of Pt XXII.

203. Given the history of the Vardon litigation, the terms of s 192 of the 1902 Act and its replication in s 353(2) of the Electoral Act, and the terms of Div 2, it is hard to accept that sub silentio the Parliament intended Div 1 to deal with the issue of constitutional qualifications except in the case of appointments under s 15 of the *Constitution*. If s 44 qualifications can be made an issue on a Div 1 petition, why did the Parliament not specifically refer to them in Div 1? After all, it refers to them in Div 2 and inferentially to s 15 qualifications in Div 1. To that formidable question, the petitioners and the Commonwealth intervening proferred no answer or, at all events, no persuasive answer.

204. The history of the legislation, therefore, suggests that until 1907 the Parliament kept to itself the privilege of dealing with the qualification of members and that, when, in that year, it provided for the Court of Disputed Returns to have jurisdiction over qualifications, it was to be at the discretion and on the motion of the House concerned, except for appointments under s 15 of the *Constitution*.

205. The constitutional distinction between disputed returns and qualifications and vacancies was, as we have seen, continued in the Electoral Act. When examined, the terms of the Electoral Act confirm what the legislative history suggests — viz that the Court of Disputed Returns does not have jurisdiction under Div 1 to hear an election petition which raises the bare question whether a person elected to the federal Parliament was constitutionally qualified to be chosen by the electors.

The grounds of a petition

206. Division 1 of Pt XXII of the Electoral Act does not specify the grounds upon which an election can be set aside. Section 355(a) merely requires the petition to "set out the facts relied on to invalidate the election or return" without identifying what facts are sufficient to constitute invalidity. However, s 362 provides:

> (1) If the Court of Disputed Returns finds that a successful candidate has committed or has attempted to commit bribery or undue influence, the election of the candidate shall be declared void.
>
> (2) No finding by the Court of Disputed Returns shall bar or prejudice any prosecution for any illegal practice.
>
> (3) The Court of Disputed Returns shall not declare that any person returned as elected was not duly elected, or declare any election void:
>
> (a) on the ground of any illegal practice committed by any person other than the candidate and without the knowledge or authority of

the candidate; or

(b) on the ground of any illegal practice other than bribery or corruption or attempted bribery or corruption;

unless the Court is satisfied that the result of the election was likely to be affected, and that it is just that the candidate should be declared not to be duly elected or that the election should be declared void.

(4) The Court of Disputed Returns must not declare that any person returned as elected was not duly elected, or declare any election void, on the ground that someone has contravened the *Broadcasting Services Act 1992* or the *Radiocommunications Act 1992*.

207. Section 352 defines the terms "bribery", "corruption", "illegal practice" and "undue influence" as follows:

(1) In this Part:

bribery or *corruption* means a contravention of section 326.

illegal practice means a contravention of this Act or the regulations.

undue influence means a contravention of section 327 of this Act or section 28 of the *Crimes Act 1914*.

(2) For the purposes of this Part, a person who aids, abets, counsels or procures, or by act or omission is in any way directly or indirectly knowingly concerned in, or party to, the contravention of a provision of this Act, the *Crimes Act 1914* or the regulations under this Act shall be deemed to have contravened that provision.

208. In general terms, s 326 makes it an offence for a person to ask for or offer or obtain or receive any property or benefit on an understanding that it will influence or affect the voting or support or candidature of a person. Section 327 makes it an offence to hinder or interfere with the free exercise or performance of a person's political right or duty that is relevant to an election under the Electoral Act or to discriminate against a person in respect of various matters for donating to a political party or candidate.

209. Given the terms of s 362, it seems distinctly unlikely that a petition could rely on any ground other than breach of the Electoral Act or regulations or bribery, corruption or undue influence as defined by the Electoral Act. That was the view of Gaudron J in *Hudson v Lee* [236] where her Honour said [237] :

> Although there is no express statement in the Act to that effect, s 362, in my view, provides exhaustively as to the general grounds on which an election may be invalidated or declared void. There are three matters which provide the basis for my view in that regard. First, the Act makes detailed and comprehensive provision as to the conduct of elections. Second, it allows for elections and returns to be disputed on the ground of "illegal practice" which is defined to mean "a contravention of [the] Act or the regulations" (which includes bribery or corruption as defined in the Act, and undue influence, to the extent that s 327 of the Act rather than s 28 of the *Crimes Act* is involved). The detail of the Act's provisions and the width of the definition of "illegal practice", standing alone, are powerful indications of the exhaustive nature of s 362. In that context, the third matter is, in my view, conclusive, that matter being that s 362 provides precisely as to the manner in which the power to declare an election invalid or void is to be exercised depending on the precise nature of the finding with respect to bribery or corruption, undue influence and illegal

practice. It would be incongruous if the Court's powers were entirely at large with respect to matters extraneous to the Act.

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(236) (1993) 177 CLR 627.
(237) *Hudson v Lee* (1993) 177 CLR 627 at 631In *Robertson v Australian Electoral Commission* (1993) 67 ALJR 818 at 819116 ALR 407 at 409, Toohey J said that the view expressed by Gaudron J was persuasive but found it unnecessary "to express a concluded view on the matter".

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210. In *Webster v Deahm* [238] , which was decided four weeks after *Hudson v Lee* [239] , however, her Honour left open the question whether in some situations an election could be set aside on a ground that was not covered by the Act. After saying that the only matter that could invalidate an election or return was one raising a matter by which "the election was likely to be affected", her Honour said [240] :

> In general terms, and leaving aside the situation in which a person was prevented from voting or in which a candidate was not eligible to stand (neither of which is claimed in this case), that can only be satisfied by an assertion that goes to or bears upon the casting or counting of votes.

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(238) (1993) 67 ALJR 781; 116 ALR 223.
(239) (1993) 177 CLR 627.
(240) *Webster v Deahm* (1993) 67 ALJR 781 at 782116 ALR 223 at 225.

Constitutional disqualification as a ground for setting aside an election

211. In *Sykes v Cleary* [241] , Dawson J had taken a different view of the Electoral Act. His Honour held that the Court of Disputed Returns had jurisdiction to hear a petition alleging that the election of Mr Cleary was void on the ground that he was disqualified from standing as a candidate by reason of s 44 of the *Constitution*. His Honour said [242] :

> The jurisdiction conferred on this Court under Div 1, Pt XXII of the *Commonwealth Electoral Act* is the equivalent of that conferred by the *Parliamentary Elections Act* and the jurisdiction retained by the House of Commons to consider questions concerning the qualifications of its own members corresponds with that which might be exercised by this Court upon a referral under Div 2, Pt XXII of the Commonwealth Act.

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(241) (1992) 66 ALJR 577; 107 ALR 577.
(242) *Sykes v Cleary* (1992) 66 ALJR 577 at 579107 ALR 577 at 580.

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212. United Kingdom cases on electoral petitions give apparent support to the view that the constitutional disqualification of an elected member is a ground for setting aside the

election of a member to the Senate or the House of Representatives. Since 1604, the House of Commons has claimed and exercised the privilege of determining whether a person was qualified to be elected to the House. The election of an ineligible person was void. Ordinarily, the House would order a new election unless the ineligibility of the person elected was known to the electorate in which case the person getting the next highest number of votes would be elected. Writing in 1820, Male [243] contended:

> If the election is made of a person or persons ineligible, such election is void either in toto, or of one only, according as the ineligibility applies to all, or one only. Where that ineligibility is clear, and pointed out to the electors at the poll, it has been held that the votes given to such ineligible candidate, after notice, are thrown away, and a competitor, though chosen by the smaller number of electors, has, in such case, been held duly elected.

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(243) Male, A Treatise on the Law and Practice of Elections, 2nd ed (1820), p 336.

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213. By the *Parliamentary Elections Act 1868 UK*, however, the jurisdiction to decide disputed elections was taken from the House of Commons and given to a tribunal consisting of a judge of the "Superior Courts of Common Law at Westminster or Dublin" [10] . That legislation, like the Electoral Act, did not specify the grounds upon which a petition could be brought. Given the parliamentary precedents, it is unsurprising that, on a number of occasions, the judges of the English and Irish courts determined petitions under the *Parliamentary Elections Act 1868* which were brought upon the ground that the elected candidate was not qualified to be elected. Thus, in County of Tipperary [11] the Irish Court of Common Pleas, on a case stated by Keogh J, upheld a petition which claimed that the elected member was disqualified as a candidate because he was an alien and a convicted felon who had not undergone his sentence [12] . In Borough of Cheltenham [13] , Pollock B and Hawkins J heard but rejected a petition claiming that the elected member was an alien and disqualified from being elected [14] . Similarly, in Western Division of the Borough of Belfast [15] , Dowse B and O'Brien J heard but rejected a petition that the elected member was disqualified because he had already been elected and returned as a member for another Division. More recently, English and Irish tribunals, acting pursuant to the *Representation of the People Act 1918 UK*, have upheld petitions claiming that the elected member was disqualified from standing [16] . The United Kingdom cases, therefore, appear to support the view that, because the Electoral Act does not specify the grounds of a petition, the constitutional qualification for election to the Parliament can be a ground for setting aside the election of a member. However, when the statutory context of the United Kingdom cases is examined, it is clear that these cases have no application to the Electoral Act.

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(244) *Parliamentary Elections Act 1868*, s 11.
(245) (1875) 3 O'M & H 19.
(246) County of Tipperary (1875) 3 O'M & H 19 at 43-44.
(247) (1880) 3 O'M & H 86.
(248) The petitioner contended that an Act of Parliament, which recited that the elected member had all the rights of a natural born British subject but that of being a member of the Privy Council or Parliament, and then enacted that the member should have all the rights which he would have enjoyed if born in the United Kingdom, did not expressly enact that he could be a member of Parliament. Accordingly, the petitioner claimed that the legislation in question did not overcome the effect of 12 & 13 Will III, c 2, s 3 which prohibited a person born out of the United Kingdom of non-English parents being a member of Parliament although he or she was naturalised.
(249) (1886) 4 O'M & H 105.

(250) *In re Mid-Ulster Election Petition: Beattie v Mitchell* [1958] NI 143 *In re Fermanagh and South Tyrone Election Petition: Grosvenor v Clarke* [1958] NI 151 In re Parliamentary Election for Bristol South East [1964] 2 QB 257.

The United Kingdom election cases are not authoritative in Australia

214. Section 50 of the *Parliamentary Elections Act 1868* declared that "after the next Dissolution of Parliament no Election or Return to Parliament shall be questioned except in accordance with the Provisions of this Act". However, as Keogh J held at first instance in County of Tipperary [17] , "the House of Commons has [not] parted with its inherent right to declare who are eligible and who are ineligible to sit in that House, to expel those from amongst them whom they do not think fit to be there, and to issue new writs to fill the vacancies so created". Nevertheless, s 50 took away the jurisdiction of the House of Commons to determine disputed returns, a jurisdiction which it had exercised since 1604 [18] . In those circumstances, it is unsurprising that the tribunals set up under the United Kingdom legislation should entertain petitions seeking to set aside a person's election on the ground that he or she was disqualified from standing for election. The *Parliamentary Elections Act 1868* substituted the tribunals for the Select Committees of the House of Commons which had exercised the House's jurisdiction since the enactment of the *Grenville Act UK* [19] in 1770. Those Committees had determined questions concerning the status or qualifications of members of the House of Commons. Dawson J was therefore right in *Sykes v Cleary* [20] when he said that "the jurisdiction retained by the House of Commons to consider questions concerning the qualifications of its own members corresponds with that which might be exercised by this Court upon a referral under Div 2, Pt XXII of the Commonwealth Act". But it does not follow that the position under the Electoral Act can be equated with the position in the United Kingdom either before or after the enactment of the *Parliamentary Elections Act 1868*. The statutory context in Australia is different from that in the United Kingdom.

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(251) (1875) 3 O'M & H 19 at 36.
(252) *Goodwin v Fortescue* (1604) 2 StTr 91.
(253) 10 Geo III, c 16.
(254) (1992) 66 ALJR 577 at 579; 107 ALR 577 at 580.

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215. The *Parliamentary Elections Act 1868* did not specify the grounds upon which a petition could be brought although corrupt practices could found a petition. That term was defined to mean "Bribery, Treating, and undue Influence, or any of such Offences, as defined by Act of Parliament, or recognized by the Common Law of Parliament" [21] . Nor does the Electoral Act specify the grounds of a petition, although it recognises that a petition can be brought, and an election avoided, for breach of the Electoral Act or regulations or for bribery, corruption or undue influence as defined by the Electoral Act. Unlike the Electoral Act, the *Parliamentary Elections Act 1868* did not provide for the House of Commons to refer questions concerning the qualifications of a member to the tribunal.

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(255) *Parliamentary Elections Act 1868*, s 3.

216. In so far as the person returned as a member has breached the qualifications for nomination *specified in* s 163 of the Electoral Act, that breach can ground a petition alleging an "illegal practice". However, compliance with the requirements of s 44 of the *Constitution* is not one of the qualifications specified in s 163. Instead, s 170 states that a nomination is not valid unless in the nomination paper the person nominated declares inter alia that he or she "is qualified under the Constitution and the laws of the Commonwealth to be elected".

217. Furthermore, s 172 enacts that the returning officer can only reject a nomination if the provisions of ss 166, 167, 170 or 171 have not been substantially complied with in relation to the nomination. A nomination cannot be rejected on the ground that the person nominated is incapable of being chosen as a Senator or member of the House of Representatives by reason of s 44 of the *Constitution*. If the nomination paper "is false or misleading in a material particular" the person commits an offence punishable by imprisonment for up to six months [22] . In a prosecution, however, it is a defence if the person proves that he or she did not know and could not reasonably be expected to have known that the statement was false or misleading [23] . Because the petitioners do not rely on an "illegal practice" to support their petitions, it is unnecessary to determine whether a nomination which complies with the Act, even though it contains a statement which renders the nominee liable to a penalty, constitutes "a contravention of this Act" and therefore an "illegal practice" within the meaning of s 352(1) of the Electoral Act. Nor is it necessary to determine whether there is a contravention of the Act when the nomination contains a false or misleading statement but the nominee has a defence to a prosecution by reason of s 339(4) of the Electoral Act [24] .

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(256) Electoral Act, s 339(3).
(257) Electoral Act, s 339(4).
(258) In *Sovar v Henry Lane Pty Ltd* (1967) 116 CLR 397, a majority of this Court held that the existence of a defence provided by s 27(5) of the *Factories, Shops and Industries Act 1962 NSW* "[i]n any prosecution for a breach of the obligation imposed" did not mean that there was no breach of the duty imposed under the Act by the relevant obligation.

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218. If the person elected has not complied with the nomination provisions of the Electoral Act, he or she has contravened the Act. That being so, the Court of Disputed Returns would seem to have the power to declare that that person was not duly elected "on the ground that illegal practices were committed in connexion with the election" [25] . But that is a different matter from alleging that the election should be set aside on the ground that the person returned as elected, although complying with the nomination provision, has falsely declared that he or she "is qualified under the Constitution and the laws of the Commonwealth" [26] . It is also a different matter from alleging that the person was "incapable of being chosen or of sitting as a senator or a member of the House of Representatives" by reason of s 44 of the *Constitution*. As long as the nominee for election has declared that he or she "is qualified under the Constitution and the laws of the Commonwealth", the Australian Electoral Officer or Divisional Returning Officer cannot reject the nomination because of a belief or knowledge that the nominee is not so qualified [27] . So far as Div 1 of Pt XXII is concerned, questions of qualification are subsumed under the label of "illegal practice"; Div 1 does not make constitutional qualifications a condition of nomination. Furthermore, qualifications are not of themselves a ground for a petition. The significance of the silence of that Division in respect of the issue of qualification stands in sharp contrast to the terms of Div 2 of Pt XXII of the Electoral Act.

(259) Electoral Act, s 360(3).
(260) Electoral Act, s 170(1)(b)(i).
(261) Electoral Act, s 172(1).

219. Division 1 is headed "Disputed Elections and Returns". In contrast, Div 2 is headed "Qualifications and Vacancies". It empowers the Senate and the House of Representatives to refer to the Court of Disputed Returns "[a]ny question respecting the qualifications of a Senator or of a Member of the House of Representatives" [28] . In determining the reference, that Court is given [3] "the powers conferred by section 360 so far as they are applicable, and in addition thereto shall have power to declare that any person was not capable of being *chosen* or of sitting as a Senator or a Member of the House of Representatives" [4] . Thus, Div 2, but not Div 1, gives the Court express power to declare that a Senator or member was not capable of being chosen as a Senator or member. The fact that in Div 2 the Court is given an express power to make a declaration concerning capacity supports the view that the general powers conferred by s 360 in Div 1 were not intended to deal with questions of capacity. That is to say, the powers conferred by s 360 to declare that any person who was returned as elected was not duly elected, to declare any election absolutely void and to uphold a petition were not intended to reach cases where the member was not qualified by reason of matters external to the Electoral Act.

(262) Electoral Act, s 376.
(263) Electoral Act, s 379 (emphasis added).
(264) Section 360 is contained in Div 1 of Pt XXII of the Electoral Act.

The general provisions of the Electoral Act — ss 353(1), 360(2) and 364

220. The question then arises as to whether the very general provisions of ss 353(1), 360(2) and 364 of the Electoral Act, or the common law, allow a petitioner under Div 1 to raise the issue of constitutional disqualification. Section 353(1) enacts that the "validity of any election or return may be disputed by petition addressed to the Court of Disputed Returns *and not otherwise.* " (Emphasis added.) Section 360(2) declares that the Court may exercise its powers under s 360 "on such grounds as the Court in its discretion thinks just and sufficient". The powers conferred by s 360 include the power to declare that a person returned as elected was not duly elected or that the election was absolutely void. Section 364 declares that the Court "shall be guided by the substantial merits and good conscience of each case without regard to legal forms or technicalities, or whether the evidence before it is in accordance with the law of evidence or not".

Section 353(1)

221. Divorced from its context, s 353(1) is expressed in terms which are wide enough to cover a challenge to an election on the ground that the return of a member was invalid by reason of his or her lack of capacity to be chosen as a member because of the terms of s 44 of the *Constitution*. Standing alone, and without regard to history and context, s 353(1) might be regarded as an exercise of the jurisdiction conferred by s 76(i) of the *Constitution* which empowers the Parliament to make laws conferring original jurisdiction on this Court in any matter arising under the Constitution or

involving its interpretation. But when s 353(1) is read in the context of Divs 1 and 2 of Pt XXII, and against the background history of the legislation, I do not think that Parliament can have intended the general provisions of that sub-section to be the vehicle for dealing with questions of constitutional qualification. It is true, as Barwick CJ pointed out in In re Webster [5] — a case referred under Div 2 — that disqualification by reason of s 44 of the *Constitution* "is automatic and does not depend upon a decision of the House or of the Court of Disputed Returns, though means are there provided of resolving the facts and their legal consequences". But given the structure of Divs 1 and 2 and the terms of their various provisions, I do not think that in enacting s 353(1) the Parliament could have been intending to exercise the power conferred by s 76(i) of the *Constitution*. Rather s 353(1), like the rest of Div 1, apart from the special case of s 15 appointments, should be seen as an exercise of the power conferred by s 76(ii) of the *Constitution*. That is to say, s 353(1) purports to give this Court jurisdiction with respect to a matter arising under a law made by Parliament. In that respect, it differs from Div 2 which purports to vest matters in the Court pursuant to s 76(i) of the *Constitution*.

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(265) (1975) 132 CLR 270 at 279.

Sections 360(2) and 364

222. The meaning of s 360(2) and its counterparts in other electoral legislation has given rise to a division of opinion as to whether it confers substantive or merely procedural powers on a Court of Disputed Returns. In *Chanter v Blackwood* [6] , Griffith CJ expressed the view during the argument of counsel that a corresponding section referred only to procedure. His view was followed by Mitchell J, sitting as the Court of Disputed Returns, in *Crafter v Webster* [7] and by Blair CJ and seemingly by R J Douglas J as members of the Full Court of the Supreme Court of Queensland in *Ithaca Election Petition; Webb v Hanlon* [8] . On the other hand, in *Dunbier v Mallam* [9] , Hardie J appears to have taken the view that such a provision confers substantive powers on the tribunal. In *Webb v Hanlon* [10] , Evatt J said that such a provision "gives emphasis to the administrative as distinct from the judicial character of the special tribunal". Earlier, in *Holmes v Angwin* [11] , Barton J had expressed a similar view, saying "that the character of the tribunal and the method of procedure are such as did not characterise the ordinary tribunals of justice". These statements suggest that Evatt J and Barton J saw provisions such as s 360(2) as conferring substantive administrative powers.

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(266) (1904) 1 CLR 39 at 43.
(267) (1980) 23 SASR 321 at 329.
(268) [1939] St R Qd 90 at 131-132, 145-146.
(269) [1971] 2 NSWLR 169 at 172.
(270) (1939) 61 CLR 313 at 330.
(271) (1906) 4 CLR 297 at 309.

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223. If it were not for the statutory context, I would hold that ss 360(2) and 364 purport to confer independent and additional powers on the Court of Disputed Returns to reach such decision as fair-minded persons, unfettered by legal rules, would reach in all the circumstances of the case. Not only may the Court exercise its powers on such

grounds as it thinks just and sufficient, but it is to be guided by the substantial merits and good conscience of the case without regard to legal forms and technicalities and whether or not the evidence is in accord with the law of evidence. I would find it difficult to distinguish the powers conferred by these sections from those considered in *Moses v Parker; Ex parte Moses* [12] , a non-election case, where the Privy Council held that the similar powers there conferred left the Supreme Court of Tasmania "free and unfettered in each case".

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(272) [1896] AC 245 at 248.

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224. However, when Div 1 is considered as a whole, I think that the purpose of the Electoral Act is to allow an election to be set aside on the grounds of bribery, corrupt practices, undue influence and illegal practices and not otherwise. That being so, ss 360(2) and 364 are to be seen as ancillary to those specific powers. They do not authorise the bringing of a petition on the ground that the person returned as elected was constitutionally disqualified from standing for Parliament. But they are widely expressed. Subject to the directions in s 362, the Court has an unfettered discretion to act according to what it regards as just and sufficient without regard to legal forms or technicalities or the laws of evidence. The fact that the decision of the Court is final and conclusive and that there is no right of appeal strongly suggests that the orders in each case are to be made on the basis of what the Court regards as the justice of that case and not by reference to a body of rules antecedently known to an appellate court.

225. It follows that nothing in the Electoral Act gives the Court of Disputed Returns any jurisdiction to hear the present petitions.

The common law of elections

226. There is authority in this and other courts supporting the proposition that at common law an election for a legislature could be set aside if there was no real electing by the constituency or the election was not really conducted in accordance with the laws governing it. Thus, in *Woodward v Sarsons* [13] , where the Court of Common Pleas had to consider the powers of the election tribunal brought into existence by the *Parliamentary Elections Act 1868*, Coleridge LCJ, speaking on behalf of the Court, said:

> [A]n election is to be declared void by the common law applicable to parliamentary elections, if it was so conducted that the tribunal which is asked to avoid it is satisfied, as a matter of fact, either that there was no real *electing* at all, or that the election was not really conducted under the subsisting election laws. As to the first, the tribunal should be so satisfied, ie that there was no real electing by the constituency at all, if it were proved to its satisfaction that the constituency had not in fact had a fair and free opportunity of electing the candidate which the majority might prefer. This would certainly be so, if a majority of the electors were proved to have been prevented from recording their votes effectively according to their own preference, by general corruption or general intimidation, or by being prevented from voting by want of the machinery necessary for so voting, as, by polling stations being demolished, or not opened, or by other of the means of voting according to law not being supplied or supplied with such errors as to render the voting by means of them void, or by fraudulent counting of votes or false declaration of numbers by a returning officer, or by other such acts or mishaps. And we think the same result should follow if, by reason of any such or similar mishaps, the tribunal, without being able to say that a majority had been prevented, should be satisfied that there was reasonable ground to believe that a majority of the

electors *may have been* prevented from electing the candidate they preferred. (Emphasis in original.)

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(273) (1875) LR 10 CP 733 at 743-744.

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227. However, nothing in this passage gives any support for the view that the Court of Disputed Returns has power to set aside the election of Mrs Hill on the ground of a constitutional disqualification. Moreover, as Philp J pointed out in *Flinders Election Petition; Forde v Lonergan* [14] , misunderstanding concerning *Woodward v Sarsons* [15] has arisen because the report of the case does not indicate that the Court of Common Pleas was required by statute to apply the principles "being observed in the case of election petitions under the provisions of the Parliamentary Elections Act, 1868" [16] . It was not applying common law principles.

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(274) [1958] Qd R 324 at 330.
(275) (1875) LR 10 CP 733.
(276) *Corrupt Practices (Municipal Elections) Act 1872 UK*, s 21(2).

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228. Great care must be taken in using parliamentary election cases decided in England both before and after the enactment of the *Parliamentary Elections Act 1868*. Section 26 of that Act provided that "[u]ntil Rules of Court have been made in pursuance of this Act, and so far as such Rules do not extend, the Principles, Practice, and Rules on which Committees of the House of Commons have heretofore acted in dealing with Election Petitions shall be observed so far as may be by the Court and Judge". Issues concerning agency are a good illustration of the differences between the principles of the common law and the principles on which the committees of the House of Commons acted. As Grove J pointed out in Borough of Wakefield [17] , under the common law of agency a person is not responsible for acts which he has not authorised or for acts done beyond the scope of the agent's authority. Under the principles of parliamentary election law developed by the House of Commons, however, the candidate is responsible for all acts done in support of his candidacy of which the candidate or his agents have "reasonable knowledge". Furthermore the law of agency for election purposes was deliberately left flexible so as to apply to actions that the committees and later the tribunal thought should be sheeted home to the candidate.

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(277) (1874) 2 O'M & H 100 at 103.

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229. Pursuant to the *Parliamentary Elections Act 1868*, a petition could also be brought on the ground of a "Corrupt Practice" or "Corrupt Practices" in the election and those terms were defined, inter alia, to mean any offence "recognized by the Common Law of Parliament" (s 3), an expression that Griffith CJ said in *Chanter v Blackwood* [18] he did "not quite understand". In the same case, his Honour said that "there are very weighty

authorities to the effect that Parliamentary law is not introduced into the colonies, and therefore not into the Commonwealth" [19] . Subsequently, the Full Court of Queensland rejected the proposition that the parliamentary law of elections is applicable in Australia [20] . However, Griffith CJ went on to say [21] that he "must not be supposed to suggest that there is not a Common Law applicable to elections". He said [22] that "the law is correctly laid down in [the above] passage in *Woodward v Sarsons* [23] ". In *Bridge v Bowen* [24] , Griffith CJ, dissenting, once again regarded *Woodward v Sarsons* [25] as laying down the common law as to elections. So too did Barton J who also dissented [26] . Isaacs J, who was in the majority, appears to have been of the same view [27] . Yet it seems likely that, in *Woodward* , Coleridge LCJ was applying the very principles of law which in *Chanter v Blackwood* [28] Griffith CJ said he did "not quite understand" and which "weighty authorities" said were not part of the law of Australia.

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(278) (1904) 1 CLR 39 at 56.
(279) *Chanter v Blackwood* (1904) 1 CLR 39 at 57
(280) *Ithaca Election Petition; Webb v Hanlon* [1939] St RQd 90 at 139, 147.
(281) *Chanter v Blackwood* (1904) 1 CLR 39 at 58
(282) *Chanter v Blackwood* (1904) 1 CLR 39 at 58
(283) (1875) LR 10 CP 733 at 743-744.
(284) (1916) 21 CLR 582 at 591-592.
(285) (1875) LR 10 CP 733.
(286) *Bridge v Bowen* (1916) 21 CLR 582 at 605
(287) *Bridge v Bowen* (1916) 21 CLR 582 at 616-619
(288) (1904) 1 CLR 39 at 56-57.

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230. It is highly problematic whether there is a common law of elections in respect of Parliament other than that developed by the House of Commons and its Select Committees. In *Ashby v White* [29] , where the plaintiff claimed damages for being deprived of the right to vote at a parliamentary election, Powys J, sitting in the King's Bench, said:

> Another reason against the action is, that the determination of this matter is particularly reserved to the Parliament, as a matter properly conusable by them, and to them it belongs to determine the fundamental rights of their House, and of the constituent parts of it, the members; and the Courts of Westminster shall not tell them who shall sit there. Besides, we are not acquainted with the learning of elections, and there is a particular cunning in it not known to us, nor do we go by the same rules, and they often determine contrary to our opinion without doors.

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(289) (1703) 2 Ld Raym 938 at 944 [92 ER 126 at 130].

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231. The majority decision of the King's Bench was reversed by the House of Lords [30] which upheld the dissenting judgment of Lord Holt CJ who held that an action would lie because the plaintiff had a common law right to vote. However, the remarks of Powys J suggest that, even though in some cases the right to vote arises from the common law, there is no common law relating to parliamentary elections. Significantly, Lord Holt CJ said [31] :

> This is a matter of property determinable before us. Was ever such a petition heard of in Parliament, as that a man was hindred [sic] of giving his vote, and praying them to give him remedy? The Parliament undoubtedly would say, take your remedy at law. It is not like the case of determining the right of election between the candidates.

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(290) *Ashby v White* (1703) 2 Ld Raym 938 at 958 [92 ER 126 at 138].
(291) *Ashby v White* (1703) 2 Ld Raym 938 at 956 [92 ER 126 at 138].

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232. Prior to the passing of the *Parliamentary Elections Act 1868*, elections to Parliament were governed by a large number of statutes concerning the franchise and the qualifications and disqualifications of members, by statutes dealing with bribery and corrupt practices, by conventions for the conduct of elections which do not seem to have been justiciable in the ordinary courts of justice and by the principles and practices developed and applied by the House of Commons between 1604 and 1868. Sir William Holdsworth has pointed out [32] that even at the end of the seventeenth century:

> [T]here seems to have been very little law as to how the sheriff should conduct an election. But in the latter part of the seventeenth century conventional rules were growing up. Sheriffs and candidates would agree on rules to be observed at a forthcoming election; candidates were appointing agents; and as early as 1701 "inspectors were established at county polls in the interest of candidates". (Footnotes omitted.)

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(292) A History of English Law, (1938), vol 10, pp 570-571.

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233. The now important practice of the returning officer granting a scrutiny [33] , for example, did not exist in the time of Lord Coke. Indeed, for the sheriff to grant a scrutiny may have exceeded his implied authority in respect of the election although there was no statute or resolution of the House on the subject and over the years the House heard a number of petitions complaining of a refusal to grant a scrutiny [34] . The House, and later the Select Committees, appear to have left the grant or refusal of a scrutiny to the discretion of the returning officer. There appears to be no case at common law where the courts have ruled that there was any common law right or power to have the votes scrutinised before the return of the writ declaring the member or members elected. At all events, there was none before the *Parliamentary Elections Act 1868*. Moreover, in one action in the Common Pleas, Charles James Fox recovered substantial damages from the high bailiff who had not returned Fox on the day appointed because the scrutiny had not proceeded as expeditiously as it could have [35] .

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(293) In A Treatise on the Law and Practice of Elections, 2nd ed (1820), pp 213-214, Male defined the scrutiny "to mean, a general reconsideration, by the returning officer, or others by him appointed, either of the poll altogether, or the scrutinizing and maturely examining the validity of particular votes so taken; or the grounds of certain claims which have been respectively received or rejected at the

poll, and amending the same, by correcting or establishing the decisions so made, as they may prove to have been erroneous or right".
(294) Male, A Treatise on the Law and Practice of Elections, 2nd ed (1820), pp 214-216.
(295) Male, A Treatise on the Law and Practice of Elections, 2nd ed (1820), p 220 (note).

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234. It is true that many actions in relation to elections could be the subject of proceedings in the civil and criminal courts. Thus, in *R v Pitt* [36] , Lord Mansfield CJ is reported as saying that bribery at elections for members of Parliament "must undoubtedly have always been a crime at common law; and, consequently, punishable by indictment or information". The lesser offence of treating would also seem to have been an offence at common law [37] . In Borough of Bradford [38] , a case decided under the *Parliamentary Elections Act 1868*, Martin B went so far as to say:

> [I]f it could be proved that there was treating in all directions on purpose to influence voters, that houses were thrown open where people could get drink without paying for it, — by the common law such election would be void.

Unless his Lordship was referring to the common law of Parliament, however, this dictum should be regarded as erroneous.

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(296) (1762) 3 Burr 1335 at 1338 [97 ER 861 at 863].
(297) *Hughes v Marshall* (1831) 2 C& J 118 [149 ER 49].
(298) (1869) 1 O'M & H 35 at 41.

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235. However, the fact that conduct occurring in the course of election may give rise to civil or criminal liability throws no light on whether there is a common law relating to elections to Parliament. In any event, whether or not there is a common law of parliamentary elections in addition to the so-called common law of Parliament, the terms of the Electoral Act by necessary implication exclude its application. Under the Electoral Act, as under the election governed by the *Sydney Corporation Act 1902 NSW* considered in *Bridge v Bowen* [39] , the "election [is] entirely a statutory proceeding, with statutory directions and statutory consequences" [40] .

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(299) (1916) 21 CLR 582.
(300) *Bridge v Bowen* (1916) 21 CLR 582 at 613

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236. Furthermore, as Philp J also pointed out in *Flinders Election Petition; Forde v Lonergan* [41] , the effect of legislation such as ss 360(2) and 364 of the Electoral Act is that electoral cases in this country have always been decided against a very different statutory background from that applicable in the United Kingdom. In this country, the requirement that an election tribunal be guided by real justice and good conscience was introduced into our law by the enactment of s 42 of the *Electoral Districts Act 1843 NSW*. A provision to similar effect seems to have been inserted in all subsequent Australian legislation dealing with parliamentary elections. In *Flinders Election Petition; Forde v Lonergan* [42] , Philp J applied the principles expounded by Coleridge LCJ in *Woodward v Sarsons* [43] because his Honour thought that they comported with "what is

real justice in the present circumstances" and not because the common law of elections was applicable. In my opinion, this is the correct approach. Election cases in the United Kingdom may give some assistance in determining whether a particular practice in an Australian election is or is not contrary to the real justice of the case. But they contain no principles that are authoritative under the Electoral Act. Nor do they support the view that there is a common law of parliamentary elections in addition to that developed by the House of Commons in the exercise of its privileges.

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(301) [1958] Qd R 324 at 331-332.
(302) [1958] Qd R 324 at 333.
(303) (1875) LR 10 CP 733 at 743-744.

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237. Furthermore, even if the principles laid down in *Woodward v Sarsons* [44] represent the common law relating to elections and are applicable in cases heard by the Court of Disputed Returns, they do not assist the petitioners in the present case. *Woodward v Sarsons* does no more than declare that any matter which goes to or bears upon the casting or counting of votes [45] in consequence of which a defeated candidate may have been prevented from being elected is a sufficient ground at common law for setting aside the election of a person. Questions of constitutional disqualification, however, are matters antecedent to the casting or counting of votes.

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(304) (1875) LR 10 CP 733 at 743-744.
(305) cf *Webster v Deahm* (1993) 67 ALJR 781 at 782116 ALR 223 at 225.

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238. Given the structure of the Electoral Act, the specific reference to bribery, corrupt practices, undue influence and illegal practices, the omission of any reference in Div 1 to the constitutional qualification of a member except the special case of a s 15 appointment and the enactment of Div 2 which deals exclusively with the qualification of members, the best interpretation of the Electoral Act is that a petition on the bare ground of an allegation of a breach of s 44 of the *Constitution* is not within the jurisdiction of the Court of Disputed Returns.

239. Moreover, there are practical reasons why the Parliament may have wished to keep the issue of constitutional disqualification out of the Court of Disputed Returns except by specific reference. If that Court could determine a question of constitutional qualification, although no breach of the Electoral Act has occurred, conflicting decisions on a member's constitutional qualifications might be given by the Court of Disputed Returns and one of the Houses of Parliament, a situation that Div 2 is designed to prevent. As that Division makes clear, the Houses of Parliament retain the right to rule on the qualification of a member. If the Court of Disputed Returns can determine the question of constitutional qualification on a petition, it is possible that, upon a member taking his or her seat in Parliament, the relevant House could decide that the member was or was not qualified before the Court determined the petition and held to the contrary [46] . Further, although a decision of the Court that a person has not "been duly elected" is binding on that person and perhaps the House [47] , the dismissal of a petition or the making of a declaration by the Court that a person returned as a member was duly elected appears to bind no one, except perhaps the petitioner. At all events, there is nothing in the Electoral Act that suggests that it binds. Because that is so, a

House would be entitled to disregard a decision of the Court dismissing a petition which had alleged that the person returned as elected was disqualified from being chosen by reason of s 44 of the *Constitution*. It is true that s 368 declares that "[a]ll decisions of the Court shall be final and conclusive and without appeal, and shall not be questioned in any way". But this is no more than a privative clause, designed to prevent appeals against or collateral legal challenges to decisions of the Court of Disputed Returns.

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(306) Campbell, Parliamentary Privilege in Australia (1966), pp 97-98; Schoff, "The Electoral Jurisdiction of the High Court as the Court of Disputed Returns: Non-judicial Power and Incompatible Function?", Federal Law Review, vol 25 (1997) 317, at p 342.

(307) Electoral Act, s 374(i).

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240. Furthermore, I do not think that the existence of the *Common Informers (Parliamentary Disqualifications) Act 1975 Cth* (the Common Informers Act) [48] gives any assistance in determining the construction of Div 1 of Pt XXII of the Electoral Act. Section 3 of the Common Informers Act provides for the recovery of penalties against a person who sits in Parliament when disqualified from doing so. That Act was passed long after the enactment of the Electoral Act and cannot be taken to have amended the latter Act in any way.

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(308) Sections 3, 4 and 5 of the Common Informers Act provide: "3. (1) Any person who, whether before or after the commencement of this Act, has sat as a senator or as a member of the House of Representatives while he was a person declared by the Constitution to be incapable of so sitting shall be liable to pay to any person who sues for it in the High Court a sum equal to the total of — (a) $200 in respect of his having so sat on or before the day on which the originating process in the suit is served on him; and (b) $200 for every day, subsequent to that day, on which he is proved in the suit to have so sat. (2) A suit under this section shall not relate to any sitting of a person as a senator or as a member of the House of Representatives at a time earlier than 12 months before the day on which the suit is instituted. (3) The High Court shall refuse to make an order in a suit under this Act that would, in the opinion of the Court, cause the person against whom it was made to be penalised more than once in respect of any period or day of sitting as a senator or as a member of the House of Representatives. 4. On and after the date of commencement of this Act, a person is not liable to pay any sum under section 46 of the Constitution and no suit shall be instituted, continued, heard or determined in pursuance of that section. 5. Original jurisdiction is conferred on the High Court in suits under this Act and no other court has jurisdiction in such a suit."

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241. It is true that, because of the existence of the Common Informers Act, a person elected to Parliament but constitutionally disqualified might be better off if the issue of disqualification could be dealt with by petition. There is a real question, however, whether a person can be sued under the Common Informers Act until either the relevant House of Parliament has declared that that person is disqualified or this Court has done so on a reference under Div 2 of Pt XXII of the Electoral Act.

242. On one view, the effect of s 3 of the Common Informers Act is that the Parliament has otherwise provided within the meaning of s 47 of the *Constitution* so that, notwithstanding the restrictive terms of Div 2 of Pt XXII of the Electoral Act, the High Court can determine at any time the eligibility of a member of Parliament.

243. The other view of s 3 is that it does not otherwise provide for the determination of a "question respecting the qualification of a senator or of a member of the House of Representatives" [49] . On that basis, the determination is made by the relevant House

of Parliament or by this Court on a Div 2 reference, and the function of s 3 is to authorise a suit for the recovery of a penalty once a declaration of incapacity has been made. Favouring this construction is the fact that it avoids potential and unseemly conflicts between the Court and a House of Parliament over the qualifications of a member of that House. It might also seem surprising that Parliament, in enacting the Common Informers Act, had intended, so to speak, to allow a person to bypass the restrictively worded provisions of Div 2 of Pt XXII of the Electoral Act.

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(309) *Constitution*, s 47.

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244. The debates on the Common Informers Act in both Houses of federal Parliament favour the first of these two constructions. The Second Reading Speeches in the Senate and the House of Representatives both assumed that this Court could deal with the issue of constitutional disqualification by a suit under s 3 even if the matter was not referred to the Court of Disputed Returns. However, the Second Reading Speeches also assumed that the Bill was otherwise providing for the purpose of s 46 [50] of the *Constitution*, not s 47. Furthermore, the Bill seems to have been drafted and debated hastily because of concern that actions for penalties could be brought against Senator Webster, pursuant to s 46 of the *Constitution*. For that reason, the debates may be regarded as less persuasive than usual on the construction of legislation.

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(310) "Until the Parliament otherwise provides, any person declared by this Constitution to be incapable of sitting as a senator or as a member of the House of Representatives shall, for every day on which he so sits, be liable to pay the sum of one hundred pounds to any person who sues for it in any court of competent jurisdiction."

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245. However, it is unnecessary to choose between the competing interpretations. Whichever view is the correct one, it throws no light on whether Div 1 of Pt XXII of the Electoral Act authorises a petition claiming that an election is void because the person elected was constitutionally disqualified. Furthermore, in almost all disputed House of Representatives elections the person elected will have sat in the House before the Court of Disputed Returns determines the petition. That will also be the case with Senators who are re-elected. If the first construction of the Common Informers Act is correct, these persons will be liable to a suit under that Act whether or not the validity of their elections can be challenged under Div 1 of Pt XXII. Similarly, when the disqualification arises after an election, the Senator or member will be liable to be sued notwithstanding that the relevant House has or has not referred the issue to the Court of Disputed Returns. That being so, only Senators elect, such as Mrs Hill, will probably avoid the consequences of the Common Informers Act if Div 1 of Pt XXII authorises petitions based on constitutional disqualifications. While that is a matter of importance to at least this group of persons, it cannot affect the construction of Div 1 of Pt XXII of the Electoral Act, an Act which was passed more than fifty years before the Common Informers Act.

246. Nothing in the Electoral Act expressly authorises the bringing of a petition on the ground relied on in the present cases. Moreover, the inferences to be drawn from the general structure of the Act and the special provisions of Div 2 of Pt XXII tell strongly

against the Court of Disputed Returns having jurisdiction to hear a petition alleging such a ground.

247. In my opinion, therefore, the Court of Disputed Returns has no jurisdiction to hear a petition alleging that an elected person was incapable of being chosen as a member of the Parliament by reason of the provisions of s 44 of the *Constitution*. Hearing and determining such a petition is an exercise of one of the privileges of the Parliament. Sir William Holdsworth thought that it was one of the four most important of those privileges [51] . In the absence of clear statutory language, we should not construe the Electoral Act as impliedly transferring that privilege to this Court to exercise, particularly having regard to the restrictive and carefully worded provisions of Div 2 of Pt XXII. It follows that the decision of Dawson J in *Sykes v Cleary [No 1]* [52] was wrong and should be overruled.

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(311) Holdsworth, A History of English Law, 2nd ed (1937), vol 6, p 95.
(312) (1992) 66 ALJR 577; 107 ALR 577.

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248. The question as to whether Mrs Hill was capable of being chosen as a Senator is one for the Senate to determine unless and until the Senate resolves to refer the question to the Court of Disputed Returns. There is no need for me to determine, therefore, whether Pt XXII attempts to confer non-judicial power on this Court or whether, at this stage of Australia's constitutional development, the United Kingdom is a "foreign power" within the meaning of s 44 of the *Constitution*.

Orders

249. The questions in each case stated should be answered as follows:

Question (a): No

Question (b): Inappropriate to answer.

Question (c): Inappropriate to answer.

Question (d): Does not arise.

Question (e): Does not arise.

Question (f): The Commonwealth should pay the costs of the petititioner and of the first respondent in this Court. The second respondent should bear its own costs [53] .

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(313) Electoral Act, s 360(1)(ix).

KIRBY J.

250. The Federal Parliament created by the Australian Constitution consists of the Queen, a Senate and a House of Representatives [54] . Each of the Chambers of the Parliament

enjoys "powers, privileges, and immunities" (privileges) as do the members and committees of each House [55] . Because such privileges, including decisions on the disputed qualifications of members of the Parliament, derive from long-established tradition and because these remain essential to the effective performance by the Parliament of its constitutional functions, courts, including this Court, must approach any diminution of, or qualification upon such privileges, with considerable circumspection [56] .

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(314) *Constitution*, s 1.
(315) *Constitution*, s 49.
(316) *Egan v Willis* (1998) 195 CLR 424

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251. Although, under the Australian Constitution, the privileges of the Parliament must exist in a textual context which provides for the other branches of government, including the Judicature [57] , tradition, practicality and law require that a large measure of deference should be accorded to the exercise by the Parliament of its privileges. In ascertaining the Parliament's purpose in a matter connected with its privileges, no court should strain legislative language to claim a jurisdiction which has not been clearly vested in it. Restraint is the watch-word for courts in this context. If the Parliament wishes to confer jurisdiction in accordance with the legislative powers that it enjoys under the Constitution [58] , it may do so. But, subject to the Constitution, it is for the Parliament, and the Parliament alone, to surrender its privileges and to involve the courts in the resolution of controversies that concern those privileges.

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(317) *Constitution*, Ch III.
(318) eg, under s 51(xxxvi).

Facts, legislation and issues

252. The background facts are stated by Gaudron J. The legislation necessary to my opinion is set out in the reasons of McHugh J. Two petitioners have purportedly invoked the jurisdiction of the High Court as the Court of Disputed Returns [59] . They have done so by petitions filed in purported compliance with the *Commonwealth Electoral Act 1918 Cth* (the Act) (the Act, s 353). Each petition challenges the qualifications of Mrs Heather Hill (the first respondent) to be chosen, or to sit, as a Senator. In the 1998 general election, she was returned following the counting of the ballots of electors of the State of Queensland [60] . In the ordinary course of events, Mrs Hill, whose name has been certified by the Governor of Queensland to the Governor-General as having been chosen for that State, would take her seat in the Senate after 1 July 1999. The petitioners contend that she is constitutionally disqualified from doing so [61] .

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(319) *Commonwealth Electoral Act 1918 Cth* (the Act), s 354(1).
(320) On 26 October 1998, pursuant to the *Constitution*, s 7.
(321) *Constitution*, s 44(i).

253. The proceedings are now before this Court pursuant to cases stated in accordance with the *Judiciary Act 1903 Cth* [62] . Six questions are stated for our opinion. The questions are set out in the reasons of Gaudron J. Only one, the first, is relevant in the approach which I take. It asks: "Does s 354 of the Act validly confer upon the Court of Disputed Returns jurisdiction to determine the issues raised in the Petition?" Because in my view it does not, it is inappropriate or unnecessary to answer any of the other questions save one as to the costs. In these proceedings, those other questions may not be determined. No jurisdiction having been conferred upon this Court as the Court of Disputed Returns (and no other jurisdiction of the Court having been invoked), the resolution of the qualifications of Mrs Hill to be chosen or to sit as a Senator is a matter reserved by the Constitution to the Senate.

(322) The *Judiciary Act 1903 Cth*, s 18.

Provisions for disputed elections

254. In parliamentary law, long before the creation of the Federal Parliament, a distinction was drawn between disputed returns (in the sense of contests about the validity of an election and thus of the returns as to electoral results) on the one hand, and the qualifications and status of a person elected or offering for election, on the other [63] . The history of the distinction is explained by McHugh J. I will not repeat it. It was noticed in passing by Dawson J in *Sykes v Cleary [No 1]* [64] .

(323) The *Judiciary Act*, s 18 provides that "[a]ny Justice of the High Court may state any case or reserve any question for the consideration of a Full Court and a Full Court shall thereupon have power to hear and determine the case or question". No mention is made therein to the Court as a Court of Disputed Returns. It is assumed that the fact that cases have been stated by the Chief Justice and a Justice of the Court, purportedly as constituting the Court of Disputed Returns, does not call into question the validity of the reference under s 18, should the constitution of the High Court as the Court of Disputed Returns be constitutionally invalid. No party contested the validity of the references to the Full Court or the jurisdiction of the Court, pursuant to the reference, to determine the questions referred.

(324) (1992) 66 ALJR 577 at 579; 107 ALR 577 at 580. See also In re Wood (1988) 167 CLR 145 at 157-158.

255. There is no doubt that the framers of the Australian Constitution were aware of the distinction. In the debate at the Adelaide Convention in 1897 there was much discussion of the difference between what were described as "disputed returns" and "qualification of a member" [65] . In response to concerns expressed at the Convention that this distinction would be eroded, Mr Barton explained that the provision in the Constitution Bill of the phrase "until The Parliament otherwise provides" would leave it to "the Parliament of the Commonwealth to determine whether the Houses, after they are called together, shall determine this question, or whether the Judges should do it. It is a matter for the Federal Parliament to deal with. It increases the freedom of action of the Parliament of the Federation, and for that reason it is also desirable to leave it in the hands of the Parliament if the Parliament will not undertake the matter itself, it will delegate it to the High Court" [66] . Mr Wise observed that there were "two questions

involved here, which ought to be kept distinct. There is the qualification of a member or the question as to vacancies on the one side, and the question of a disputed return, which is a matter of altogether a different character. I apprehend that only questions of disputed returns should be dealt with by the Supreme Court " [67] . Other participants expressed like views.

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(325) Official Record of the Debates of the Australasian Federal Convention (Adelaide), 15 April 1897, pp 680-681.
(326) Official Record of the Debates of the Australasian Federal Convention (Adelaide), 15 April 1897, p 681.
(327) Official Record of the Debates of the Australasian Federal Convention (Adelaide), 15 April 1897, p 681.

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256. It is against this background that the meaning of s 47 of the *Constitution* (which preserves the distinction), already plain from its text, becomes still clearer. The section states relevantly:

> Until the Parliament otherwise provides, any question respecting the qualification of a senator or respecting a vacancy in either House of the Parliament, and any question of a disputed election to either House, shall be determined by the House in which the question arises.

257. A question respecting the qualification of a Senator being now raised in advance of Mrs Hill's sitting as a Senator, the issue presented by s 47 of the *Constitution* is whether the Parliament has relevantly "otherwise provide[d]". If it has not, subject to any other relevant provision of the Constitution, the determination of the question remains by s 47, to be made by the House in which the question arises, namely the Senate, and nowhere else. The question may not be determined by any other person, body or court. An attempt to do so would be a breach of the Constitution and of the privileges constitutionally belonging, in this case, to the Senate.

258. The distinction which was observed in the pre-1901 history of the Parliament of Westminster, recognised in the Convention debates and reflected in the terms of s 47 of the *Constitution* was, unsurprisingly, carried over to the *Commonwealth Electoral Act 1902 Cth* as first enacted. Part XVI of that Act contained provisions, clearly modelled on pre-existing colonial statutes, which constituted the High Court as the Court of Disputed Returns [68] . The powers of the Court included "[t]o declare that any person who was returned as elected was not duly elected" [69] ; "[t]o declare any candidate duly elected who was not returned as elected" [70] ; and "[t]o declare any election absolutely void" [71] . No separate provision was made in respect of disputes concerning the qualification of candidates, an issue which logically arises at a time anterior to the return which was disputed. The omission was not through oversight.

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(328) The 1902 Act, s 193.
(329) The 1902 Act, s 197(iv).
(330) The 1902 Act, s 197(v).
(331) The 1902 Act, s 197(vi).

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259. When the *Commonwealth Electoral Act 1905 Cth* was enacted, it too made no express reference to the qualification of a Senator or member of the House of Representatives as referred to in s 47 of the *Constitution*. Its concern with the illegal and other practices involved in the actual conduct of elections was made still clearer by the amendment of the 1902 Act [72] . This inserted s 198A obliging the Court of Disputed Returns, if it found that "a candidate has committed or has attempted to commit bribery or undue influence" to declare void that candidate's election "if he is a successful candidate" but subject to being satisfied that the result of the election was likely to be affected.

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(332) By the 1905 Act, s 56.

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260. That the omission of express reference in the Act to questions "respecting the qualification of a Senator" was not accidental, was made even more clear by amendments adopted in 1907. By the *Disputed Elections and Qualifications Act 1907 Cth*, for the first time, the provisions of Pt XVI dealing with the Court of Disputed Returns were amended and the distinction already reflected in the Constitution was carried into the federal election statutes. The Part was divided into two divisions. Division 1, titled "Disputed Elections and Returns", was inserted above the provisions from s 192 [73] . Then, over a new s 206AA was inserted the heading "Division 2 — Qualifications and Vacancies". Section 206AA (which is now s 376 of the Act) provided for the first time, in accordance with s 47 of the *Constitution*, with respect to "[a]ny question respecting the qualification of a Senator". It did so in a particular and highly specific way, namely by providing for a reference by resolution to the Court of Disputed Returns by the House in which the question arose. Only upon such a reference, according to the Act, would "the Court of Disputed Returns thereupon have jurisdiction to hear and determine the question" [74] . Machinery provisions were also enacted to provide for the presiding officer of the House in question to transmit a statement of the question "upon which the determination of the Court is desired" [75] ; for the parties to the reference [76] ; the powers of the Court "[o]n the hearing of any reference under this part of this Act" [77] ; for the order to be sent to the House affected [78] ; and for the incorporation into the Division of some, but by no means all, of the provisions previously enacted as part of Div 1 [79] .

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(333) By the 1907 Act, s 5.
(334) The 1907 Act, s 206AA (now s 376 of the Act).
(335) The 1907 Act, s 206BB (now s 377 of the Act).
(336) The 1907 Act, s 206CC (now s 378 of the Act).
(337) The 1907 Act, s 206DD (now s 379 of the Act).
(338) The 1907 Act, s 206E (now s 380 of the Act).
(339) The 1902 Act, ss 199, 201, 202A, 202B, 204, 205 and 206, now ss 364 (real justice to be observed), 368 (decisions to be final), 370 (representation), 373 (costs) and 375 (power to make rules of Court).

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261. On the face of these amendments and additions to the predecessors to the Act, the purpose of the Parliament could not have been plainer. Whereas previously, it had not surrendered to any court, including the Court of Disputed Returns, the privilege preserved by s 47 of the *Constitution* to determine in the House concerned any question which arose "respecting the qualification of" a Senator or Member of the House of Representatives, now it had done so. It is erroneous and misleading to read

the sections in Div 2 of Pt XXII of the Act (formerly Pt XVI of the Acts of 1902-1907) without regard to the text of s 47 of the *Constitution*, the Parliamentary history preceding its adoption and the deliberate way by which, after an interval and due debate, the decision was made to surrender to the Court of Disputed Returns the resolution of questions of qualification, but only upon terms and by procedures which the Parliament itself approved.

262. Any last lingering doubt that this was a deliberate distinction, appreciated by the Parliament and reflected in the amendments which it adopted, is dispelled by a glance at the Second Reading Speech of the Vice-President of the Executive Council (Senator Best) who introduced the 1907 amendments [80] . Referring to the clause which became s 206AA (now s 376) the Minister said [81] :

> The last part of the Bill is clause 6, dealing with the contingency of questions of law arising with regard to qualifications and vacancies. I have already drawn special attention to section 47 of the *Constitution*, which refers to the powers of the Parliament in regard to qualifications, vacancies, and disputed elections. We have already dealt with disputed elections by the Electoral Act. They are therefore outside this Bill, and beyond the power of Parliament, unless Parliament desires to amend the Electoral Act [The new provision] does not take away from the Senate the power to deal with these questions [qualification of a Senator] itself. There is a reason for that, which I will explain. In the event of a question arising on the subject of qualifications or vacancies, the machinery is provided by this clause for the Senate simply to pass a resolution making the reference, and thereupon the question involved is referred to the Court [W]e do not propose to compel the House or the Senate to refer the matter to the High Court, but leave it to their discretion to do so.

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(340) Australia, Senate; Parliamentary Debates (Hansard); 1 November 1907, p 5467.
(341) Australia, Senate; Parliamentary Debates (Hansard); 1 November 1907, pp 5470-5471.

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263. The Minister pointed out that in some cases, as where a person apparently elected was disqualified as an undischarged bankrupt, for conviction of a relevant crime or for holding an office of profit forbidden by s 44 of the *Constitution*, "it would be absurd to send such cases to the High Court for decision, as they would depend on facts easily ascertained" [82] . But the Houses of Parliament were reserving to themselves the decision on whether or not to refer the question to the High Court as the Court of Disputed Returns. In accordance with s 47 of the *Constitution* the Parliament had indeed "otherwise provided"; but it had retained to its respective Houses the threshold determination of whether or not, by resolution, to refer "any question respecting the qualification of a senator " to the Court. Without such a reference, the Court would not have jurisdiction under the Act to decide any question respecting qualifications.

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(342) Australia, Senate; Parliamentary Debates (Hansard); 1 November 1907, p 5471.

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264. Given this constitutional background and legislative history, it would be surprising indeed, within the language and structure of the Act, if such a careful scheme, designed to reserve the decision at the gateway of the jurisdiction of the Court of Disputed

Returns on matters of qualification of parliamentarians, could so easily be circumvented by the bringing of a petition of an individual elector under Div 1 of Pt XXII of the Act. In my view, this would completely destroy the arrangement adopted by the Parliament. Commonsense dictates that in any election where qualifications of a candidate are contested, an individual elector may readily be found to lodge a petition. What was the point of enacting Div 2, reserving the power to the House of Parliament if, under Div 1, a petition was available to raise the same questions without the slightest need of a prior resolution by the House of Parliament concerned?

265. If the theory propounded by the petitioners in the present proceedings is correct, it was always open to an individual elector to contest the due election of a Senator or member of the House of Representatives upon the hypothesis that "due election" included the evaluation of the successful candidate's qualification to be chosen and to sit. This theory will not stand with the history of the legislation. More importantly, it is inconsistent with the distinction drawn by the terms of s 47 of the *Constitution* and the proper approach to the ascertainment of whether, until 1907, the Parliament had surrendered to the Court the determination of questions respecting the qualification of Senators that otherwise belonged to it and, subject to the Constitution, to no court.

266. Still further confirmation that this is the scheme of the Act is found by reference to the powers which the Parliament gave to the Court of Disputed Returns for the first time in 1907 when Div 2 was inserted in the Act. Those powers were to be in addition to the powers enjoyed by the Court of Disputed Returns under s 197 of the 1902 Act (now s 360 of the Act). The terms in which the powers were conferred are specific and peculiarly apt to the resolution by the Court of Disputed Returns of disputes as to qualification of a person to be chosen or to sit as a Senator or member of the House of Representatives. They are, relevantly [83] :

> (b) to declare that any person was not capable of being chosen or of sitting as a Senator ;
>
> (c) to declare that there is a vacancy in the Senate

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(343) The 1907 Act, s 206DD.

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267. Without knowledge of the history, constitutional text, controversies and ultimate amendment of the Act, the powers conferred in general terms by what was originally s 197 (now s 360) of the Act, referred to above, might perhaps be taken as extending to contests about qualification of candidates. But with these considerations in mind, such an approach would be wholly artificial. It would require the Court to don blinkers as to the past and to read the powers in s 360 of the Act (as it now stands) without paying proper account to the considerations which I have listed. Indeed, even if the constitutional setting and the history of the legislation are totally ignored, it is surely completely unacceptable to ignore the scheme and structure of the Act and the plain division which the Parliament has made, signified by the titles of the divisional headings [84] between "Disputed Elections and Returns" (for which Div 1 provides) and "Qualifications and Vacancies" (for which Div 2 provides).

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(344) These are part of the Act: *Acts Interpretation Act 1901 Cth*, s 13(1).

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268. Because it is common ground that no question respecting the qualification of any person has been referred to the Court of Disputed Returns by resolution of the Senate (assuming that to be constitutionally permissible and available in this case where Mrs Hill is yet to be sworn as a Senator) no jurisdiction of the Court of Disputed Returns respecting the qualification of Mrs Hill to sit as a Senator has properly been invoked. By reason of the considerations which I have mentioned, it is not possible for an individual elector to invoke the jurisdiction of the Court of Disputed Returns by petition addressed to the Court under s 353 of the Act within Div 1. No jurisdiction is conferred on that Court by s 354 of the Act, also within Div 1, to determine the issues raised in the petition filed in each of the proceedings. The first question reserved for the opinion of this Court must therefore be answered in the negative.

269. Given that the view which I hold is that, in questions respecting the qualifications of a Senator (or a member of the House of Representatives) the privileges of the Parliament have not been released to any court, such questions remain, subject to any other provisions of the Constitution, to be determined by the Houses of Parliament. The only exception arises where s 15 of the *Constitution* expressly governs the matter or in the limited and qualified circumstances by which, in Div 2 of Pt XXII of the Act, the Parliament has purported to provide for a reference to the Court of Disputed Returns. I say "purported" because, despite the exercise by this Court in the past of jurisdiction under Div 2 [85] , a question clearly exists as to whether, compatibly with the Court's elaboration of Ch III of the *Constitution* and its requirements, this Court or any other federal court, could be vested with jurisdiction of the kind contemplated by Div 2 [86] . No such jurisdiction having been invoked in this case, it is inappropriate to resolve that question.

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(345) In re Webster (1975) 132 CLR 270; In re Wood (1988) 167 CLR 145.
(346) cf Walker, "Disputed Returns and Parliamentary Qualifications: Is the High Court's Jurisdiction Constitutional?", University of New South Wales Law Journal, vol 20 (1997) 257, at p 263; Schoff, "The Electoral Jurisdiction of the High Court as the Court of Disputed Returns: Non-judicial Power and Incompatible Function?", Federal Law Review, vol 25 (1997) 317, at pp 324, 326-328.

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270. The possibility that the provisions within Div 2, or some of them, might be invalid, as incompatible with Ch III of the *Constitution* does not affect in the slightest the foregoing reasoning. The Parliament has certainly attempted to provide, relevantly, with respect to questions regarding the qualification of a Senator. If this attempt be found to have miscarried so far as it purports to confer jurisdiction to hear and determine a question referred by resolution of either House of the Parliament, this does not alter either the juxtaposition drawn between the divisions of Pt XXII of the Act or the manifest purpose thereby demonstrated that Div 1 should deal, and deal only, with disputed elections and returns on grounds otherwise than the qualifications of candidates or a vacancy in either House and Div 2 with questions as to qualifications and vacancies.

Remaining objections

271. There is no holding of a Full Court of this Court which requires a conclusion contrary to the foregoing. It is true that in Sykes [No 1] [87] Dawson J, ruling on a preliminary objection as to the jurisdiction of the Court of Disputed Returns, in a petition brought in accordance with Div 1, concluded that the Court had jurisdiction to decide whether a candidate was disqualified under s 44 of the *Constitution*. It follows from what I have said that, in this regard, *Sykes* was wrongly decided. It should be overruled.

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(347) (1992) 66 ALJR 577 at 579; 107 ALR 577 at 580.

272. Dawson J considered that support for his conclusion was to be found in the decision of the Full Court in In re Wood [88] . That case involved a reference to the Court of Disputed Returns by resolution of the Senate pursuant to s 377 of the Act which appears in Div 2. Whatever other problems might have arisen for the jurisdiction of the Court of Disputed Returns, the one which has been argued in these proceedings, was not presented for decision in *Wood* . Any discussion of that question was therefore obiter. Furthermore, the Full Court concluded that it was not necessary to determine whether Senator Wood was incapable of being chosen or of sitting as a Senator by reason of the provisions of s 44(i) of the *Constitution* [89] . The Court, accordingly, did not address the question of whether, if s 44(i) had been the only ground of disqualification, it would have been capable of being agitated pursuant to Div 1. Nor did the Full Court, when *Sykes v Cleary [No 2]* [90] came before it, review the holding of Dawson J on the jurisdictional question. It simply answered the two questions reserved to it [91] . The Full Court (which included Dawson J) did not address the matter of jurisdiction based on a petition within Div 1.

(348) (1988) 167 CLR 145 at 157.
(349) In re Wood (1988) 167 CLR 145 at 169.
(350) (1992) 176 CLR 77.
(351) "Question (a): Was [Mr Cleary] duly elected at the election?" ["No"]. "Question (b): If no to (a), was the election absolutely void?" ["Yes"]. See *Sykes v Cleary [No 2]* (1992) 176 CLR 77 at 93, 101, 140.

273. Accordingly, no authority of this Court binds us now to a particular conclusion. Dicta exist in other cases which suggest that an assumption has been made that jurisdiction on a petition exists with respect to qualifications of candidates [92] . But in this case, that question has been fully argued. It is inappropriate to explore and to attempt to distinguish dicta of individual justices which, in other cases, are said to support or dispute [93] the existence of jurisdiction. In these proceedings, the Court should decide the matter as a point of principle. So approached, the conclusion that there is no jurisdiction is plain.

(352) See, eg, *Free v Kelly* (1996) 185 CLR 296
(353) *Hudson v Lee* (1993) 177 CLR 627 *Webster v Deahm* (1993) 67 ALJR 781 at 782 *Robertson v Australian Electoral Commission* (1993) 67 ALJR 818 at 819116 ALR 407 at 409.

274. To the argument that this produces an odd result in which the Court of Disputed Returns, on a petition, is confined to machinery questions and incapable of deciding without reference from a House an issue fundamental to the due election of a candidate, viz that candidate's qualification or disqualification under the Constitution, there are several answers. They go beyond the clear language and structure of the Act, its constitutional setting and the history that preceded and followed its original enactment.

275. Where a person is apparently the successful candidate, disputes about the counting of ballot papers and illegal practices (ss 360(3), 362) having been resolved, that person is on the face of things entitled to take his or her place in the Parliament without undue distraction of the kind which further disputes as to qualification or as to the election might occasion. Although the person might be "incapable of being chosen or of sitting" [94] , subject to the Constitution, parliamentary privilege, tradition and courtesy reserve the decision on that question to the House concerned. It is, after all, dealing with a person who is, or shortly will be, one of its own. Although it might be said to be theoretically desirable that any elector should be able to challenge before the Court of Disputed Returns the apparently successful candidate's constitutional qualifications, the withholding of jurisdiction in that regard from the Court of Disputed Returns, in the case of a person elected and returned, is by no means without precedent, as this Court noted in In re Wood [95] .

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(354) *Constitution*, s 44.
(355) (1988) 167 CLR 145 at 157.

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276. The same justification for the distinction as existed in history underpins that now found as between Div 1 and Div 2 of Pt XXII of the Act. It is, in my view, a serious defiance of the distinction there drawn to acknowledge suggested defects in the drafting of provisions of particular sections in Div 1 to engage in the surgery of constitutional severance and then to stretch words expressed in general terms to perform functions which the language, history and scheme of the Act show, with clarity, were not those which the Parliament had in mind. Whereas the Parliament accepted that questions going to the democratic integrity of a disputed election might be resolved by the Court of Disputed Returns on an elector's petition, issues respecting the qualifications of a person elected by that process, it retained to itself. The involvement of the Court of Disputed Returns under Div 2 was to be confined to a jurisdiction initiated by the relevant House of Parliament, and that House alone. It is pointless otherwise to dispute the justifiability or merits of the distinction. History, long-standing parliamentary practice and the Constitution itself confirm the existence of the distinction which the Act has merely preserved. The duty of any court, in the absence of some other constitutional constraint or requirement, is to give effect to this constitutional and legislative purpose and to observe the distinction.

277. To the complaint that this might result in a person, although disqualified, being chosen and sitting as a Senator or member of the House of Representatives (or for that matter being held disqualified from doing so for purely political reasons) there are several answers. First, the reservation of the determination of qualifications to the respective Houses of the Parliament was recognised in s 47 of the *Constitution*. It might have been maintained indefinitely, if the Parliament did not otherwise provide. It should not be assumed that in matters of this kind the Federal Parliament would act otherwise than with propriety and lawfulness as the Constitution presumes. Secondly, whilst observing considerable restraint against intruding into the evaluation of the occasion for the exercise of a privilege belonging to a House of the Parliament [96] and ordinarily permitting parliamentary procedures to be completed before they intervene [97] , the ordinary courts of the land, including this Court, exist to uphold the law and the Constitution in relation to the Parliament as to the Executive Government and the courts themselves [98] . Where it could clearly be demonstrated that a person was incapable of being chosen or of sitting as a Senator or a member of the House of Representatives [99] , and particularly where, having been allowed to sit, no steps were taken to invoke the Act to resolve the disputed qualification, a person with standing

would be entitled to secure relief of an appropriate kind under s 75(v) of the *Constitution* directed to a relevant officer of the Commonwealth.

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(356) *R v Richards; Ex parte Fitzpatrick and Browne* (1955) 92 CLR 157 at 162 *Egan v Willis* (1998) 195 CLR 424 at 445, 462-463, 487-494.
(357) *Cormack v Cope* (1974) 131 CLR 432cf *Trethowan v Peden* (1930) 31 SR(NSW) 183; *Attorney-General (NSW) v Trethowan* (1931) 44 CLR 394 *Attorney-General (NSW) v Trethowan* (1932) 47 CLR 97[1932] AC 526 *Egan v Willis* (1998) 195 CLR 424 at 492-493
(358) *Egan v Willis* (1998) 195 CLR 424 at 492-493
(359) *Constitution*, s 44.

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278. Although in several places the Act purports to limit disputes as to the validity of any election or return (the Act, s 353(1)) to proceedings by way of petition addressed to the Court of Disputed Returns "and not otherwise" and purports to make all decisions of that Court, whether in such disputes (the Act, s 368) or in proceedings on a reference under Div 2 by either House of the Parliament (the Act, s 381) "final and conclusive and without appeal, and not [to] be questioned in any way" (the Act, s 368), such provisions appearing in the Act could have no operation to defeat the availability of relief otherwise provided by the Constitution. No such relief was sought in this case. It is therefore unnecessary and inappropriate to explore the questions that would be raised [100] . But it should not be assumed that the Constitution would provide no relief where the relevant House of the Parliament failed or refused to "determine" a question respecting the qualification of a Senator or of a member of the House of Representatives. Neither a lack of provision in Div 1 nor even an invalid provision for reference in Div 2 would necessarily leave a meritorious complainant without constitutional remedy.

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(360) They include the extent to which s 47 of the *Constitution*, appearing in Pt IV of Ch I, would be read as subject to all of the requirements of Ch III; cf *R v Richards; Ex parte Fitzpatrick and Browne* (1955) 92 CLR 157 at 166-168

Conclusions

279. It follows that the Court of Disputed Returns has no jurisdiction to hear and determine the petition of either of the petitioners challenging the election of Mrs Hill as a Senator for the State of Queensland. Question (a) in each of the cases stated for the opinion of the Full Court should therefore be answered "No".

280. In these circumstances, it is unnecessary for me to decide whether an additional reason exists for reaching this conclusion by virtue of the impermissibility, under Ch III of the *Constitution*, of conferring jurisdiction on the High Court as the Court of Disputed Returns, including the jurisdiction purportedly conferred in Div 1 of Pt XXII of the Act. Before considering constitutional questions, it is ordinarily appropriate and usually necessary to ascertain the meaning of the Act, the constitutional validity of which is disputed. Where, as in this case, the provisions of the Act, properly understood, afford no jurisdiction to the Court of Disputed Returns, invoked on the petition of an elector, no question arises as to whether jurisdiction, if it were conferred, would be beyond the power of the Parliament because contrary to Ch III. Because it is unnecessary to answer that question, I will refrain from doing so. However, perhaps I can be permitted

to contrast the willingness of the majority in this case to countenance the conferral of a peculiar and purportedly exclusive statutory jurisdiction on this Court (in effect reconstituting and even renaming it as a kind of special creature of the Parliament to perform a multitude of functions, many of them quasi-political and semi-advisory, according to extremely broad criteria and sometimes peremptory, and even apparently arbitrary, procedures) with the very strict approach taken in other recent decisions where the negative implications of Ch III of the *Constitution*, unstated in the text, have been given a most generous rein [101] .

(361) *Re Wakim; Ex parte McNally* (1999) 198 CLR 511

281. Each of the questions raised in the cases stated was fully argued. Of course, I have formed views about them. But it is inappropriate to express those views because, at the heart of my approach to these proceedings is the conviction that the Parliament, so far as the Act is concerned, has kept to itself, in the first instance, consideration of disputes as to the qualification of persons otherwise lawfully elected as a Senator or as a member of the House of Representatives. At least in these proceedings, it should therefore be left to the parliamentary process, and not to a court, to determine what should be done in relation to the suggested disqualification of Mrs Hill.

282. This is not a case where the alleged disqualification might be decided simply, as by a certificate of conviction of a relevant offence [102] , proof that the person is an undischarged bankrupt [103] , holds an office of profit under the Crown [104] or has a direct and impermissible pecuniary interest in an agreement with the Public Service of the Commonwealth [105] . Very many Australian citizens, whose allegiance to Australia could not be questioned, have dual citizenship with other countries. Estimates were given during the hearing, running perhaps into millions, of Australian citizens who would be affected. Their status for s 44(i) of the *Constitution* could not, in my opinion, depend upon (or be surrendered to) the laws of other countries which are many and varied. The defects of s 44(i) of the *Constitution* in a country whose citizens are drawn from so many other lands and nationalities has frequently been called to notice [106] . The consideration of whether Mrs Hill was incapable of being chosen or of sitting as a Senator raises issues which may have considerable political significance upon which, in the first instance at least, it is completely appropriate to leave it to the Senate, rather than a court, to make a determination.

(362) *Constitution*, s 44(ii).
(363) *Constitution*, s 44(iii).
(364) *Constitution*, s 44(iv).
(365) *Constitution*, s 44(v).
(366) Australia, Constitutional Commission, Final Report (1988), pp 288-289. See also Australian Parliament, Senate Standing Committee on Constitutional and Legal Affairs, The Constitutional Qualifications of Members of Parliament (1981) No 6, pp 9-12, 14.

283. If, pursuant to s 376 in Div 2, the Senate, by resolution, were to refer to the Court of Disputed Returns any question respecting the qualifications of Mrs Hill to be a Senator, that would be the appropriate time for such a Court to consider the reference and, if its validity were upheld, to give its response. This Court may not do so on a petition addressed to it under s 353 in Div 1 for it has no jurisdiction to try that petition under s

354 in the same Division. The scheme of the Act should be followed at this stage. Not least is this necessary because the scheme of the Act reflects that of the Constitution itself [107] .

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(367) *Constitution*, s 47.

Costs

284. A question arises as to the costs of the proceedings in this Court. Those proceedings are before the Court pursuant to the two references made to the Court under the *Judiciary Act*. By s 26 of that Act, the Court has jurisdiction to award costs in all matters brought before the Court, including matters dismissed for want of jurisdiction. It is pursuant to that provision and not s 360 of the Act that costs must be provided (the Act, s 360(1)(ix)) The special provisions of s 360(4) by which the Court of Disputed Returns may "order costs to be paid by the Commonwealth where the Court considers it appropriate to do so" are unavailing in the view which I take of the nature of this Court's jurisdiction and the lack of jurisdiction of the Court of Disputed Returns. Ordinarily, because the petitioners have invoked a jurisdiction which does not belong to the Court of Disputed Returns, they would be ordered to pay the costs occasioned by their error.

285. However, before this Court the Attorney-General for the Commonwealth intervened in support of the interests of the petitioners. The ambiguities and uncertainties of the Act have been drawn to attention in the past. The issues litigated involve constitutional and statutory questions of general application and of fundamental importance to the operation of federal electoral law. In such circumstances, I consider that it is just that the costs of the petitioners in each case stated in this Court and of the first respondent should be borne by the Commonwealth. The second respondent should bear its own costs.

Orders

286. The questions in the case stated should be answered, and the orders for costs made, as McHugh J has provided.

CALLINAN J.

287. I agree with McHugh J that, given the structure of the *Commonwealth Electoral Act 1918 Cth*, the specific reference to bribery, corrupt practices, undue influence and illegal practices, the omission of any reference in Div 1 to the constitutional qualification of a member (except the special case of a s 15 appointment) and the enactment of Div 2 which deals exclusively with the qualification of members, the best interpretation of the *Commonwealth Electoral Act* is that a petition on the bare ground of an allegation of a breach of s 44 of the *Constitution* is not within the jurisdiction of the Court of Disputed Returns.

288. There is only one other matter to which I wish to refer.

289. The petitioners (and the Commonwealth which supports them) acknowledge that at the time of Federation the United Kingdom was unquestionably not a foreign power. One of their primary arguments on the central question whether the United Kingdom is a foreign power is that, as time has passed, circumstances have changed, and the United Kingdom, by a process of evolution has now become a power foreign to Australia (the "evolutionary theory"). It is upon that argument that I wish to comment.

290. The evolutionary theory is, with respect, a theory to be regarded with great caution. In propounding it, neither the petitioners nor the Commonwealth identify a date upon which the evolution became complete, in the sense that, as and from it, the United Kingdom was a foreign power. Nor could they point to any statute, historical occurrence or event which necessarily concluded the process. There were, they asserted, a series of milestones, for example, Federation itself, the *Statute of Westminster Adoption Act 1942 Cth*, the *Royal Style and Titles Act 1973 Cth* and the *Australia Acts* [108] but neither the last of these nor any other enactment was said to be the destination marker of the evolution.

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(368) *Australia Act 1986 Cth*; *Australia Act 1986 UK*.

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291. The great concern about an evolutionary theory of this kind is the doubt to which it gives rise with respect to peoples' rights, status and obligations as this case shows. The truth is that the defining event in practice will, and can only be a decision of this Court ruling that the evolutionary process is complete, and here, as the petitioners and the Commonwealth accept, has been complete for some unascertained and unascertainable time in the past. In reality, a decision of this Court upon that basis would change the law by holding that, notwithstanding that the Constitution did not treat the United Kingdom as a foreign power at Federation and for some time thereafter, it may and should do so now.

292. There was no evidence before the Court as to the consequences of the renunciation of British citizenship; whether, for example, entitlements to United Kingdom pensions or social services might be adversely affected; or whether any rights of children of a person renouncing citizenship to seek employment in the United Kingdom or Europe might be affected. However, plainly a person who renounces United Kingdom citizenship will be forgoing a right to hold a United Kingdom passport which confers at least some advantages in travel to the United Kingdom and in Europe. Any person should be entitled to know at what point in time the United Kingdom has come to be, if it is to be so regarded, a foreign power, so that that person may make an informed choice or election, to enjoy whatever benefits (including to stand for election to an Australian Parliament) renunciation of United Kingdom citizenship may confer, in exchange for the forgoing of such benefits as United Kingdom citizenship may bestow. The operation of an evolutionary theory in this context would deny a person such as the first respondent the opportunity of making an informed choice or election until such time as this Court or, if appropriate, Parliament, determine that the evolution is complete.

293. The Court was not taken to any statutes in which the term "foreign power" is used. However there are statutes which do use that term and whose application might perhaps be different if this Court were to hold that the United Kingdom is a foreign power. One such statute is the *Australian Security Intelligence Organization Act 1979 Cth*. Section 4 of that Act defines "foreign power" to mean a foreign government, an entity directed or controlled by a foreign government or a foreign political organisation. Section 4 also defines "acts of foreign interference" to mean activities carried on by a "foreign power" that are "clandestine or deceptive", "carried on for intelligence purposes", "carried on for the purpose of affecting political or governmental processes", "otherwise detrimental to the interests of Australia" or "involve a threat to any person". Section 4 also defines "security" to include the protection of the people of Australia from, inter alia, "acts of foreign interference".

294. A number of sections of the *Australian Security Intelligence Organization Act* define the powers and obligations of ASIO officers in terms of "security". One of the primary functions of ASIO is to provide "security assessments" to government agencies. Such

assessments are statements by ASIO to the relevant organisation whether it is consistent with "security" to take prescribed administrative action against a particular person (see Pt IV of the *Australian Security Intelligence Organization Act*). Hence, the meaning of "foreign power" could well affect, for example, employment opportunities of people in the same position as the first respondent. Whilst the meaning of "foreign power" for the purposes of this, or indeed any other Act will ultimately depend upon the language of those Acts and the context in which the expression is used, the constitutional meaning of the same term could have a bearing upon its statutory meaning, particularly in a statute dealing with matters of national security.

295. Another Act which uses the term "foreign power" is the *Crimes Act 1914 Cth*. Section 78 of that Act makes it an indictable offence to make, obtain or possess any kind of document or article that could be useful to "an enemy or a foreign power". The penalty for this offence is seven years imprisonment. Section 80(c) of the same Act makes a place that would be useful to "an enemy or to a foreign power" a "prohibited place" for the purposes of the *Crimes Act*. "Foreign power" is not defined in this Act.

296. The potential reach of s 78 of the *Crimes Act* is very great. It is conceivable that until a decision of this Court that the United Kingdom is a foreign power, (assuming the expression should have the same meaning in the *Crimes Act*) people might unknowingly have been infringing that section for an indeterminate period of time.

297. I would therefore be inclined to hold that the evolutionary theory which has been advanced in this case, having as it does the defect of uncertainty as to events and conclusion, should not be accepted or applied here. However on neither that nor the other arguments relied on by the parties and the Commonwealth is it necessary for me to express any concluded opinion in view of my agreement with McHugh J on the issue of jurisdiction.

298. The following are the questions and the answers which I would give to them:

(a) Does s 354 of the Act validly confer upon the Court of Disputed Returns jurisdiction to determine the issues raised in the Petition? No

(b) Was the first respondent at the date of her nomination a subject or citizen of a foreign power within the meaning of s 44(i) of the *Constitution*? Inappropriate to answer.

(c) Was the first respondent duly elected at the Election? Inappropriate to answer.

(d) If no to (c), was the Election void absolutely? Does not arise.

(e) If no to (d), should the second respondent conduct a recount of the ballot papers cast for the Election for the purpose of determining the candidate entitled to be declared elected to the place for which the first respondent was returned? Does not arise.

(f) Save for those otherwise dealt with by order, who should pay the costs of the Stated Case and of the hearing of the Stated Case before the Full High Court? The Commonwealth should pay the petitioners' and the first respondent's costs.

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