IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S190 of 2017

BETWEEN:

Peter Alley
Plaintiff

and

David Gillespie
Defendant

Attorney-General of the Commonwealth
Intervening

PLAINTIFF'S OUTLINE OF SUBMISSIONS ON QUESTIONS RESERVED

Filed on behalf of Peter Alley
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PART I: Publication

1. These submissions are in a form suitable for publication on the internet.

PART II: s 78 Certification

2. The plaintiff certifies that various constitutional issues arise in this case and that it has filed and served two s 78B notices in relation to them.[1]

PART IIIA: Argument – First Question

3. The first question reserved is "can and should the High Court decide whether the defendant was a person declared by the Constitution to be incapable of sitting as a Member of the House of Representatives for the purposes of the *Common Informers (Parliamentary Disqualifications) Act 1975* ("Common Informers Act")". The plaintiff submits that this question should be answered as follows:

> *The High Court can and must decide whether the defendant was a person declared by the Constitution to be incapable of sitting as a Member of the House of Representatives for the purposes of s 3 of the Common Informers Act.*

4. Question One involves construing the Common Informers Act against its particular constitutional setting. The constitutional setting is not one where s 46 depends upon s 47 to provide the operative antecedent (ie the state of affairs in which a person is incapable of sitting). The existence of such a relationship is not open textually, contextually or historically. The restrictive reading of s 46 urged by the Commonwealth and the defendant is not a reading which is imperatively demanded by the more general considerations of the Constitution. This Court should reject the artificial placement of such a restrictive reading on s 46.[2] Moreover, no such relation between ss 46 and 47 was capable of being created, by the enactment of displacing legislation pursuant to s 47. Only s 46 displacing legislation was capable of creating a procedural dependence on the legislation which displaced s 47. The displacement of s 46 by the Common Informers Act manifestly did not create any such dependency. It preserved every presently relevant aspect of s 46 with one exception, being the exclusive jurisdiction for this Court thereby abolishing the jurisdiction of "any court of competent jurisdiction".

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[1] See Questions Reserved Book ("QRB") at pp 35 and 49. See also the Commonwealth's s 78B Notice at QRB 45.
[2] See *R v Richards; Ex parte Fitzpatrick and Browne* (1955) 92 CLR 157, at 165 per Dixon C.J., McTiernan, Williams, Webb, Fullagar, Kitto and Taylor JJ; see also *Sue v Hill* (1999) 199 CLR 462 [1999] HCA 30 at 510 [118] per Gaudron J.

The Constitutional Setting

Sections 44, 45 and 46

5. An important textual feature of s 46 is that its subject is "any person". Section 46 is in harmony with the opening words in s 44, the subject of which is also "any person". The language of "any person" distinguishes the operation of ss 44 and 46 from the other relevant provisions of Part IV of Ch I of the Constitution which operate upon a "senator" or a "member of the House of Representatives" ("MHR"). The distinction between any person, senator and a MHR is that it is only "any person" who is incapable of "being chosen or of sitting as a senator or a member of the House of Representatives" for the purposes of s 44. Any person who is capable of being chosen, upon being chosen, becomes a senator or MHR for the purposes of Ch I of the Constitution. (As this case concerns a purported MHR and as there is no presently relevant distinction between a senator or a MHR, the term MHR will hereafter be used to capture the concept of a member of either House.)

6. A duly elected MHR who, during his or her term, "becomes subject to any of the disabilities mentioned" in s 44 is not "incapable of being chosen". Rather, they are merely incapable of sitting or continuing to sit, because s 45 provides that his or her place "shall thereupon become vacant". As Quick and Garran explain[3]:

> *The preceding section [s 44] enumerates different kinds of status, which, while they continue, disqualify "any person" from becoming or being a senator or member; this section [s 45] enumerates different acts or events which, if they are done by or happen to a senator or a member, disqualify him from continuing to be a senator or a member. The preceding section [s 44] refers to the continuing existence of a disqualifying status: this section [s 45] to the happening of a disqualifying event. This section [s 45] therefore deals only with senators or members who were qualified at the time of their election, but who become disqualified afterwards.*
>
> *The disqualifying event mentioned in subsection i [i.e. s 45(i)] is the requirement of any of the kinds of status enumerated in the preceding section [s 45]. If such status existed at the time of the election, the person affected is not a senator or a member; he is dealt with under the preceding section [s 44]. If, after becoming a senator or a member, he "becomes subject to" the disability, eo instanti his seat is vacated under this section.*

7. What the Constitution required a common informer to prove in a s 46 suit was first that the defendant was a person who was "incapable of sitting", second that the defendant did in fact so sit and third on how many days he or she did so. If these elements were proven a "court of competent jurisdiction" would be bound to

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[3] Quick and Garran in *Annotated Constitution of the Commonwealth of Australia* (1901, 1971 reprint) p 494 § 153 "If a Senator or Member".

determine the monetary liability accordingly. Replacement of the s 46 suit by a suit under the Common Informers Act expressly preserved that scheme, modified by limiting the relevant period for which a penalty was recoverable and by greatly reducing the amount of the penalty.

8. The phrase "incapable of being chosen or of sitting" in s 44 is a singular condition.[4] The "or of sitting" does not provide an alternative path to liability to that of "incapable of being chosen", given the place and effect of s 45 (see 6 above). Section 46 does not impose a penalty for the incapacity of any person "being chosen" if the person does not sit. A prayer for relief in a common informer's suit seeking a declaration of a vacancy on a s 46 suit is either inapposite or unnecessary.[5] The incapacity to sit is simply a necessary finding to obtain a penalty, albeit it also produces a vacancy under s 45. The proper relief claimable by a common informer against "any person" is the s 46 penalty which is to be calculated by the number of days "any person" "so sits".

Section 47

9. There is nothing in the text of s 47 which imposes on s 46 a procedural dependence on s 47, in the sense that the operative antecedent of the incapacity to sit cannot be proved in a common informer's suit. Rather, a comparison between s 46 and s 47 shows that the Constitution assigns power to judicial bodies in s 46 and assigns power to parliamentary bodies in s 47. The Constitution situates the language of "declared by this Constitution" in the section which assigns power to judicial bodies and not in the section which assigns power to parliamentary bodies. The Constitution does not provide that in order for a common informer to sue in a body exercising judicial power they must wait for the very same "question respecting... a qualification" (ie whether the MHR has sat while incapable of doing so) to be determined in his or her favour by a body exercising parliamentary power.

10. This Court, sitting as the Court of Disputed Returns, has held that s 47 questions are not mutually exclusive questions; questions of "qualification" or "vacancy" can arise both independently of and dependently with a "disputed election".[6] This is different from the supposed dependence relied on by the Commonwealth and the defendant which is a dependence of s 46 on s 47. It is important to note that the starting point for determining the existence and consequence of any relationship between ss 46

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[4] QRB at 13 SOC at [15] the plaintiff alleges that the defendant a) was incapable of being chosen; b) was incapable of sitting; and c) is incapable of continuing to sit.
[5] The Plaintiff does not seek a declaration of a vacancy - QRB at p 14.
[6] *Sykes v Cleary (No. 1)* (1992) 66 ALJR at 579 per Dawson J; *Sue v Hill* [1999] HCA 30; (1999) 199 CLR 462 at [24] – [25] per Gleeson CJ, Gummow and Hayne JJ, and at [113] – [114] per Gaudron J.

and 47 is not akin to a s 109 inconsistency inquiry. It is nonsensical to conceive of s 47 as covering the s 46 field. In the absence of displacing legislation, both ss 46 and 47 would operate independently of one another, even if they operate in the same general "field". That ss 46 and 47 must be independent is shown by Parliament's ability to displace or alter the several effects of ss 46 and 47 by "otherwise providing" in whatever terms Parliament chooses from time to time.

11. In relation to s 46, the framers of the Constitution intended that a court of competent jurisdiction[7], on application by a common informer, was assigned power to determine whether any person had breached the s 44 constitutional imperative, by sitting. The only relevant powers the Constitution gave to the Parliament in relation to s 46 was the power to displace and the power to confer jurisdiction on particular judicial bodies to exercise the judicial power required by s 46.

12. In relation to s 47, the framers of the constitution intended that the questions respecting "vacancy", "qualifications" and "disputed elections" not be questions for a body exercising judicial power, initially unless and until the Parliament otherwise provides. This was the "exclusive jurisdiction" of each House.[8] A question respecting the "qualification" of a MHR was a question respecting the qualification provisions in s 34 (which themselves were able to be altered by Parliament). A question respecting a "vacancy" in either House was a question respecting ss 19 and 37, 20 and 38 and 45. A question of a "disputed election" was a question concerning the subject matter which is now enshrined in Part XXII of the *Commonwealth Electoral Act 1918* (Cth) ("Electoral Act") but had its origins in the *Parliamentary Elections Act 1868* (UK). On this interpretation of s 47, it was (initially) the House in which a question arose that could determine any question respecting a "qualification", "vacancy" or "disputed election".

13. However, the Constitution did not in s 47 or elsewhere assign power to a House to determine what the "Constitution declared". That has always been the exclusive function of the judicial power. It was never the role of the Senate or the House of Representatives to determine what the Constitution declared.

14. Whether for the purposes of s 46 a person is "declared by the Constitution to be incapable of sitting" is by its character a question to be determined by a court exercising judicial power and not a body expressing its political will by majority

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[7] To be provided by the Parliament under for example s 76(1) and 77(3), as was done in general terms by the *Judiciary Act* 1903 (Cth) ss 30 and 39 (subject to s 38).

[8] See fn 3 of the defendant's written submissions and Quick and Garran in *Annotated Constitution of the Commonwealth of Australia* (1901, 1971 reprint) p 496 § 155 "Qualification .. Vacancy .. a Disputed Election.".

resolution as occurs in the Senate and the House of Representatives (let alone by a bureaucratic body exercising executive power).

15. Perhaps with an eye to relatively recent British history[9] the Constitution was less concerned with whether a duly elected "senator or member" became subject to a s 44 disability during his or her term. In any event, the initial position provided by ss 45 and 47 reflected earlier British and American history that the qualification of a representative who was validly elected but subsequently alleged to be not qualified to sit was a question to be determined by a parliamentary body[10]. Section 46 is not expressed in such a way that would render the specific questions raised by s 47 redundant, superseded, moot or foreclosed – and the same is true vice-versa. Any question respecting a "vacancy" or a "qualification" was a question for the House in which it arose but any determination of what was "declared by this Constitution" for the purposes of s 46 remained the domain of a judicial body.

16. That s 46 is independent of s 47 is reinforced by the same phrase "declared by this Constitution" in s 52 of the Constitution in relation to the exclusive powers of Parliament. It is not the case that any body other than a judicial body is capable of determining what is "declared by the Constitution" for the purposes of s 52 of the Constitution. An assertion that it was not for a Chapter III Court to determine what the Constitution declared in s 52 would be doomed to fail.

Section 48

17. The Constitution provides that each MHR "shall receive an allowance of four hundred pounds a year, to be reckoned from the day on which he takes his seat". Thus, the effect of the Constitution on "any person" who sits whilst possessing a s 44 disability is the imposition of a penalty equivalent to a quarter of their annual salary each day they sit. The clear intention of s 46 was to provide a tremendous sanction against sitting whilst possessing a s 44 disability. What would frustrate this intention is if the imposition of the penalty was dependent upon a House determining an antecedent "question respecting the qualification" of an MHR. More appositely, what would frustrate this intention is if the imposition of the penalty was dependent upon a House determining that a person was "declared by this Constitution to be incapable of sitting".

18. A House could simply refuse to determine the "question". More importantly, a House (unlike a court) is under no duty to determine what the Constitution declares and

[9] Parliamentary Elections Act 1868 (UK) (also known as the *Election Petitions and Corrupt Practices at Elections Act)*.
[10] eg US Constitution Art 1 s 5

could simply refuse to determine what the Constitution declares. A House (unlike the High Court) could also be wrong about what the Constitution declares. If the political will of a House was to refuse to either determine a question respecting a qualification or determine what the Constitution declared a person could go full term as a purported MHR.

Section 49

19. Although the effect of ss 44 and 46 was to assign power to a judicial body in relation to what the "Constitution declared" this did not result in a wholesale extinguishment of the power, privileges and immunities of a House. Those powers, privileges and immunities were assumed by each House upon their creation by force of s 49. The 1999 example used in the defendant's submissions of a motion passed in the House of Representatives in relation to Mr Entsch MHR is illustrative. That motion did not state that Mr Entsch MHR was a person "declared by the Constitution" to be capable of sitting. Nor could it. The motion stated that "the House determines that the Member for Leichhardt [does not have the relevant s 44(v) interest]... and is therefore not incapable of sitting as a Member of the House". The Constitution mandates that the determination of whether Mr Entsch is declared by the Constitution to be incapable of sitting, in a s 46 suit, is an independent and distinct determination which can only be undertaken by a body exercising judicial power.

20. If, after the passage of the above resolution, a common informer was to commence proceedings which alleged that Mr Entsch was a person declared by the Constitution to be incapable of sitting, the High Court (and only the High Court since 1975) would have both the duty and power to determine whether Mr Entsch was declared by the Constitution to be incapable of sitting. This would make a reality of McHugh J's potential "unseemly conflict"[11]. If it is unseemly it is a constitutionally mandated unseemliness which can only become seemlier by deference to one of two competing constitutional organs. Deference to the political organ is deference to the political will of a House on a matter requiring judicial determination and has no basis in the Constitution. Deference to the judicial organ is deference to the Constitution.

Constitutional setting: summary

21. The Constitution intended that a judicial body have the power and also the duty to determine what the Constitution declared. Further, the framers of the Constitution

[11] *Sue v Hill* [1999] HCA 30; (1999) 199 CLR 462 at 556 [243].

intended that a s 46 court would superintend the s 44 constitutional imperative. What the Constitution provided in s 47 was not for a House to determine what the Constitution declared, rather, it provided that a House could determine various questions respecting various subject matter. Section 47 was displaced by the Electoral Act (and its cognates). Section 46 was displaced by the Common Informers Act.

Displacing legislation

The Common Informers Act and the Electoral Act

22. Neither the defendant nor the Commonwealth assert that the Electoral Act was an Act which otherwise provided for the purposes of s 46. The plaintiff also does not assert this. Conversely, no party asserts that Common Informers Act was an Act that otherwise provided for s 47[12]. It remains to construe the Common Informers Act alongside the Electoral Act.

23. The position of the Commonwealth is that s 47 is the exclusive source of a court's authority to decide matters arising under s 44.[13] The Commonwealth asserts that this exclusive source of a court's authority was vested in the Court of Disputed Returns by force of the Electoral Act (a s 47 Act)[14]. The defendant's position is not as nuanced. It appears to assert that both pre and post 1975 the Court of Disputed Returns was the only judicial body which could determine whether the defendant is a "person declared by the Constitution to be incapable of sitting." [15] Whether a person is "declared" in relation to the "Constitution" is the language of s 46. If what the defendant means is that the Court of Disputed Returns has jurisdiction to make a s 46 declaration this would mean that the Electoral Act displaced s 46, a proposition which no party advances.

24. The reason why the positions of the Commonwealth and the defendant both fail is because s 47 is not the exclusive source, or even a source, of a court's authority to decide a matter arising under s 44. The High Court's judicial power is assigned to it by s 71 of the Constitution. The High Court has authority to decide any matter arising under the "Constitution or involving its interpretation" if the Parliament confers it jurisdiction to do so pursuant to s 76(i) of the Constitution. The power

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[12] See AGWS at 7(d) and DWS at [28] and Defence at [1](iii) QRB at p 16.
[13] See AGWS at [47] "however, unless the absence of qualification had been determined in the manner prescribed by or under s 47, a "Court of competent jurisdiction" could not proceed to impose such a penalty, because such a court had no authority to decide one of the two critical questions upon which liability to that penalty included" see also [48] "none of that gives rise to any imperative that might lead the Court to strain to imply into s 46 authority to decide which is exclusively dealt with in s 47".
[14] AGWS at [52].
[15] See DWS at [30].

Parliament exercised when it conferred jurisdiction on the Court of Disputed Returns to determine s 44 constitutional qualifications was the power assigned to it by s 76(i) of the Constitution. [16] Thus it was ss 71 and 76(i) of the Constitution and not s 47 which was the source of the High Court's (sitting as the Court of Disputed Returns) authority to decide matters relating to the s 44 constitutional imperative.

25. A slightly different question arises if the Commonwealth or the defendant were to assert that the jurisdiction of the High Court in relation to s 44 matters was exclusively provided for when the Parliament enacted the Electoral Act. It may be put against the plaintiff that in enacting the Common Informers Act, the Parliament did not intend to (and thus did not) confer s 76(i) jurisdiction on the High Court and therefore the High Court is unable to determine s 3(1) Common Informer Act liability because it does not have authority to decide whether the operative antecedent exists under s 44. Such an argument would hold that the authority to decide the operative antecedent for the Common Informers Act was conferred by the Electoral Act on the Court of Disputed Returns to the exclusion of subsequent Acts. The first thing to be said about such a position is that there is nothing textually that would suggest the Parliament did not intend to confer s 76(i) jurisdiction on the High Court in a Common Informers Act suit in order for it to determine whether the operative antecedent existed. It would be expected that such an intention be made clear. At the least, it would be expected that the Common Informers Act omit the words "declared by the Constitution to be incapable of sitting". The second thing to be said about such a position is that the Common Informers Act is later and more specific than the Electoral Act whereby the latter is an unlikely basis to restrict the ordinary meaning of the statutory grant of jurisdiction in the former.

The ordinary meaning

26. The ordinary meaning of ss 3 and 5 is that the High Court was exclusively granted the duty and power to hear and determine if any person was "declared by the Constitution to be incapable of sitting". Moreover, the High Court was conferred the authority to decide whether any person possessed a s 44 disability. The ordinary meaning of s 3 is not that it relies on the Electoral Act to provide it with the operative antecedent of liability. The ordinary meaning of 3 is not that it relies on the political will of the House to provide it with the operative antecedent of liability.

27. In such circumstances where the provisions of the Common Informers Act are unambiguous, reference to material extrinsic to the Common Informers Act is only

[16] *Sue v Hill* (1999) 199 CLR 462 at 472 – 473 [4] per Gleeson CJ, Gummow and Hayne JJ.

warranted to confirm that this meaning is the ordinary meaning.[17] The Second Reading speech of the then Attorney-General is confirmatory, and provides:[18]

> *The purpose of the provision is to allow alleged disqualifications to be independently tested. There is already another procedure for this and in normal circumstances it would seem to the Government that the House itself would refer the question to the High Court and have the matter properly judicially determined. One significant change that the Bill will make is that common informer proceedings, if brought, are to be brought in the High Court.*
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> ...
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> *The Government was attracted to the idea of doing away with the common informer action altogether. It did not adopt that course for reasons which I shall try to give in a non-political way. May I put them in a hypothetical way to illustrate my point? One can imagine a situation in which a case arises, either in this House or in the other place, with different parties not only a 2-party system, but also a 3-party or a 4-party system- where a Government might take the view, trying to be non-political, that a charge has been made against a member and that the charge should be referred to the High Court pursuant to section 203 of the Commonwealth Electoral Act. In doing that the Government is not expressing any view whether the man is guilty or not guilty but, rather, that the charges have been made, the facts have been put before the Parliament and the matter should be resolved by the highest tribunal in the land.*
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> *In a hypothetical situation one can also imagine a combination of parties in Opposition, to which the charged person belonged, arguing amongst themselves and perhaps saying to themselves, if they had a majority in that House of the Parliament, that the matter should not go to the High Court. If the situation came about where two or more opposition parties- this could not happen in this House-outnumbered the government and defeated its proposition to send the matter to the High Court for independent inquiry and report pursuant to section 203 of the Electoral Act, then from the point of view of the public there would appear to be something not very different from a conspiracy. It is this situation which the Government is anxious to avoid. If in a House, say the Senate, a majority of the non-Government members-this could be any party-put their minds to a matter and defeated what was obviously a proper measure than the public would say: 'These silly politicians are ganging up to protect one of their members'. They might use stronger words. The Government took the view that there must be preserved an independent right to challenge a person's right to sit in this House. That right is a common informer action...*
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> *The government believes it is a healthy measure to allow a citizen outside Parliament who is concerned with the way Parliament operates and with the basic question of whether a member of the House of Representatives or of the Senate is qualified and eligible to be investigated to take action if he thinks that the politicians in one of the 2 houses have not done the right thing by him. He should not be enriched.*

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[17] *Acts Interpretation Act 1901* (Cth) s 15AB (1)(a).
[18] Commonwealth, *Parliamentary Debates*, House of Representatives, 22 April 1975 at 1979.

> *He should not benefit from it unjustly. But he should be entitled to put that matter to the test in the court.* [19]

28. Notably absent from the above and the balance of the extrinsic material is any reference to a House determining a s 44 question itself. The Parliament in 1975 proceeded on the basis that a constituent body of Parliament could not provide (or deny) the operative antecedent for the purposes of s 3 of the Common Informers Act. What is clear from Hansard is that Parliament did contemplate that there would be some relation between the Electoral Act and the Common Informers Act. It was not contemplated that this was such that a common informer, and this Court, would have to wait until the Court of Disputed Returns, activated by a resolution by the House, had determined the question favourably to the common informer. Perhaps, there might be a potential overlap between the operation of the Common Informers Act and the Electoral Act, resulting in a confluence of proceedings. If such a confluence arose and if a common informer pressed his or her suit (which might be unlikely given the same political question would be determined at someone else's expense), this Court would exercise ordinary case management.

29. It is not denied by the Commonwealth that the High Court has jurisdiction to hear and power to determine the plaintiff's suit. The Commonwealth's position is that the suit should be stayed until the operative antecedent is supplied by the House or by this Court, sitting as the Court of Disputed Returns, on a referral pursuant to the Electoral Act. Both of those courses of action are dependent on the political will of the House of which the defendant purports to be a member. It is not clear whether the defendant accepts the Commonwealth's position that the Court should stay this proceeding until the House expresses its political will. The position of the plaintiff is that this Court has the means of resolving the facts and their consequences relating to the defendant. Moreover, this Court has both power and duty to do so. The duty is somewhat heightened in circumstances where there is a clearly arguable case (pleadings have closed and there has been no applications of a summary nature), where there has not been a referral from the House and where there has been nine recent referrals in relation to other purported parliamentarians (a point which the Commonwealth highlights[20]).

PART IIIB: Argument – Second Question

30. The second question reserved is "If the answer to question 1 is yes, is it the policy of the law that the High Court should not issue subpoenas in this proceeding directed

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[19] Commonwealth, *Parliamentary Debates,* House of Representatives, 22 April 1975 at 1985-86 (The Hon. Kep Enderby).
[20] AGWS at [48] see fn 81.

to a forensic purpose of assisting the plaintiff in his attempt to demonstrate that the defendant was a person declared by the Constitution to be incapable of sitting as a Member of the House of Representatives for the purposes of section 3 of the Common Informers Act". The plaintiff submits that this question should be answered as follows:

No.

31. The plaintiff accepts that the second question does not arise if it the court determines Question One against the plaintiff.

32. Question Two relates to the ability of this Court, in this special jurisdiction, to establish facts that bear upon the s 44 constitutional imperative. It is not legitimate to call in aid historical disapproval of common informers let alone historical inadequacy of official investigators to prosecute when construing the jurisdiction created in 1975 by the Common Informers Act. The starting point is not the middle ages. Rather, it is the second reading speech of the Common Informers Act. What Parliament sought to do by enacting the Common Informers Act was to preserve the common informer's suit as a modern device, being an accountability mechanism, by removing the atavistic aspect of a plaintiff suing to enrich himself or herself. As was explained by the then Attorney-General:[21]

> *It is not the intention of the Government to encourage common informer proceedings. But it feels that this procedure should be kept open notwithstanding its disuse during the twentieth century in relation to the Australian Constitution. However, we do not think it should be a vehicle by which a private citizen should be put in a position to enrich himself unjustly*

33. If further support for the proposition that a common informer is unable to enrich himself or herself is required, it can be found in Schedule 1 of the *High Court of Australia (Fees) Regulation 2012* which provides that the fee for filing a Common Informer Act suit is $2715 being more than ten times the penalty provided by s 3(1)(a) of the Common Informers Act.[22] The only function served by the Common Informers Act is a public one. It is difficult to conceive of a worthier public pursuit than an action which holds as its objective exposing a person as incapable of being a representative in the national Parliament. All of the old law which is imbued with judicial distaste for the common informer action is anachronistic and simply wrong in relation to a modern Common Informers Act proceeding.

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[21] Commonwealth, *Parliamentary Debates*, House of Representatives, 22 April 1975 at 1979 (The Hon. Kep Enderby).
[22] See item 102 of Schedule 1.

34. The Parliament deliberately conferred exclusive jurisdiction on the "highest tribunal in the land" (to use the words of the then Attorney-General) in relation to a Common Informers Act proceeding. It did so with the knowledge that the "highest tribunal in the land" had various compulsory powers at its disposal. This included the powers in the *High Court Rules* relating to subpoenas.[23] The policy of the law would not be served by a prohibition imposed by this Court on the issuing of subpoenas in a Common Informers Act suit. The contrary is the case, the policy of the law might well be frustrated should this Court not be able to issue subpoenas (directed to an appropriate forensic purpose) at the request of a common informer.

10 35. Finally, it is important to note the plaintiff accepts that the defendant may have valid privilege objections to a subpoena addressed to the defendant. However, the plaintiff has not sought to subpoena the defendant. Reliance on penalty privilege is misplaced.

Part IV: Time Estimate

36. The plaintiff estimates he will require no more than 1½ hours for the presentation of his oral argument.

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[23] See r 24.02 of the *High Court Rules 2004*.