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Australia: A Parliament of Irresponsibility

Peter Dutton, Section 44 and Pecuniary Interests

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Global Research, November 29, 2018
Region: Oceania

It took place as the blades were being sharpened for a palace coup in August. On Radio National's breakfast program, Deputy Leader of Labor, ***Tanya Plibersek*** *was tight lipped to her interlocutor. The issue posed to her party was the eligibility of the then recently resigned Home Affairs minister,* ***Peter Dutton****, chief knife wielder and executioner against* ***Prime Minister Malcolm Turnbull.*** *Plibersek, it transpired, had received advice earlier in the year that might leave Dutton without his seat. But what also surfaced was a certain, carefree irresponsibility: instead of making use of that material, Labor had a useful weapon to keep in storage.*

When necessary, the strategists in opposition could refer Dutton to the Australian High Court, claiming his ineligibility under section 44 of the Australian Constitution. While other sitting members have fallen on the sword of dual-nationality and owing allegiance to a foreign power (s. 44(i)), the case with Dutton is pecuniary in nature, posing a potential conflict of interest (s. 44(v)).

That limb of the provision states that any person who "has any direct or indirect pecuniary interest in any agreement with the Public Service of the Commonwealth" is disqualified from sitting in the chambers of parliament. As he is a beneficiary of a discretionary family trust which, through its trustee, owns two childcare centres in Queensland which have been in receipt of childcare subsidies, the issue of a "pecuniary interest" might arise.

The undergrowth of legal argument over this is suffocatingly dense. One of Australia's foremost constitutional authorities, **Anne Twomey**, suggests that Dutton might have an out: that the childcare centres in question "merely receive the subsidy on behalf of the parents and do not have an agreement with the public service." But if an agreement is, in fact, found, an indirect pecuniary interest might be identified.

To date, the Solicitor-General has given the most inadequate of band aids to the government. (As he knows, never second guess the judicial heads on the bench.) **Stephan Donaghue**, back in August, was scrupulous in covering all his exits, lest egg find its way to his unsuspecting face: Dutton was "not incapable" of sitting as a member of parliament, but there was "some risk" that the High Court might see the "substantial size of the payments" arising from subsidies as a problem. "However, for a variety of reasons, I have been briefed with very little factual information." Yet again, darkness descends where light should enlighten.

The High Court has given some clue about its brutal and merciless reading of s. 44(v). Family First senator Bob Day was one such individual to fall foul of that section, another instance of the High Court's enthusiastic policing of the constitution's invalidating procedures. Chief Justice Kiefel and Justices Bell and Edelman noted an exemption: there

would be “no relevant interest if the agreement in question is one ordinarily made between government and citizen.” The senator was not so lucky.

The conditions have shifted again, tickling Labor into action. The Coalition government has received yet another blow directed from within the party room: MP **Julia Banks** has joined the ranks of those “three female independent representatives” who sport “sensible, centre, liberal values”. The Liberals are now another representative short, accused of falling into the arms of woman-hating “reactionaries”. The recently elected independent member for Wentworth, Kerry Phelps, has also put the feelers out for a prospective referral.

True to parliamentary form, **Christopher Pyne**, the leader of the House, has retaliated with his own variant of political poison gas: should Labor and Phelps wish to push the issue of referring Dutton to the High Court, the Coalition would seek to refer Phelps, and Labor MPs Mike Freelander and Tony Zappia.

The trio offer another bag of legal delights for the constitutional vultures: Phelps because of her being both a city of Sydney councillor and medical practitioner; Freelander because he was, like Phelps, a GP in receipt of Medicare subsidies; and Zappia for an alleged interest in his wife’s fitness centre.

> “My original position, of course,” claimed Pyne on Radio National, “is that we don’t have a constitutional issue but if they decide that he does and they want to send him there, they’ll have to send the other three as well.”

How utterly sporting of him.

Far from being a matter of public duty, integrity and issue of good governance, section 44 and its eligibility requirements are weapons of choice for opponents. Even after the disastrous strafing of Parliament by a range of High Court decisions declaring certain sitting members to be ineligible (dual nationality can be a tricky, thorny thing), doubts louse the locks of certainty. Self-confidence on the part of politicians that their position is secure should be treated with hearty contempt, even more so than economic forecasts.

There is a logistical, and bureaucratic cock-up in waiting as well. Were Dutton actually found to be invalidly vested with power, his decisions under the *Migration Act*, it would follow, would be void. Legal eagles are also swooping upon the prospect that 1,600 decisions made by the minister to cancel visas of those convicted of a crime are null. Lawyers for a man designated FQM18 currently argue that, due to the breaches incurred under s. 44, Dutton is was “not constitutionally permitted to act as a minister” when he made a decision of non-revocation on February 6, 2018.

As the claim goes, in full,

> “At the time of the non-revocation decision, Mr. Dutton was incapable of sitting as a member of the House of Representatives of the commonwealth of Australia because he had a pecuniary interest in an agreement with the public service of the commonwealth in breach of s. 44(v) of the constitution.”

The Labor opposition has little reason to bear itself up as a proud example of parliamentary

conduct. For them, as, for that matter, other political parties, Australia's constitution has been an inconvenience and a godsend. It invalidating provisions for members of parliament lie in cold storage, only to be thawed and deployed when the winds blow favourably.

Section 44 has been used to eliminate enemies, unseat opponents and destroy the credibility of sitting members. It has added doubt to voters who no doubt wonder whether candidates and members can read basic paperwork. High Court fundamentalism, laced with opaque reasoning, has done the rest, leaving little room for error for anybody wishing to stand for the highest elected chambers in the country. Run for elected office at your peril.

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