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THE PRIME MINISTER AS PUPPET

Taking Howard to the High Court

NICOLE ROGERS

Often, for those of us who teach law, it is our students who plant the seed for an idea, a paper, an article or even a lawsuit. The idea for this article came from a question asked by a first year constitutional law student shortly after the Prime Minister, John Howard, announced that Australia would join in the US-led war on Iraq. She had read through the *Constitution* and had come across s 44(i). She asked why it was that John Howard was not disqualified from continuing to sit as a Member of Parliament due to his acknowledgment of allegiance to a foreign power.

No one asked which foreign power she meant. Most of our students, and indeed many Australians, perceived Howard as a puppet whose strings were being pulled by a powerful US government. His apparent subservience to the stated wishes of the President of the US and his support of an aggressive US foreign policy were, and still are, strongly criticised. Still, even if his behaviour amounted to an acknowledgment of allegiance to the US, what could be done about it?

The framers of the *Constitution* anticipated this question by inserting s 46. Section 46 confers the right to initiate a common informer suit in such circumstances. Through the common informer suit, an ordinary Australian can take any Member of Parliament, including the Prime Minister, to the High Court, and argue that the Member of Parliament is no longer qualified to continue to represent him or her.

At that time, people were assembling in huge anti-war protests all over the world. Why shouldn't a concerned Australian, necessarily a man or woman of straw, initiate a common informer suit against John Howard and argue in the High Court that the Prime Minister's allegiance to the US was demonstrated by his unpopular decision to join the 'Coalition of the Willing' in March 2003?

Section 46: the common informer suit

The relevant sections of the *Constitution*, ss 44 and 46, can be found in part IV. Section 44 sets out a number of constitutional grounds for disqualification of senators or members of the House of Representatives. Section 46 creates a right in 'any person' to bring a common informer suit against any Member of Parliament disqualified by the *Constitution* from continuing to sit as a Member of Parliament. The common informer suit entitles the successful litigant to a penalty payable by the disqualified Member of Parliament. However, the right to bring a common informer suit under s 46 can be modified or removed by ordinary legislation, without the need for a constitutional referendum, as the section begins with the phrase 'until the Parliament otherwise provides.' Parliament has otherwise provided, in the hastily enacted *Common Informers (Parliamentary Disqualifications) Act 1975* (Cth),¹ which reduces the amount that can be claimed as a penalty but nevertheless, importantly, preserves the right to bring a common informer suit. The right to bring a common informer suit is no longer conferred by s 46 of the *Constitution*; it is now conferred by legislation but, importantly, it is still there.

The preservation of the common informer suit offers an opportunity for any disgruntled Australian, frustrated by his or her apparent lack of choice in the appointment of our representatives in government and by their behaviour once in power, to challenge the right of a representative to continue to sit in either House of Parliament. Admittedly, the Member of Parliament must meet one of the grounds for disqualification set out in s 44. However, given the very broad application of s 44,² it is surprising that the common informer suit has not been used to advantage in the past and remains a 'constitutional curiosity'³ rather than a useful mechanism to make members of parliament more accountable to the Australian people.

In particular, the common informer suit seems to offer an excellent opportunity for an activist to challenge, in a public forum, the compliance of our current Prime Minister with US acts of aggression. In the Australian system of democracy, our right to determine who represents us in Parliament is limited to a vote,⁴ and an entrenched system of party politics and preferential voting⁵ ensure that in casting a vote there is only the illusion of choice. Surely, given these deficiencies, the common informer suit has an important role to play.

Why, then, has the common informer suit languished in obscurity? A common informer writ was issued against a senior cabinet minister in the Whitlam Government.⁶ However, 'despite the obvious financial attractions,'⁷ particularly before the passage of the *Common Informers (Parliamentary Disqualifications) Act*

1975 reduced the amount of penalty payable by a disqualified Member of Parliament, Australians have otherwise ignored the opportunities for enhanced popular participation in political decision-making offered by the common informer suit.

Gareth Evans has pointed out that the penalty aspect of a common informer suit can dissuade 'those individuals who might be most likely to bring suit for proper, public interest motives', lest they be labelled greedy informers.⁸ Evans also notes that historically, courts tended to place procedural and evidentiary barriers in the way of common informers and to interpret the law in the defendant's favour.⁹ Furthermore, the right to bring a common informer suit is not constitutionally entrenched but now is conferred by legislation. An activist might hesitate to use the common informer suit as a strategy for publicly airing grievances about the policies of a particular government; after all, that government can easily repeal the *Common Informers (Parliamentary Disqualifications) Act 1975* and legislate to remove the right to bring such a suit.

Despite these drawbacks, the political significance of the common informer suit should not be underestimated. The broadest interpretation of the right to initiate a common informer suit permits the suit to be brought when the relevant House of Parliament acts to protect its member. During argument in *Sue v Hill*,¹⁰ Gummow J outlined a scenario in which:

No one takes the point before the member takes his or her seat. There is a question, though, arises as to disqualification. It may have been one with an anterior existence. It may arise during the tenure whilst a person is sitting. There is no move within the Parliament to refer anything for party political reasons. What is to be done? How is the *Constitution* to be vindicated? That is why s 46 is there, why the common form is there.

The common informer suit may have been intended to be a mechanism that permits the resolution of an issue of disqualification in circumstances in which a House refuses to act against one of its members.¹¹ However the application of the common informer suit in such circumstances is unclear. In *Sue v Hill*, McHugh J pointed out that the debates on the *Common Informers (Parliamentary Disqualifications) Act 1975* in both Houses favour an interpretation of the legislation such that the High Court can determine *at any time* the eligibility of Members of Parliament to continue to sit. However, he stated that the debates might be less persuasive than usual due to the haste with which the Bill was drafted and debated. For the purposes of the case, it was unnecessary to decide between competing interpretations.¹² In the same case, Gaudron J held that s 46 should be construed broadly, so that it applies to Members of Parliament irrespective of whether the relevant House has made a determination as to their qualifications to continue to sit.¹³ Orr and Williams prefer an interpretation of the *Common Informers (Parliamentary Disqualifications) Act* such that the right to initiate a common informer suit is a 'full right to petition the Court of Disputed Returns at any time to unseat the disqualified member'.¹⁴ Yet the question of whether a common informer suit can be initiated without, or despite, a resolution by the relevant House remains unresolved.

The common informer suit is only one avenue by which questions of disqualification can be raised in the High Court. Questions of constitutional disqualification can be referred to the High Court sitting as the Court of Disputed Returns by way of electors' petitions.¹⁵ Furthermore, questions as to disqualification can be referred to the High Court sitting as the Court of Disputed Returns by the House in which the question arises, under s 376 of the *Commonwealth Electoral Act 1918*. Can such questions be decided instead by the relevant House of Parliament? This depends on the interpretation of s 376 of the *Commonwealth Electoral Act* and whether Parliament has, in enacting this section, 'otherwise provided' such that the constitutional right of the relevant House of Parliament to determine questions as to disqualification under s 47 of the *Constitution* has been removed.¹⁶ Section 47 is another constitutional section which begins with the phrase 'until the Parliament otherwise provides', and therefore the power of the relevant House of Parliament to decide issues of disqualification, as set out in s 47, can be removed by ordinary legislation without the need for a constitutional referendum. The uncertainty surrounding this question did not deter the House of Representatives in 1999 from passing a resolution that Warren Entsch, Parliamentary Secretary to the Minister for Industry, was not disqualified from continuing to sit despite his involvement in a company which had ongoing contracts with the RAAF.¹⁷

There are obvious problems in the retention of parliamentary power over disqualifications. Party politics will determine the outcome of any challenge raised in Parliament. Party politics will also determine whether or not the House refers a matter to the court under s 376 of the *Commonwealth Electoral Act*.¹⁸ Another problem is that electors' petitions under s 353 of the *Commonwealth Electoral Act* cannot be lodged if the issue as to disqualification arises some time after the election has been held. This is in contrast to the common informer suit, which permits a concerned member of the public to bypass party politics and air concerns that arise about the disqualification of a Member of Parliament in a public forum, even if the events that lead to disqualification have occurred after an election.

It is entirely possible that the High Court sitting as the Court of Disputed Returns will reach a different conclusion to that reached by the relevant House of Parliament in relation to whether a Member of Parliament should be disqualified from continuing to sit. A conclusion that a Member of Parliament should be disqualified will not necessarily change the political make up of a particular House.¹⁹ In the past, the High Court has considered the constitutional qualifications of five members,²⁰ and decided that four of the five were constitutionally disqualified from continuing to sit. Two of these members, Phil Cleary and Jackie Kelly, were then re-elected and the other two, Robert Wood and Heather Hill, were replaced by candidates who

belonged to the same minority parties. However other political outcomes, in terms of drawing public attention to the activities of particular Members of Parliament, may certainly result from such challenges.

Section 44(i): under any acknowledgement of allegiance to a foreign power

Thus far, I have focused on the role and significance of the common informer suit in our political system. In the remainder of this article, I focus on the question of whether one of the constitutional grounds of disqualification in s 44 applies to the Prime Minister, John Howard, for the purposes of a common informer suit. The relevant ground is the first limb of s 44, which disqualifies any person 'who is under any acknowledgment of allegiance, obedience or adherence to a foreign power'.

Hitherto, it has been the second and third limbs of s 44(i) that have attracted the most attention, due to their broad application in a predominantly multicultural society. These second and third limbs disqualify subjects or citizens of foreign powers, and any person entitled to the rights or privileges of a subject or citizen of a foreign power. In *Sykes v Cleary*, the High Court majority held that Australians with dual citizenship, who had not taken 'reasonable steps' to renounce their foreign nationality, were disqualified under these limbs of s 44(i).²¹

This application of s 44(i) has been widely criticised. Margaret Thornton has written that.²²

Sykes v Cleary illustrates the residual resistance to diversity in the constitution of citizenship, albeit that Australia is an immigrant society, which boasts of its racial homogeneity and beneficent multicultural policies. It takes no more than a small scratch to reveal the latent xenophobia beneath the bland surface of universalism that legal formalism endeavours to occlude.

Section 44(i) is about 'the avoidance of an actual or perceived split allegiance or divided loyalty'.²³

Proponents of reform point out that dual citizenship does not necessarily affect a Member of Parliament's allegiance or loyalty to Australia. James Jupp refers to the 'mistaken belief that loyalty and assimilation can be measured by citizenship and can only be limited to one state'.²⁴ In his view, 'dual citizenship is appropriate to an immigrant society in a globalizing world. Exclusive citizenship is not'.²⁵

Of far more concern than dual citizenship is the demonstration of an 'active' interest in a foreign state.²⁶ An active demonstration of a member's allegiance, obedience or adherence to a foreign state presumably raises more disturbing questions about loyalty and allegiance than does the possession of dual citizenship.

However, there is little case law upon the first limb of s 44(i) and the meaning of 'an acknowledgment of allegiance, obedience or adherence to a foreign power' remains unclear.

The first limb of s 44(i) has been considered by the High Court in *Crittenden v Anderson*²⁷ and in *Nile v Wood*.²⁸ In *Crittenden*, it was alleged that the respondent, a professed member of the Catholic Church, owed allegiance to the Papal State. This challenge was unsuccessful due to the operation of s 116 of the *Constitution*, which states that no religious test shall be required as a qualification for any office or public trust under the Commonwealth. In *Nile v Wood*, it was asserted that Robert Wood's protest activities against the vessels of a friendly nation brought Wood within the first limb of s 44(i). The High Court described the petition as incurably defective, observing that the 'foreign power' was not identified. The judges stated that 's 44(i) relates only to a person who has formally or informally acknowledged allegiance, obedience or adherence to a foreign power and who has not withdrawn or revoked that acknowledgment'.²⁹

Neither case sheds much light on the types of activities that would amount to a formal or informal acknowledgment of allegiance, obedience or adherence to the US. Lumb and Moen maintain that acceptance of a foreign passport or service in one of the foreign armed forces would amount to the giving of allegiance.³⁰ Carney provides other examples, including taking an oath of allegiance to a foreign power, seeking the protection of a foreign state, or describing oneself in an official document as a citizen or subject of a foreign state.³¹ Have the decisions or actions of the current Prime Minister amounted to an acknowledgment of allegiance, obedience or adherence to the US?

Throughout his political career, Howard has always expressed enthusiasm for the ANZUS alliance and has been a consistent supporter of US foreign policy.³² Before the Iraqi war, the term 'deputy sheriff' was being used to describe Howard's perception of Australia's role in the Asian region. The term first appeared in a *Bulletin* article in September 1999. Journalist Fred Brenchley wrote that 'the Howard Doctrine — the PM himself embraces the term — sees Australia acting in a sort of 'deputy' peacekeeping capacity in our region to the global policeman role of the US'.³³

Howard did not invent the term, but unwisely made no official move to repudiate it until alerted to the reaction of our Asian neighbours. Gerard Henderson wrote in June 2003 that the term 'is still used today — and not only by the Prime Minister's foreign policy critics (for whom this is a term of derision)'.³⁴ After our participation in the Iraqi war, President George Bush compounded the problem by upgrading Australia's role to that of 'sheriff' in an interview in October 2003. The Howard Government attempted to downplay the significance of this description, but again, there were reports of adverse reactions from politicians and leaders in Asian countries.

Before and after Howard's decision to support the US-led pre-emptive strike on Iraq, politicians, commentators and other Australians expressed the view that Howard and his government acquiesced in and supported US foreign policy without sufficient regard for Australia's own interests. Mark Latham, then

Shadow Treasurer and now the leader of the Opposition, infamously described Howard and his government as 'yes-men to the US', and, 'a conga line of suckholes', and continued that 'the truth is the Prime Minister has forgotten how to stand up for the national interest. He has forgotten how to be a good Australian, not some yes-man to a flaky and dangerous American President.'³⁵ The then Opposition leader, Simon Crean, criticised Howard's 'capitulation and subservience to a phone call from the US President',³⁶ and in October 2003, Greens Senator Bob Brown described Howard as a 'forelock tigger to the White House rather than a leader of the independent nation of Australia'.³⁷ Such comments and, in particular, those of Latham, received wide publicity because they expressed sentiments shared by a large number of Australians.

Howard's support for Bush's plan for a national missile defence shield and his willingness to increase Australian dependence on US military technology pre-date the Iraqi war. It was, however, his controversial decision to follow the US into the Iraqi war that focused public attention on his subservience to US wishes and highlighted the inherent dangers in his approach.

In March 2003, Howard committed Australian troops to a US pre-emptive strike on Iraq without the support of the Australian people and despite the passage of a no-confidence motion in the Senate. There was no United Nations mandate for the war. Howard claimed that he was acting in accordance with the terms of the ANZUS alliance, but Article 1 of the alliance states that the parties are 'to refrain in their international relations from the threat or use of force in any manner inconsistent with the purposes of the United Nations'. Howard also claimed that he was acting in Australia's national interest and in the interests of Australia's long-term security, but the weapons of mass destruction that supposedly posed a threat to Australian security did not exist. In October 2003, the Senate again voted to censure Howard, this time for misleading the Australian Parliament and the Australian people in his justification for taking the country to war with Iraq.

Howard asserted that his government had not taken its position on Iraq 'out of some blind automatic loyalty' to the US,³⁸ but the Australian public was not convinced. When Howard announced his intention to join in the war on Iraq, a correspondent to the *Sydney Morning Herald* stated succinctly 'your headline today should have more accurately read "Organ grinder chooses war, monkey agrees"'.³⁹

Many saw Howard's decision as a decision to commit Australia 'to a radical new US-determined global order'.⁴⁰ Howard's loyalty to the US and his commitment to US foreign policy, were perceived as the governing factors in the decision to go to war.

Howard's loyalty to the Australian people was further compromised during Bush's visit to Australia in October 2003. In order to protect the US President from unseemly criticism, Howard denied members of the public and Australian press photographers access to Parliament House and confined protest activities to a site well away from Bush and his entourage. Howard could not prevent the two Greens Senators from expressing dissident viewpoints during Bush's lightning visit to Parliament House; nor could he prevent CNN from broadcasting images of these Senators being physically restrained by Coalition Senators from approaching Bush. However, the Bush visit reinforced and cemented an alliance that required the Prime Minister to ignore the wishes of an overwhelming majority of Australians, and the censure of the Senate, in following the US into war with Iraq.

In November 2003, US plans to set up a 'defence staging post', as distinct from a military base, near Darwin were divulged to the Australian public.⁴¹ At the beginning of 2004, Howard indicated that he intends to involve Australia in Bush's 'Son of Star Wars' missile defence system and in January 2004, the looming prospect of a joint training facility for Australian and US troops on Australian soil suggested that Howard's commitment to US interests was stronger than ever.⁴²

In the past, other Australian Prime Ministers have displayed great loyalty to the US and have also followed the US into war. Alison Broinowski, a former Australian diplomat, has pointed out that 'until World War II, Australia accepted its foreign and defence policies direct from London; and after that, from Washington'.⁴³ This history has allowed some commentators to downplay Howard's apparent subservience to US foreign policy as 'consistent with that of governments — conservative and social democrat alike — since Federation'.⁴⁴ Harold Holt's notorious 'all the way with LBJ' exemplifies the sort of enthusiastic sentiments expressed by previous Australian Prime Ministers. There are precedents in the closing down of the Australian Parliament for an address by an American President. However, even if Howard's policies are consistent with those of previous Prime Ministers, this does not necessarily mean that there has not been an acknowledgment of allegiance to the US. Instead, this simply raises the question as to why the wholesale adoption of US foreign and defence policies by other Prime Ministers has never been construed as acknowledgment of allegiance to a foreign power for the purpose of s 44(i), and, furthermore, why this issue has not yet been raised in the High Court by a common informer.

For the purposes of s 44(i), it is necessary to ask whether Howard's unswerving and demonstrated commitment to supporting the US foreign policy, in the face of overwhelming popular opposition and despite the censure of the Senate, amounts to an acknowledgment of allegiance to the US.

Conclusion

This question can be raised by a member of the House of Representatives, and debated in the House, but the outcome would be predictable, given that the Government holds a majority in the House of

Representatives. It would be more interesting to raise this question in the High Court by means of a common informer suit. It is difficult to predict how the High Court would deal with a common informer suit. There are no clear precedents. However, a common informer suit may well be a powerful mechanism for holding the Prime Minister accountable for his actions.

The common informer suit has the potential to be one of the few mechanisms that empowers the Australian people and provides the marginalised with the opportunity to argue their viewpoint in the High Court. An activist can use the common informer suit to express his or her opinion publicly on the actions of the most prominent figure in our system of government, who is otherwise protected by the powerful party structure that dominates our Houses of Parliament. We have been exposed to public debate and satire in which the Prime Minister's slavish concessions to US interests have been derided and ridiculed. The common informer suit permits us to shift this debate into the High Court, and question the potent political symbolism of the Prime Minister as puppet and 'deputy sheriff'. Surely now, as our military links with the US are further strengthened, is an appropriate time to transform this 'constitutional curiosity', the common informer suit, into a tool for meaningful social and political change.

Postscript

In March 2004, a Southern Cross University law student, Eric Bateman, tried to initiate a common informer suit by filing a Statement of Claim in the High Court Registry, in which he alleged that John Howard's actions amounted to an acknowledgment of allegiance to a foreign power. The Registry, on the direction of Kirby J, refused to issue a writ of summons and the attached Statement of Claim without the leave of a High Court justice, on the basis that the proceedings were frivolous, vexatious and/or an abuse of process. Bateman then sought that leave, filing an affidavit in which he argued that there was a genuine legal question to be heard. His attempt to get the High Court to hear the common informer suit was unsuccessful. In dismissing Bateman's application, Gummow J stated:⁴⁵

The proposed statement of claim alleges statements and acts and omissions by the Prime Minister in the conduct of public affairs which, if proved, it is contended, found a conclusion that whilst a member of the House of Representatives, the Prime Minister has acknowledged his allegiance, obedience and adherence to the US of America. However, that conclusion would not necessarily enliven s 44(i) of the *Constitution*.

The question which the *Constitution* would present is not whether the Prime Minister has conducted himself in a particular way but whether, as a matter of law, he is 'under' any acknowledgment of 'allegiance, obedience, or adherence to a foreign power' within the meaning of s 44(i).

This restrictive interpretation of s 44(i) suggests that the current High Court is reluctant to draw constitutional conclusions from political misdeeds. The reluctance of the current High Court to evaluate the political conduct of a prominent politician in a constitutional context, while simultaneously, in refusing to hear Bateman's application, delivering a strong political statement itself, raises some interesting questions about the interaction between the High Court and political theatre.

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2. Professor Tony Blackshield, in his appearance before the 1997 Inquiry of the House of Representatives Standing Committee on Legal and Constitutional Affairs into Aspects of s 44 of the *Constitution*, commented that in the 1980s, 35 members of parliament were allegedly disqualified after one election, and 57 after another. One of this number included the then Prime Minister Bob Hawke, who was said to be disqualified after being made an honorary citizen of Israel. House of Representatives Standing Committee on Legal and Constitutional Affairs, *Report into Aspects of Section 44 of the Australian Constitution* (1992) 12.
3. Graeme Orr and George Williams, 'Electoral Challenges: Judicial Review of Parliamentary Elections in Australia' (2001) 23 *Sydney Law Review* 53, 67.
4. Furthermore, there is no constitutional requirement that votes should have equal weight. See *Attorney-General (Cth) (Ex rel McKinlay) v Commonwealth* (1975) 135 CLR 1 and *McGinty v Western Australia* (1996) 186 CLR 140.
5. The party system and preferential voting are not constitutionally entrenched and, in fact, political parties are mentioned in only one section of the *Constitution* (s 15). However, the High Court has dismissed arguments that the division of ballot papers on party lines, and legislative requirements in relation to preferential voting, are unconstitutional. See *McKenzie v Commonwealth and Oers* (1984) 57 ALR 747 and *Langer v Commonwealth* (1996) 186 CLR 302.
6. Evans, above n 1, 464.
7. *Ibid* 472.
8. *Ibid* 473. See also Gerard Carney, *Members of Parliament: law and ethics* (2000), 146.
9. Evans, above n 1, 472.
10. (1999) 199 CLR 462: see *Sharples v Hill and Anor* B49/1998 (12 May 1999), High Court transcripts, <http://austlii.edu.au> at 3 October 2004.
11. Carney, above n 8, 146-147.
12. *Sue v Hill* (1999) 199 CLR 462, 556 (McHugh J).
13. *Sue v Hill* (1999) 199 CLR 462, 510 (Gaudron J).
14. Orr and Williams, above n 3, 67.

15. Section 353, *Commonwealth Electoral Act* 1918 (Cth).
16. Orr and Williams, above n 3, 63–64.
17. See Tony Blackshield and George Williams, *Australian Constitutional Law and Theory. Commentary and Materials* (3rd ed, 2002), 445.
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28. (1986) 167 CLR 133.
29. *Nile v Wood* (1986) 167 CLR 133, 140.
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