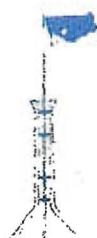


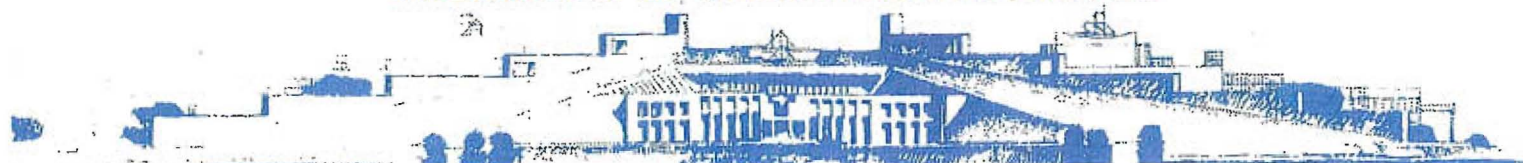


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*Dual Citizenship, Foreign  
Allegiance and s.44(i)  
of the Australian Constitution*



Parliament of the Commonwealth of Australia



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Law and Government Group  
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**Parliamentary  
Research Service**

***Background Paper Number 29  
Dual Citizenship, Foreign  
Allegiance and s.44(i) of  
the Australian Constitution***

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## Summary

*You may sing of the shamrock, the thistle, and rose,  
Or the three in a bunch if you will;  
But I know of a country that gathered all those,  
And I love the great land where the waratah grows,  
And the wattle-bough blooms on the hill.<sup>1</sup>*

Many more have now joined the indigenous wattle. Against this background, what are the citizenship requirements contained in Australia's *Constitution* to sit in the Federal Parliament? This paper examines the operation of s.44(i) of the *Constitution* which 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.

### Sykes v Cleary

Section 44(i) has recently come under intense public and parliamentary scrutiny following the decision of the High Court in *Sykes v Cleary*<sup>2</sup> handed down on 25 November 1992. In that case six of the seven judges of the High Court found Mr Cleary incapable of being chosen or of sitting as a Member of Parliament on the grounds that he held an office of profit under the crown under s.44(iv) of the *Constitution* and as a result the by-election was void.

The case also involved consideration of s.44(i) of the *Constitution*. By a majority of five to two the High Court found two other candidates, Mr Kardamitsis and Mr Delacretaz were ineligible under s.44(i) and therefore a recount could not be conducted. All seven judges found that s.44(i) required a person to take 'all reasonable steps' to renounce their other citizenship. The majority of the court<sup>3</sup> held this required

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1 From 'Waratah and Wattle', Henry Lawson.

2 Unreported, High Court of Australia, Judgment Full Court 92/046: 25 November 1992. All page references are to the High Court transcript of the unreported judgment.

3 Mason C.J., Brennan, Dawson, Toohey and McHugh JJ.

use of the renunciation procedures of the other country if there were such procedures. Where there were no such procedures or where the other country refused renunciation, proof of requesting renunciation was sufficient. Because such procedures were available in relation to the two countries of which Mr Kardamitsis and Mr Delacretaz were citizens they had not taken 'all reasonable steps' to renounce and were therefore ineligible under s.44(i).

Two judges dissented on the s.44(i) point and considered that Mr Kardamitsis and Mr Delacretaz had taken 'all reasonable steps' by making oaths of allegiance to Australia when they were naturalised which included a renunciation of other allegiances,<sup>4</sup> together with their long term commitment to Australia.

### Representative democracy

The question of eligibility of Members of Parliament goes to the heart of any democracy. So much so that s.46 of the *Constitution* empowered 'any person' to sue any Senator or Member disqualified under s.44. It is the only matter in the *Constitution* in respect of which individuals were given a constitutional right to take action to ensure compliance of their representatives with the *Constitution*. Section 46 empowered Parliament to 'otherwise provide' and this right is now contained, although slightly modified, in the *Common Informers (Parliamentary Disqualifications) Act 1975* (Cth).

The rules regulating eligibility must reflect the equality and freedom of persons to participate in the fullest expression of political life. This must be balanced against the needs of the community to have competent and loyal service to Australia. What are the present constitutional requirements for ensuring loyalty? Are the requirements too harsh? Or should a higher proof of loyalty be expected for membership of Parliament than Australian citizenship alone? Examining the operation of s.44(i) is necessary for determining what requirements can reasonably be imposed on elected representatives in a multicultural Australia after a century of federation.

Questions relating to the enforcement of s.44(i) may involve exploration of the extent of electors' rights inherent in Australia's constitutional system of representative democracy. This follows the High Court's recent decisions in the *Political Advertising case*<sup>5</sup> and

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4 Deane and Gaudron JJ.

5 *Australian Capital Television Pty Ltd v Commonwealth of Australia* (1992) 108 ALR 577.



*Nationwide News*<sup>6</sup> in which the Court recognised legal and political rights flowing from Australia's constitutional system of representative democracy.

The paper is divided into Part A which deals with the interpretation of s.44(i) referring in detail to the High Court's judgment in *Sykes v Cleary* and Part B which looks at the jurisdiction of the High Court and the consequences of disqualification under s.44(i).

### Qualifications

In order to understand s.44(i) it is helpful to be aware of the 'two tier' regime of regulation of membership of Parliament. First, Members of Parliament must have certain *qualifications*. Originally these qualifications were prescribed in ss.16 and 34 of the *Constitution*, however these sections empowered the Parliament to 'otherwise provide' its own qualification requirements. Parliament has done this by enacting certain provisions of the *Commonwealth Electoral Act 1918*. Today, sections 162 and 163 of the *Commonwealth Electoral Act* require persons to be over 18 years of age; be Australian citizens and be entitled to vote.<sup>7</sup>

### Disqualifications

The second tier of regulation is through the *disqualifications* contained in s.44 of the *Constitution*. Unlike ss.16 and 34 of the *Constitution*, s.44 does not empower the Parliament to 'otherwise provide' and change the grounds of disqualification. Mr Cleary was found ineligible under s.44.

### Relationship between s.44(i) and *Commonwealth Electoral Act*

These two tiers of regulation are of course complementary as together they create the eligibility requirements for Members of Parliament but they are not inter-connected in their actual content, they are 'parallel.' It is not possible to relax the disqualifications in s.44 by enacting provisions in the *Commonwealth Electoral Act*. Section 44 can be amended only by the means set down in the *Constitution* (i.e. by referendum under s.128).<sup>8</sup>

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6 *Nationwide News Pty Ltd v Wills* (1992) 108 ALR 681.

7 It was under these provisions that Robert Wood was found to be ineligible to be nominated or elected as a Senator.

8 There has however been a suggestion that the *Constitution* could possibly be amended by relying on s.8 of the Statute of Westminster. See G. Lindell, 'Why is Australia's Constitution Binding? The Reasons in 1900 and now, and the

There are however connections between s.44(i) and the *Commonwealth Electoral Act* where a person seeks to use the mechanisms in the *Commonwealth Electoral Act* to dispute the election of another person. In these circumstances the petitioner argues that the elected person is ineligible under s.44 but in disputing the election the petitioner must comply with the procedures in s.355 of the *Commonwealth Electoral Act* such as lodging the petition with the High Court acting as the Court of Disputed Returns within 40 days of the return of the writs. This was the way in which Mr Sykes disputed the election of Mr Cleary.

### Ways in which s.44(i) can be brought before High Court

There are three and possibly four ways in which s.44(i) can be brought before the High Court:

1. It may be brought as the basis of a petition under s.353 of the *Commonwealth Electoral Act* disputing the validity of an election or return. This form of petition must be lodged within 40 days of the return of the writs.<sup>9</sup> The High Court hears the petitions acting as the Court of Disputed Returns. (This was the form of petition and reliance on s.44(i) used by Mr Sykes in *Sykes v Cleary*).
2. It may be raised as a question referred to the High Court by a House of Parliament pursuant to s.376 of the *Commonwealth Electoral Act* respecting a vacancy or the qualifications of a Senator or Member. Such questions are referred by resolution and may be referred at any time (there is no time limit of 40 days after return of the writs).<sup>10</sup>
3. It may be raised in a suit for penalty brought by an individual under the *Common Informers (Parliamentary Disqualifications) Act* seeking a Member or Senator to pay a penalty. This can be pursued only when a person has been elected and has actually sat in Parliament.
4. It is not clear whether s.44(i) could be used by electors, other candidates or Members of Parliament to seek an injunction or declaration from the High Court under the Court's original jurisdiction in interpreting the *Constitution*. (This declaratory option would only

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Effect of Independence' (1986) 16 *Federal Law Review* 32 at 40-41.

9 Or within 40 days of the notification of the appointment of a person to hold the place of a Senator under s.15 of the *Constitution*.

10 As vacancies arising from ineligibility under s.44 may arise at any time.

be necessary if the *Common Informers Parliamentary Disqualifications Act* was ever repealed).

Before the Court could grant any such prerogative writs the Court would first have to decide that it had jurisdiction to hear such a case and that s.47 of the *Constitution* did not vest sole jurisdiction in relation to questions concerning s.44 with the Parliament. The Court would then have to grant the elector, candidate or other member of Parliament standing. It is unclear whether the High Court's recent decisions in the *Political Advertising Case*<sup>11</sup> and *Nationwide News*<sup>12</sup> which recognised a constitutional right to freedom of political expression and information inherent in Australia's constitutional system of representative democracy could be relevant to standing. The person seeking a declaration would have to argue that inherent in the constitutional system of representative democracy was the right to be represented by constitutionally qualified candidates.<sup>13</sup>

#### Examination of s.44(i) in relevant House of Parliament

Questions concerning whether a person is ineligible under s.44(i) can also be examined at any time by the relevant House of Parliament under s.47 of the *Constitution*. It is unclear whether s.47 imposes an obligation on the relevant House to consider whether there is a vacancy caused by a Member of Parliament's ineligibility under s.44(i) by either referring the question to the High Court under ss.376 or 377 of the *Commonwealth Electoral Act* or examining the question in the relevant House itself.

#### Three tests contained in s.44(i)

Section 44(i) actually contains three 'tests' for determining whether a Senator or a Member is disqualified and these are outlined in Part A of this paper. The first test deals with 'acknowledgment of allegiance, obedience or adherence' to a foreign power. The paper briefly summarises the old English legal meaning of the terms 'allegiance' and 'adherence', its limited judicial interpretation and circumstances in which it may become relevant in Australia today.

The second test deals with the possession of privileges of citizenship of a foreign power. This part of s.44(i) is sufficiently wide to

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11 (1992) 108 ALR 577

12 (1992) 108 ALR 681

13 If this were the case a declaration could be sought independently of any 40 day limit on lodgment of petitions disputing an election under the *Commonwealth Electoral Act*.

incorporate the first part of s.44(i). However, the first test may operate independently of the second as a person may have made some acknowledgment of allegiance to a foreign power but not be a citizen of that power.

The third test deals with persons who are 'entitled to the rights or privileges of a subject or a citizen' of a foreign power. The paper examines the limited material which may assist in interpreting this part of s.44(i).

### Interpretation

Prior to *Sykes v Cleary*, s.44(i) has received virtually no judicial attention and very little academic attention. Even in *Sykes v Cleary* itself, the High Court only had to consider the second part of s.44(i) relating to dual citizenship. The meaning of the first and third parts of s.44(i) remain largely uncharted waters.<sup>14</sup> The circumstances of the case in *Sykes v Cleary* did not require decisions to be made concerning matters such as: the ways in which s.44(i) can be brought before the High Court; who has standing to argue s.44(i) in certain circumstances and the practical consequences of any decision that someone is ineligible under s.44(i). Given this legal vacuum it is difficult to determine all the potential legal issues. It is therefore important to examine the wording of s.44(i) very closely.

### Other cases in which s.44(i) has been raised

In addition to analysing the High Court's decision in *Sykes v Cleary* the paper analyses the earlier cases in which s.44(i) has been raised. Four of these petitions were based on imaginative challenges to eligibility under the first part of s.44(i) (foreign allegiance). For various reasons however, s.44(i) was not fully considered by the High Court in these cases or insufficient argument or evidence was adduced by the petitioner. These petitions were:

- *Maloney v McEacharn*<sup>15</sup> (1904): that an Honorary Consul of Japan was under an acknowledgment of foreign allegiance.

The High Court appears to have declared the election void on the basis of postal vote irregularities and did not appear to refer to the s.44(i) argument.

14 Although some judges in *Sykes v Cleary* indicated that the first part of s.44(i) required some positive act of acknowledgment as had also been observed by the High Court in *Nile v Wood* (1987) 167 CLR 133.

15 Tabled in the House of Representatives by the Clerk on 8 February 1904.

- *Sarina v O'Connor*<sup>16</sup> (1946), and *Crittenden v Anderson*<sup>17</sup> (1956): that a Roman Catholic was under a foreign allegiance to the Pope.

The 1946 petition was withdrawn. In relation to the 1956 petition Fullagar J dismissed the argument on the basis that s.116 of the *Constitution* meant that no religious qualification could be imposed by s.44(i) for entering Parliament.

- *Nile v Wood*<sup>18</sup> (1987): In the petition brought by Elaine Nile against Robert Wood, Nile argued that Mr Wood's protest activities against visiting warships indicated allegiance to a foreign power.

The High Court held that the petition did not provide sufficient facts concerning an alleged allegiance and failed to identify the 'foreign power' in question.

- *Sykes v Cleary* (1992): In his petition Mr Sykes argued that Mr Kardamitsis was under a foreign allegiance because he was an 'officer' of the Greek Orthodox Church.

Dawson J struck out the petition at the Directions hearing, on the basis that *Crittenden v Anderson* had established that s.44(i) could not be used to disqualify persons on the basis of any religion.<sup>19</sup>

#### Reports/Convention debates/academic writings

Although it may appear that s.44(i) has become a controversial issue only recently there have actually been various constitutional reports and Constitutional Convention debates from 1976 onwards commenting on either general dual citizenship issues or constitutional issues and the potentially harsh operation of the provision and making certain recommendations.

The paper summarises the available academic opinion on each part of s.44(i). This is followed by the drafting history of each part.

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16 Tabled in the House of Representatives by the Clerk on 20 November 1946.

17 Unreported, Judgment of the High Court, 23 August 1950, noted in (1977) 51 ALJ 171.

18 (1987) 167 CLR 133.

19 Directions Hearing in the matter of *Sykes v Cleary, Delacretaz, Kardamitsis and Rawson* Transcript of Proceedings, Melbourne 30 June 1992: p.37.

**Justiciability/jurisdiction of High Court and consequences of disqualification**

Part B deals with issues concerning jurisdiction of the High Court in relation to s.44(i) issues; enforcement issues and the consequences of disqualification under s.44(i). This is divided into two stages: the nomination stage and the return of the writs and sitting stage.

## Part A - Interpretation of s.44(i)

Section 44(i) of the *Constitution* applies to three categories of persons:

- (1) a person who is under any acknowledgment of allegiance, obedience or adherence to a foreign power;
- (2) a subject or a citizen of a foreign power; and
- (3) a person who is entitled to the rights or privileges of a subject or a citizen of a foreign power.

### 1. The first test

Three general points can be made about the first part of s.44(i). First the test appears to have a wide application, disqualifying persons who, although they may not have a formal nationality or citizenship link with another country, may have some other form of allegiance with that country.

Secondly, it is unclear exactly how the High Court would interpret this part of s.44(i) as this did not arise for consideration by the High Court in *Sykes v Cleary*. This is because the persons challenged in *Sykes v Cleary* had clear dual citizenship and were found ineligible under the second part of s.44(i). However, in *Nile v Wood* and comments in *Sykes v Cleary* the High Court considered some formal or informal acknowledgment was required.<sup>20</sup>

Thirdly, possession of Australian citizenship would be strong prima facie evidence that a person had sole allegiance to Australia. But it would not be conclusive. In other words Australian citizenship would not 'cancel out' a 'formally or informally' acknowledged allegiance to a foreign power.<sup>21</sup>

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20 *Nile v Wood* (1988) 167 CLR 133, per Brennan, Deane and Toohey JJ at p.140.

21 Senate Standing Committee on Constitutional and Legal Affairs, *The Constitutional Qualifications of Members of Parliament*, AGPS 1981 Parliamentary Paper No. 131/1981: p.9. para 2.1.4.

### 1.1 'Allegiance', 'obedience' and 'adherence' in old English law

The word 'allegiance' derives from the old French 'lige' meaning pure and absolute, with liege homage meaning unconditional and the Latin 'ligare' (to bind).<sup>22</sup>

The concept of allegiance developed from the English feudal system under which tenants of land owed certain allegiance to their feudal lords.<sup>23</sup> Gradually it was settled that the unconditional oath of allegiance could be taken in respect of the Sovereign king alone. The king was the 'liege lord' and his subjects were termed 'liege subjects' and were bound to serve and obey him.<sup>24</sup>

There were generally held to be four kinds of allegiance:<sup>25</sup> **natural allegiance** due from all persons born within the Sovereign's dominions; **acquired allegiance** obtained by naturalisation or denization; **local allegiance** due from aliens as long as they remained within the Sovereign's dominions or retained a passport of the dominion; and **legal allegiance** created by the oath of allegiance or due from children born abroad of natural born subjects of the Sovereign but such children could divest themselves of their duty of allegiance by a declaration of alienage.

'Adherence' to a foreign power is a form of treason dating from old English law, specifically the *Treason Act* of Edward III in 1351.<sup>26</sup> Only a person who owes allegiance to the Sovereign can commit

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22 Jowitt's *Dictionary of English Law*.

23 The tenant swore an oath of fealty (fidelitas) to the landlord or an oath of allegiance to the superior feudal lord to bear faith to the lord in opposition to all men, without exception. Land held under this oath was called a 'liege fee' (or 'liege homage'), the tenants called 'liege men' and the lord 'liege lord'. *Blackstone's Commentaries*, (1765): Volume 1, Book 1, Chapter 10, pp.354-5.

24 Specifically they promised: to be true and faithful to the king and his heirs, and truth and faith to bear of life and limb and terrene honour, and not to know or hear of any ill or damage intended him, without defending him therefrom. Ibid. p.356. The duty of allegiance was accepted into modern law in *Calvin's Case* (1608) 2 St. Trials 559.

25 *The Oxford Companion to Law*, p.49; Jowitt, *Dictionary of English Law*, p.88. Halsbury however only seems to refer to the first three categories: Halsbury, *The Laws of England*, 4th ed., vol. 11: p.479, para 812.

26 Which codified the old law. The following summary is taken from Halsbury, *The Laws of England*, 4th ed., vol. 11: pp.480-1, para 815.



treason<sup>27</sup> as treason means betrayal of a trust i.e. betrayal or violation of allegiance.

A person is adherent to the Sovereign's enemies if he gives them aid or comfort in the Sovereign's realm or elsewhere.<sup>28</sup> The Sovereign's enemies are foreign states in actual hostility against the Sovereign and the existence of a formal declaration of war is not necessary.<sup>29</sup> Only overt acts done with the intent to aid and assist the Sovereign's enemies constitute adherence.<sup>30</sup> Actions for example like sending money or provisions to the Sovereign's enemies;<sup>31</sup> committing hostile acts against an ally of the Sovereign who is also at war with the Sovereign's enemies;<sup>32</sup> and sending communications with the Sovereign's enemies from which they may derive information to shape their attack or defence.<sup>33</sup>

A subject adheres to the Sovereign's enemies if he or she takes an oath of fidelity to the enemy, or makes a declaration of willingness to take up arms on their behalf, or becomes naturalised in the hostile state while it is at war with the Sovereign unless he or she acts under compulsion and returns to his or her allegiance as soon as possible.<sup>34</sup>

Although the common law cited above concerning adherence has developed in relation to the British Sovereign the same principles would apply in relation to Australia's Sovereign i.e. the Queen in her capacity as Queen of Australia.

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27 Halsbury, *The Laws of England*, 4th ed., vol. 11: p.479, para 812.

28 *R v Casement* [1917] 1KB 98 CCA.

29 1 Hale PC 162.

30 *R v Ahlers* [1915] 1KB 616.

31 1 East PC 78.

32 *R v Vaughan* [1696] 13 State Tr 485 at 530.

33 *R v Grahame* [1691] 12 State Tr 645.

34 *R v Lynch* [1903] 1KB 444.

## 1.2 Consideration by the High Court

### 1.2.1 Early petitions

#### *Maloney v McEacharn* (1904)

The earliest petition to the Court of Disputed Returns (the High Court) concerning s.44(i) was lodged in 1904. On 5 February 1904 William Maloney filed a petition (under the *Commonwealth Electoral Act 1902*) against the election of Sir Malcolm Donald McEacharn in the election of 16 December 1903. The petition claimed first, that there had been irregularities in postal votes and second, that McEacharn was ineligible under s.44(i) as he was an Honorary Consul for the Empire of Japan and therefore under 'an acknowledgment of allegiance, obedience or adherence to a foreign power'.<sup>35</sup>

On 10 March 1904 the Court declared that McEacharn was not duly elected and that the election for the electoral division of Melbourne was absolutely void. The basis of the Court's declaration however is not totally clear. It does not appear to have been made on the s.44(i) issue but rather, on the question of postal vote irregularities as the High Court's declaration referred to certain voting exhibits and evidence.<sup>36</sup> The *House of Representatives Practice* does not specify whether the decision was also based on the s.44(i) ground.<sup>37</sup>

#### *Sarina v O'Connor* (1946)

The second petition concerning s.44(i) was filed on 12 November 1946 in the High Court Registry in Sydney by Ronald Grafton Sarina concerning the election of William Paul O'Connor as the Member for West Sydney in the general election of 28 September 1946.<sup>38</sup> The petition raised the 'Roman Catholic question' (which was to re-appear in a later petition, see below) and claimed:

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35 The petition was tabled in the House of Representatives by the Clerk on 8 February 1904.

36 Tabled in the House of Representatives by Sir John Forrest on 15 March 1904. This conclusion is supported by another document tabled in the House on 15 March 1904, namely a reply by the Chief Electoral Officer to certain remarks made by the High Court concerning changes made by the Electoral Officer to a form in the schedule to the Act.

37 Browning, A., (ed.) *House of Representatives Practice*, Canberra: 1989. Appendix 15: p. 734.

38 O'Connor was one of the unsuccessful candidates for the seat.

that the said William Paul O'Connor is and was at all material times a Member of the Roman Catholic church and, as such, is under acknowledgment of allegiance, obedience and adherence to a foreign power to wit the sovereign Pontiff who is the sovereign of a foreign power duly recognised by international law.<sup>39</sup>

The petition however was withdrawn by Sarina on 9 December 1946 and not proceeded with.<sup>40</sup>

### 1.2.2 Crittenden v Anderson (1950)

In *Crittenden v Anderson*<sup>41</sup> a petitioner challenged the election of Mr Anderson to the House of Representatives on the ground inter alia that Mr Anderson was by virtue of being a member of the Roman Catholic Church under 'acknowledgment of adherence, obedience or allegiance to a Foreign Power' - namely the Papal State'. The petitioner did not allege that Anderson had entered into any individual or particular acknowledgment of adherence. Fullagar J sitting alone held that no investigation of the 'Roman question' specifically, the status of the Papal States as a foreign power under the Lateran Treaty of 1929 by which Italy recognised the Vatican city State:

can possibly be relevant to the election of a Member of the House of Representatives for Kingsford Smith.<sup>42</sup>

Fullagar J held religious affiliation was irrelevant in light of s.116 of the *Constitution*. He held that persons born in Australia owe automatic allegiance to the British Monarch and that s.116 (which prohibits the Commonwealth from establishing or imposing any religion or devising any religious test for qualification for any office or public trust under the Commonwealth) had the effect of not allowing s.44(i) to impose a religious test as a qualification for entering Federal Parliament.<sup>43</sup>

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39 A copy of the petition was tabled by the Clerk, in the House of Representatives on 20 November 1946.

40 The High Court Order giving leave to Sarina to withdraw the petition was tabled by the Clerk in the House of Representatives on 21 February 1947.

41 Unreported High Court of Australia Judgment of 23 August 1950 noted in (1977) 51 ALJ 171.

42 (1977) 51 ALJ 171.

43 Fullagar J noted that UK legislation has expressly provided that adherence to Roman Catholicism should not preclude someone from sitting in the British Parliament.

### 1.2.3      Nile v Wood:<sup>44</sup> 'allegiance to a foreign power'

In 1987 a petition was filed by Mrs Elaine Nile disputing the election of Robert Wood as Senator of New South Wales under the *Commonwealth Electoral Act*. One of the objections in the petition relied on s.44(i).<sup>45</sup> Mrs Nile argued that Senator Wood was disqualified from being chosen or sitting as a Senator as he was under an 'acknowledgment of allegiance, or obedience to a foreign power' in that:

His actions against the vessels of a friendly nation indicate allegiance, obedience or adherence to a foreign power.<sup>46</sup>

Brennan, Deane and Toohey JJ dismissed this argument:

Paragraph 2(e) of the petition falls well short of setting out facts which bring the first respondent within s.44(i) of the *Constitution*. It does not, in terms, assert allegiance, obedience or adherence to a foreign power. And the facts it sets out in order to establish the conclusion that the first respondent was under any acknowledgment of allegiance, obedience or adherence to a foreign power are clearly insufficient for the purpose. It does not even identify a foreign power. Furthermore it would seem 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 ... That however is a matter we do not have to decide.<sup>47</sup> [Emphasis added]

Two points can be drawn from this decision:

- (1) The Court considered that insufficient facts were presented by Mrs Nile to show foreign allegiance, obedience or adherence, including the failure to identify the foreign power in question.
- (2) The High Court suggested that for s.44(i) to be contravened a person would need to 'formally or informally acknowledge allegiance' ... and have not 'withdrawn or revoked that acknowledgment'.

See the comments in paragraph 1.5 concerning the possible scope of the test suggested by the Court.

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44 (1987) 167 CLR 133.

45 Several questions concerning the qualifications of Senator Wood were also referred to the Court by the President of the Senate which resulted in a separate case and decision based not on s.44(i) but on the *Commonwealth Electoral Act*.

46 (1987) 167 CLR 133, at 138 (i.e. actions against US warships).

47 (1987) 167 CLR 133, at 140.

### 1.2.4 Sykes v Cleary

In addition to claiming Mr Kardamitsis's ineligibility under s.44(i) on the ground of dual citizenship Mr Sykes also disputed Mr Kardamitsis's eligibility on the basis that he owed allegiance to a foreign power. In his petition Mr Sykes claimed Mr Kardamitsis:

being an officer of the Greek Orthodox Church is disqualified for office in a Secular State's Parliament.

In the Directions hearing before Dawson J, Mr Sykes asserted that s.116 of the *Constitution* meant that Members of Parliament could not show any preference for or bias against granting public office to persons who may or may not have the same religion as the Member or Senator.<sup>48</sup>

Dawson J however struck out this petition on the basis that Fullagar J in *Crittenden v Anderson* had:

made it clear that adherence to a particular religion, even a religion with a foreign origin or connection, carried with it no necessary acknowledgment of allegiance, obedience or adherence to a foreign power.<sup>49</sup>

### 1.3 Academic opinion

There is little academic comment on the first part of s.44(i). Indeed one writer has commented:

The disqualifications under ss.44 and 45 [of the *Constitution*] are of little practical importance, are riddled with difficulty and do not warrant extended discussion.<sup>50</sup>

and describes the law in this area as 'obscure and antiquated'.

In the first commentary on the *Constitution*, Quick and Garran discussed the meanings of various key words and phrases in s.44. In

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48 Sykes argued:

Section 116 could not be maintained because the officer being elected is [to] be entrusted with giving equal religious access to any person regardless of religion or having no religion at all to any public office and that, of course could not be carried out if all the members of Parliament were of a particular sect. *Sykes v Cleary*, Directions Hearing Transcript, 30 June 1992: p.50.

49 *Sykes v Cleary*, Directions Hearing Transcript, 30 June 1992: p. 37.

50 Howard, C., *Australian Federal Constitutional Law*, 3rd ed, Law Book Co, 1985: p.74.

regard to the words 'allegiance, obedience or adherence' contained in the first limb of s.44(i) they summarised the different types of allegiance:

Allegiance is the lawful obedience which a subject is bound to render to his sovereign. Allegiance is of three kinds: natural, acquired, or local. (1) Natural allegiance is that which every subject born from his birth owes to his sovereign. He is said to be a natural liegeman, as the sovereign is said to be his natural liege lord. (2) Allegiance is acquired where one is naturalised, or made a denizen. (3) The allegiance owed by every resident in the British dominions for the protection he enjoys is called local.<sup>51</sup>

In the first and second categories Quick and Garran refer to the allegiance of a subject acquired through birth or naturalisation. In the third category they refer to the local allegiance owed by someone residing within the realm, who is not necessarily a subject of the Sovereign. They do not refer to the fourth category, 'legal allegiance', to which some authorities refer, flowing from an oath of allegiance (see above). However, as noted above the significance of this fourth category is unclear as in most cases it appears a 'procedural' category describing an oath which is taken to acquire citizenship. Quick and Garran do not refer to the other terms in the first part of s.44(i) - 'obedience or adherence'.

Lumb takes a wider view of the first part of s.44(i). First he considers that Australian citizenship does not automatically preclude someone from having a foreign allegiance. Secondly, he considers that a person may have an allegiance to a country without being a citizen of that country. He calls this a 'defacto allegiance' and writes that the first limb of s.44(i):

would disqualify a person who, although formally an Australian citizen, has transferred his loyalty to a foreign country. This would usually be attested by the fact that the person has taken on foreign citizenship, but there would be cases where de facto allegiance is given without taking on formal citizenship of that country, for example by accepting a foreign passport or serving in the armed forces of the foreign country. To act as an 'honorary' consul would not be of this nature nor would acceptance of a foreign award of honour. [Emphasis added].<sup>52</sup>

Lane comments that the strict requirements of the first part of s.44(i) (i.e. not having made an oath of allegiance to a foreign power) are reinforced by the requirement in s.42 for prospective Senators and

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51 Quick, J., and Garran, R., *The Annotated Constitution of the Commonwealth* 1901, reprinted by Legal Books, Sydney 1976: p.491.

52 Lumb, R.D., *The Constitution of the Commonwealth Annotated*, 4th ed Butterworths 1986: p.69, para 167.

Members to make an oath or affirmation of 'true allegiance' to the Monarch before taking their seats.<sup>53</sup>

Neither Lumb nor Lane refer to the other words in the first part of s.44(i) - 'obedience or adherence.'

## 1.4 Drafting history of the first part of s.44(i)

The High Court may have regard to the drafting history of s.44(i) in interpreting it.<sup>54</sup>

### 1.4.1 Early Canadian provisions

It is useful to look at certain drafting changes which occurred in relation to the same type of provision in Canada prior to 1900. This is because in drafting the provisions of the Australian *Constitution* dealing with the Federal Parliament the framers of the Australian *Constitution* relied on the *British North America Act 1867* which created a federal union in Canada.<sup>55</sup> The Canadian experience was valuable as it was based on a heritage similar to Australia. It is first worthwhile to note briefly two predecessors of the *British North America Act* itself.

The Imperial *Constitution Act of 1791*<sup>56</sup> disqualified persons who took:

any oath of Allegiance or Obedience to any foreign Prince or Power<sup>57</sup>  
[emphasis added]

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53 Lane, P.H., *Lane's Commentary on the Australian Constitution*, Law Book Co. Ltd 1986: p.64.

54 *Tasmania v The Commonwealth* (1904) 1 CLR 329 at 333; *Seamen's Union of Australia v Utah Development Co.* (1978) 144 CLR 120 at 142-4.

55 La Nauze, J.A., *The Making of the Australian Constitution*. Melbourne University Press: Melbourne, 1974: p.25. In relation to many other provisions in the *Constitution* they relied on the US Constitution.

56 This Act divided the Province of Quebec into two provinces and established a Legislative Council in each Province.

57 Sections 7 and 8. They disqualified a person from taking up a hereditary right to be summoned to the Legislative Council and disqualified sitting Members of the Legislative Council.

Similar, although more detailed, wording was contained in the *Union Act 1840*<sup>58</sup> which provided that the place of a Legislative Councillor was to become vacant where the Councillor took:

any Oath or [made] any Declaration or acknowledgment of Allegiance, Obedience or Adherence to any Foreign Prince or Power.

The 1840 Act added the words 'declaration', 'acknowledgment' and 'adherence' which then appeared in the *British North America Act*.

#### 1.4.2 The 'Australian version'

In the 1891 draft of the *Constitution* clause 46(1) (the equivalent of the present s.44(i)) was in the same form as the 1840 Canadian legislation as it disqualified any person 'who has taken an oath or made a declaration or acknowledgment...' Some positive act was required. This wording was agreed to in the Convention Debates of 1897 in Adelaide.<sup>59</sup>

However, sometime after the 1897 debates the wording was changed to:

is under any acknowledgment of allegiance, obedience, or adherence...  
[Emphasis added]

This changed the provision by removing the words 'oath' and 'declaration' and making the phrase less specific. It is unclear whether this has any real effect in changing the provision from one requiring some sort of positive act, such as an oath or declaration, to a provision which only looks at whether someone is under any acknowledgment of allegiance which may have been acquired in less formal ways.

### 1.5 Comment

What effect does the first limb of s.44(i) have in Australia's multicultural society where Australian citizens may have strong ties with former homelands or with the homelands of their family ancestors?

Could the first part of s.44(i) assume importance in the context of increased 'internationalism' i.e. where Australian citizens become more active in regard to events and conditions in other specific countries? Does it apply to a person who pursues certain actions for the benefit

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58 Which re-united the Provinces of Upper and Lower Canada and provided for one Legislative Council and One Assembly of Canada.

59 *Official Report of the National Australasian Convention Debates*, Adelaide 22 March to 5 May 1897: p.736.



of another country which may conflict with official Australian policy, provided of course that such action is linked to an identifiable foreign power rather than a mere 'cause'?

*Literal meaning of first part of s.44(i).*

At present the only means of obtaining answers to these questions is by examining the literal meaning of the first part of s.44(i) and by examining the test intimated in the High Court's decision in *Nile v Wood*.

The first part of s.44(i) refers to a person who 'is under any acknowledgment of allegiance, obedience or adherence'. On the surface it may appear that this test could cover all sorts of attachment ranging from emotional attachment to, or political or military action for, a foreign power. But there are two restrictions in the test which prevent it from having too wide an operation. First, as noted above these terms have fairly specific legal meanings derived from old English law. The High Court would probably interpret these words in accordance with their technical meanings as at 1900<sup>60</sup> (but may also note any modern development regarding their meaning).<sup>61</sup>

Although this first part of s.44(i) does not specify that a person must have taken an oath or made a declaration of allegiance etc of a foreign power the fact that such actions were referred to in the earlier Australian draft of the provision may indicate that this was the way in which it was understood and intended by the framers of the *Constitution*. On the other hand of course it could be argued that because the framers of the *Constitution* did not specify an oath or declaration they did not want the first part of s.44(i) to be restricted to situations where an oath or declaration was made but rather wanted the provision wide enough to cover less formal forms of allegiance, obedience or adherence as well.

It should also be noted that the provision refers to a person who is under an acknowledgment. Does this imply that the first part of s.44(i) is directed only at acknowledgments which impose some obligation - some official obligation?

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60 *Attorney-General (NSW) v The Brewery Employees Union* (1908) 6 CLR 469, per Griffith C.J. at 501.

61 *R v Brislan; ex parte Williams* (1935) 54 CLR 262 at 282. See Wishart, D., 'Allegiance and Citizenship as Concepts in Constitutional Law,' (1986) 15 *Melbourne University Law Review* 662 for a history of the concept of allegiance. The question of what attracts the duty of allegiance has been raised in High Court cases concerning the Commonwealth's immigration power: see *Pochi v Macphee* (1982) 151 CLR 101.

*The High Court's test - formal or informal acknowledgment*

The High Court in *Nile v Wood* and Deane J in his dissenting judgment in *Sykes v Cleary* expressed the view that some formal or informal step would be required to constitute an acknowledgment. Deane J considered it:

involves an element of acceptance or at least acquiescence on the part of the relevant person.<sup>62</sup>

**1.5.1 Formal acknowledgment**

In referring to a 'formal acknowledgment' the Court seemed to draw on the earlier draft of the first part of s.44(i) which contained the words oath or declaration into s.44(i). These are acts of a formal nature.

What is a 'formal acknowledgment of allegiance'? Would the Court regard acceptance of a foreign passport or serving in the armed forces of a foreign power as coming within this category? It could be argued that such actions are a type of formal acknowledgment as they are of an official nature. They would require the participation or approval of some government agency of the foreign power and indicate a willingness of the person concerned to relate to the foreign power in some official way. In *Joyce v Director of Public Prosecutions*<sup>63</sup> the House of Lords found that the holding of a British passport created a duty of allegiance to the King of Great Britain.

Service in a foreign army may arise for interpretation under the first part of s.44(i) where the Australian citizen who serves was not a citizen of the foreign power. Where an Australian citizen is also a citizen of a foreign power and serves in the armed forces of that foreign power that person loses his or her Australian citizenship under s.19 of the *Australian Citizenship Act*.

**1.5.2 Informal acknowledgment**

The real 'unknown' about the first part of s.44(i) and the test suggested by the Court concerns actions which relate informally to the foreign power. The Court's reference to an informal acknowledgment is more problematical than its formal acknowledgment test. It is possible

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62 *Sykes v Cleary*, p. 39.

63 [1964] AC 347. In that case Joyce (although an alien) was found guilty of treason on the ground that being the holder of a British passport and thereby under an allegiance to the British Sovereign. He aided the Germans in WW II and had not renounced his passport. He had adhered to the king's enemies.

however, that 'informal acknowledgment' correlates with the word 'adherence' in the first part of s.44(i). It is doubtful whether the High Court would restrict the meaning of adherence to situations where there was an obligation of adherence. It would probably not require an obligation of adherence. It is more likely to find an acknowledgment of adherence in the actions of a person helping the Sovereign's enemies. This is the full common law meaning of adherence with the result that a person can adhere to the Sovereign's enemies under s.44(i) without having any formal link with, or obligation to, the enemy.

When would a person be found to be adherent to a foreign power? What is the position of an Australian citizen who is a member of an organisation which promotes and/or raises money for a foreign power? The answers to such questions would depend on the particular facts. For example, membership of a group sending money to save artworks in Venice would not constitute an acknowledgment of a foreign allegiance or adherence!

What is the position of a group of Australian citizens (with no formal links with the foreign power in question) which raises money to support military operations of a foreign power in either internal conflicts or conflicts with another country or who trains paramilitary in Australia to go and support a foreign power? It seems that such actions would constitute 'adherence' under s.44(i) only if they are committed to aid an enemy of Australia or an enemy of an ally of Australia during war or hostilities with Australia; or countries hostile to Australia even in the absence of a formal declaration of war.<sup>64</sup>

Is there any issue of adherence where the type of support referred to above is given to a 'liberation movement' within a foreign country? It is unclear whether a liberation group would be regarded as a 'foreign power' for the purposes of s.44(i). The High Court would probably hold that the term 'foreign power' in s.44(i) refers only to foreign nation states and not to groups of insurgents. Because of conflict in many parts of the world it may be difficult to determine exactly who is the power in a foreign country at a particular time. In such cases the Court could possibly inform itself of such matters and/or receive submissions from the executive.<sup>65</sup>

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64 See para 1.1.

65 Although Australia's new recognition policy is no longer concerned with recognition or non-recognition of governments but recognises states. (Statement of Minister for Foreign Affairs, 19 January 1988). See Starke, J., 'The new Australian policy of recognition of foreign governments', (1988) 62 ALJ 390-1.

The prospect of Australian citizens adhering to Australia's enemies may seem exaggerated. But is it? There is no shortage of Australian citizens becoming actively involved in the affairs of other countries.<sup>66</sup>

There would not be adherence where an Australian has aided a foreign power with the formal or informal approval of the Australian government. It is unlikely such approval would be given to aid enemies of Australia anyway.<sup>67</sup>

In practical terms persons with extremist views bordering on allegiance to or overwhelming connection with a foreign power would probably not gain sufficient community support to be elected. Issues of allegiance or adherence could arise however if a person was elected on a mainstream policy or policies but was subsequently found to be an active member or leader of a group supporting an 'enemy' of Australia or became active in such matters after election.

Serious cases could be disqualified under s.44(ii). Persons active in conflicts in other countries with which Australia or Australia's allies are not engaged could be prosecuted under the *Crimes (Foreign Incursions and Recruitment) Act 1978*. Such persons if convicted and under sentence could be disqualified under s.44(ii) of the *Constitution*, which disqualifies a person convicted and under sentence or subject to sentence for any offence under a Commonwealth or State law which is punishable by imprisonment for one year or longer. It would therefore not be necessary to show that they were under a foreign allegiance.

The 'adherence' test in s.44(i) may however, have a wider, more flexible operation than the disqualification of persons under s.44(ii) who are 'attainted of treason'.<sup>68</sup>

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66 For example, the training of Croatian paramilitary in Australia and their participation in incursions into Yugoslavia in 1972: *Senate Hansard*, 28 October 1981, p.1725 and 29 October 1981, p.1814; and arms smuggling to Fiji from Australia in 1988.

67 For example Australian 'approval' for Papua New Guinea to recruit 'persons to serve in or with the Papua New Guinea Defence Force in any capacity for the purpose of facilitating the use of 4 Iroquois helicopters ...' to assist the Papua New Guinea government's operations in Bougainville by declaration under s.9(2) of the *Crimes (Foreign Incursions and Recruitment) Act 1978*. *Gazette* No. 263 24 July 1989.

68 Under s.44(ii) the High Court could be asked to find someone ineligible under old common law for being attainted of treason. Where a person has actually been convicted of treason under s.24 of the Commonwealth *Crimes Act 1914* and is under, or subject to, sentence that person could be disqualified under s.44(ii).

### *Court's recognition of revocation*

An interesting point about the Court's suggested test in *Nile v Wood* and some comment in *Sykes v Cleary* is that it does not disqualify a person who has revoked his or her acknowledgment of allegiance, obedience or adherence. This is straightforward where the foreign power allows a person to revoke the acknowledgment. In situations where the foreign power does not allow revocation the High Court would probably follow the same approach it has taken in *Sykes v Cleary* and hold that it was sufficient if a person showed proof of seeking a revocation from the foreign power regardless of whether the acknowledgment of allegiance was actually revoked by the foreign power; and that he or she has not taken advantage of any privileges or fulfilled any obligations flowing from the acknowledgment of allegiance, etc.

## **2. The second test - Dual Citizenship**

The second part of s.44(i) is more specific than the first part. It refers to a specific type of foreign allegiance - ie. where a person is a 'subject or citizen' of a foreign power. It applies to persons who have certain rights because of a formal citizenship link with a foreign power. The second part of s.44(i) gives the High Court less scope for interpretation. The High Court has now had the opportunity of interpreting s.44(i) in *Sykes v Cleary* as discussed in para 2.3.

### **2.1 Dual citizenship in Australia**

The second part of s.44(i) applies directly to persons with 'dual citizenship'. In what situations can a person have dual citizenship in Australia? The *Australian Citizenship Act 1984* does not actively recognise dual citizenship but it does make a certain concession. A person can have Australian citizenship plus another citizenship where the other citizenship was acquired before he or she becomes an Australian citizen. This is due to the operation of s.17 of the Act which takes away Australian citizenship only where the 'other' citizenship is acquired after the acquisition of Australian citizenship and is acquired 'purposefully'.<sup>69</sup>

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69 Section 17 provides:

A person being an Australian citizen who has attained the age of 18 years, who does any act or thing -

(a) the sole or dominant purpose of which; and

(b) the effect of which,

is to acquire the nationality or citizenship of a foreign country, shall, upon that acquisition, cease to be an Australian citizen.

Persons may resume their citizenship lost under s.17 in certain circumstances.<sup>70</sup>

By contrast, Australian citizens who subsequently 'purposefully' acquire another nationality, lose their Australian citizenship under s.17 of the *Australian Citizenship Act*. They are excluded from being a Senator or a Member because they are not Australian citizens as required under s.163 of the *Commonwealth Electoral Act*.

A strict reading of the second part of s.44(i) means that a person who has dual citizenship is disqualified from:

- (1) being chosen, and
- (2) of sitting

as a Senator or a Member.

Three particularly complicated situations which arise in the operation of the second part of s.44(i) in respect of persons with dual citizenship are:

- (1) Where a person cannot renounce their other nationality.

Some countries do not allow a person to renounce his or her nationality. Other countries may technically allow renunciation but in practice government approval may be difficult to obtain.<sup>71</sup> Some countries allow renunciation but require payment.<sup>72</sup> In *Sykes v Cleary* however the High Court held that a person is only required to take 'reasonable steps' (see below).

- (2) Where an Australian citizen may not know they have another nationality.

Post World War II migrants and young refugees who may not know the birthplace of their parents, or their own birthplace.

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70 By furnishing a statement to the Minister that if he or she did not do the act he or she would have suffered hardship or that at the time he or she did not know the act would lead to loss of Australian citizenship and a declaration that he or she wishes to resume Australian citizenship: s.23AA.

71 For example in Venezuela judicial approval is required and in Yugoslavia and Israel Ministerial approval is required. Information supplied by the Department of Foreign Affairs and Trade.

72 Czechoslovakia required different levels of payment dependent on the educational level reached by the person seeking to revoke. The fee is calculated according to the expenditure of education funds by the State on the particular person. Information supplied by the Department of Foreign Affairs and Trade.

- (3) Persons born in countries which no longer exist or which are absorbed into another country or are newly created.

These pose complex situations for the application of s.44(i). A person's eligibility for membership of the Parliament may change with changing political boundaries although.

## 2.2 *Re Wood*: reference of questions by the Senate

In 1988 the Senate referred questions concerning the qualifications of Senator Wood to the Court of Disputed Returns. Although the Court decided the case on the basis that Robert Wood was not qualified under the *Commonwealth Electoral Act* and that s.44(i) was not relevant the Court commented:

The interpretation of s.44(i) and its applicability to an Australian citizen, who is also a citizen or who may, conceivably against his own wishes, be 'entitled to the rights or privileges of ... a citizen' of the United Kingdom or of countries other than Australia, are questions of great contemporary importance. As those questions were not fully argued, their resolution must be left for another day.<sup>73</sup> [Emphasis added]

## 2.3 *Sykes v Cleary*

On 25 November 1992 the High Court held the election of Phillip Cleary in a 1992 by-election for the federal Electoral Division of Wills in Victoria void on the basis that Mr Cleary was incapable of being chosen or of sitting as a Member under s.44(iv) of the *Constitution* because he held an 'office of profit under the Crown.'

The case had been brought by Mr Sykes, another candidate in the by-election under s.355, of the *Commonwealth Electoral Act*. In his petition Mr Sykes also challenged the eligibility of three other candidates Mr Delacretaz, Mr Kardamitsis and Mrs Rawson on the ground they were ineligible under s.44(i) of the *Constitution*. The challenge against Mrs Rawson was not proceeded with as Mr Sykes did not present argument on that point. On finding Mr Cleary ineligible the Court assessed whether second and third respondents Mr Delacretaz and Mr Kardamitsis were ineligible in order to determine whether a recount could be ordered.

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<sup>73</sup> *In re Wood* (1988) 167 CLR 145, at p. 169.

### 2.3.1 Facts of the case<sup>74</sup>

The second respondent Mr Delacretaz was born in Switzerland on 15 December 1923, migrated to Australia in 1951 and has lived in Australia since then. He became naturalised as an Australian on 20 April 1960 pursuant to Div.3 of Part III of the *Nationality and Citizenship Act 1948* (Cth). In the naturalisation ceremony he took an oath of allegiance to the Queen and swore to:

be faithful and bear true allegiance to Her Majesty Queen Elizabeth the Second, her heirs and successors according to law...[and] faithfully [to] observe the laws of Australia and fulfil [his] duties as an Australian Citizen<sup>75</sup>.

The third respondent, Mr Kardamitsis was born in Greece in 1952, came to Australia in 1969 sponsored by his brother and has lived in Australia since then. Mr Kardamitsis became an Australian citizen on 12 March 1975 pursuant to Division 2 Part III of the *Australian Citizenship Act 1948* (Cth). In the citizenship ceremony Mr Kardamitsis renounced all other allegiance. When he became an Australian citizen Mr Kardamitsis surrendered his Greek passport (which had expired one or two years after he had migrated to Australia). Between 1969 and 1978 he did not travel out of Australia. He was granted an Australian passport in April 1978 which was renewed in May 1987 for 10 years and which was still current. He entered Greece on his Australian passport for holidays in 1978 and in 1987 and for the funeral of his mother in 1979 and his father in 1990. Mr Kardamitsis had never received any social security or any other benefit from the Greek government nor had he ever stood for office in Greece or voted or enrolled as a voter in Greece.<sup>76</sup>

The High Court observed that under the law of Greece a Greek national can have his or her nationality discharged if:

- (a) the other nationality has been acquired with the approval of the Greek Minister; or
- (b) after acquisition of the other nationality approval is sought and given by the appropriate Greek Minister. In these cases the discharge of Greek nationality is effective from the date of the Greek Minister's approval, not from the date of the acquisition of the other nationality<sup>77</sup>.

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<sup>74</sup> Summarised from the joint judgment of Mason CJ., Toohey and McHugh JJ.

<sup>75</sup> *Sykes v Cleary*, p.13.

<sup>76</sup> *Sykes v Cleary*, p.14.

<sup>77</sup> *Sykes v Cleary*, p.14



### 2.3.2 Majority judgment

#### *'Reasonable Steps'*

All judges of the High Court considered that the relevant test was whether a person had taken 'all reasonable steps' to renounce the nationality of the other country. The Court split five to two however on what amounted to 'reasonable steps' in the circumstances. The majority of the High Court, Mason CJ, Toohey, McHugh JJ<sup>78</sup> delivering a joint judgment and Brennan and Dawson JJ held that Mr Kardamitsis and Mr Delacretaz were incapable of being elected because they had not taken 'reasonable steps' to renounce their foreign nationality. Justice Brennan elaborated this holding:

It is not sufficient... for a person holding dual citizenship to make a unilateral declaration renouncing foreign citizenship when some further step can reasonably be taken which will be effective under the relevant foreign law to release that person from the duty of allegiance or obedience. So long as that duty remains under the foreign law, its enforcement - perhaps extending to foreign military service - is a threatened impediment to the giving of unqualified allegiance to Australia. It is only after all reasonable steps have been taken under the relevant foreign law to renounce the status, rights and privileges carrying the duty of allegiance or obedience and to obtain a release from that duty that it is possible to say that the purpose of s.44(i) would not be fulfilled by recognition of the foreign law.

The second and third respondents each failed to take steps reasonably open under the relevant laws of his native country - Switzerland in one case, Greece in the other - to renounce his status as a citizen of that country and to obtain his release from the duties of allegiance and obedience imposed on citizens by the laws of that country. Accordingly, neither the second nor third respondent was capable of being chosen as a Member of the House of Representatives.<sup>79</sup>

The joint judgment considered that what is reasonable depends on:

1. The situation of the individual;
2. The requirements of the foreign State concerning renunciation;
3. The connection between the individual and the foreign State; and
4. The belief of a person being naturalised an Australian when he or she expressly renounces his or her foreign allegiance as a person

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<sup>78</sup> *Sykes v Cleary*, p.18.

<sup>79</sup> *Sykes v Cleary*, p.25.

may believe that he or she has effectively renounced any foreign nationality.<sup>80</sup>

Dawson J stated that what is considered reasonable will depend on the circumstances of the case such as: (a) the requirements of the foreign law for the renunciation of the foreign nationality and (b) the circumstances in which the foreign nationality was accorded to that person:

Thus the refusal of a foreign authority to exercise a discretion to allow a person to relinquish his foreign nationality need not necessarily preclude the person from being capable of being chosen or of sitting as a Senator or a Member of the House of Representatives. Further, if the foreign law does not permit a person to relinquish his foreign nationality then there are obviously no steps, save for unilateral renunciation, which that person can reasonably take to do so and, therefore, that person will not be precluded by reason only of that foreign nationality from being capable of being chosen or of sitting as a Member of either House of the Commonwealth Parliament.<sup>81</sup>

*International law and 'real and effective nationality'*

The majority held that the wording in s.44(i) precluded the High Court from using the international law approach and merely determine whether the 'real and effective nationality' of the respondents was Australian citizenship. Under international law 'real and effective nationality' is determined according to a person's association with and commitment to the countries in question.<sup>82</sup> They concluded however, that s.44(i) is concerned with a 'different question,' namely, whether a person had another citizenship.<sup>83</sup>

*Public Policy*

Brennan J stated that as a matter of international law and public policy the Court would not recognise the conferring of nationality by a foreign power which exceeded the jurisdiction of the foreign country or which was not based on a bona fide relationship with the person in question.

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80    *Sykes v Cleary*, p.18

81    *Sykes v Cleary*, p.44.

82    Decisions of the International Court of Justice, *Lichenstein v Guatemala* [1955] I.C.J. 4 at p.22 (*Nottebohm's case*); and *Iran- United States Claims Tribunal*, Decision in Case No. A/18 (6 April 1984).

83    ...'the critical words in s.44(i) do not permit this court to adopt the approach which has been taken by international law. Here the question is different: is the candidate a subject or citizen or entitled to the rights or privileges of a subject or a citizen of a foreign power?' *Sykes v Cleary*, p.17.

To take an extreme example, if a foreign power were mischievously to confer its nationality on members of the Parliament so as to disqualify them all, it would be absurd to recognise the foreign law conferring nationality.<sup>84</sup>

Brennan J stated that s.44(i) is not concerned with the operation of foreign law that is incapable in fact of creating any sense of duty, or of enforcing any duty of allegiance or obedience to a foreign power.<sup>85</sup> If foreign law were recognised in these situations some Australian citizens would be needlessly deprived of the capacity to seek election and others deprived of the right to elect them.<sup>86</sup>

Brennan J noted there were precedents in English decisions where the English courts refused on the ground of public policy to recognise changes either in the status of British subjects<sup>87</sup> or of enemy aliens<sup>88</sup> under the law of a foreign power. He considered that the doctrine of public policy should not be confined to those kinds of situations:

If recognition of status, rights or privileges under foreign law would extend the operation of s.44(i) of the Constitution to cases which it was not intended to cover, that section should be construed as requiring recognition of foreign law only in those situations where recognition fulfils the purposes of s.44(i).<sup>89</sup>

### 2.3.3 Dissenting judgments

Deane and Gaudron JJ dissented on the dual citizenship question. Both holding that Mr Kardamitsis and Mr Delacretaz had sufficiently renounced their other nationalities when they had sworn their oath of allegiance and renounced their other allegiances during their respective naturalisation ceremonies and they were therefore not incapable of being chosen under s.44(i).

Gaudron J also considered that the test to determine whether a person has taken 'reasonable steps' to renounce his or her other citizenship and satisfy s.44(i) is determined by Australian law, not the law of the other country. It may involve some consideration of the content of the

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84 *Sykes v Cleary*, p.24-5.

85 *Sykes v Cleary*, p.25.

86 *Sykes v Cleary*, p. 25. Brennan J considered this qualification is recognised by the common law per *Oppenheimer v Cattermole* [1976] A.C., 249 at p.277.

87 *R v Lynch* [1903] 1 K.B. 444.

88 *R v The Home Secretary; Ex parte L.* [1945] K.B; *Lowenthal v Attorney-General* [1948] 1 All E.R. 295.

89 *Sykes v Cleary*, p. 24.

law of the country involved but the main consideration must be the circumstances of the person concerned.<sup>90</sup>

Where reasonable steps have been taken to renounce foreign allegiance, questions arising under s.44(i) should, in my view, be answered on the basis that those steps achieved their purpose. That approach involves no reading down of s.44(i), although it may have the same result: rather, it is to spell out the process involved in determining its effect in a particular case.<sup>91</sup>

Gaudron J considered that the renunciation of other allegiances by Mr Kardamitsis when he was naturalised meant that:

he had a right to have any question of his Greek citizenship or his right or entitlement to the rights and privileges of a Greek citizen determined on the basis that the citizenship was effectively renounced and that, only if he reasserted it in some way, would the question be answered by reference to Greek law.<sup>92</sup>

Gaudron J noted that no evidence had been revealed that Mr Kardamitsis had reasserted his Greek citizenship in any way.

Given that what is at stake is the right to participate in the democratic process as a Member of Parliament - a right ordinarily attaching to citizenship - the onus of establishing that he did anything of the kind must lie on the party asserting it.<sup>93</sup>

Gaudron J considered that Mr Delacretaz also thought that he renounced his Swiss citizenship at his naturalisation, which prior to the introduction of the *Nationality and Citizenship Act 1966* (Cth) required applicants to 'renounce allegiance to their former countries' in a 'prominent and separate part of the naturalisation ceremony'.<sup>94</sup>

Deane J considered that the first limb of s.44(i) involves an element of acceptance or at least acquiescence on the part of the person. He considered that the second limb should also be construed as containing a similar element with the result that it applies only to cases where the relevant status, rights or privileges have been sought, accepted, asserted or acquiesced in by the person concerned.<sup>95</sup>

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90 *Sykes v Cleary*, p.53.

91 *Sykes v Cleary*, p.52.

92 *Sykes v Cleary*, p.51.

93 *Sykes v Cleary*, p.51.

94 Australia, House of Representatives. *Debates*, 31 March 1966: p.833.

95 *Sykes v Cleary*, p.39.

Deane J therefore held that both Mr Kardamitsis and Mr Delacretaz had done what could be 'reasonably expected' of them to renounce their other nationality. Mr Kardamitsis had been an Australian citizen since March 1975 and had taken an oath of allegiance in his citizenship ceremony and a further three oaths of allegiance as councillor and Justice of the Peace. Mr Delacretaz had also taken an oath of allegiance and had been an Australian citizen for 30 years. Deane J observed that under Swiss law a person is entitled to be released from Swiss citizenship if he has no residence in Switzerland and has acquired another nationality and that no ministerial discretion was involved. Deane J said no evidence had been given concerning the exact procedures required but that such a process would imply an acknowledgment of the continued existence of the Swiss citizenship.<sup>96</sup>

...in a context where more than thirty years of Australian citizenship have followed a public renunciation of allegiance to any country other than Australia and the swearing of an unqualified oath of allegiance to the Sovereign of this country in full compliance with the procedures required by the Australian authorities, it appears to me that it would be quite wrong to conclude that, for the purposes of our law, Mr Delecratz should now be expected to assert or acknowledge the existence of Swiss citizenship so that it can be terminated for the purposes of Swiss law.<sup>97</sup>

#### *Deane J and Commonwealth Electoral Act*

Following from Deane J's view that s.44 only operated to disqualify persons actually elected, Deane J considered ss.162 and 170(1) of the *Commonwealth Electoral Act* were relevant to determine whether Mr Cleary was actually elected. Section 162 provides no person is capable of being elected unless 'duly nominated.' Section 170(1) provides a nomination is not valid unless the nomination includes a declaration that the nominee is qualified under the *Constitution*. Deane J considered that if according to the majority of the Court Mr Cleary's nomination was invalid, it then became necessary to assess whether the nomination contained a fundamental error or a procedural error under s.170(2). Section 170(2) provides nominations are not invalid on the basis of procedural error.

Deane J concluded that because Mr Cleary had been found incapable of being chosen by the majority of the Court under s.44(i) and because ss.162 and 170 had not been argued by the parties it would be a waste of time and money to invite submissions on these provisions and it

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96 *Sykes v Cleary*, p.41.

97 *Sykes v Cleary*, p.42.

would be inappropriate for him to express a conclusion on that question.<sup>98</sup>

## 2.4 Academic opinion

Following the decision in *Sykes v Cleary* the position regarding dual nationals under s.44(i) has been clarified. Although s.44(i) had received very little academic attention some writers had indicated it might have been given a stricter interpretation than actually given in *Sykes v Cleary* to make persons ineligible even where they could not renounce.<sup>99</sup>

Pryles was more optimistic that the rigours of s.44(i) could be avoided by reading down the provision.<sup>100</sup> He also suggested that the High Court could create a

new exception to the rule of private international law that the possession of a foreign nationality is determined in accordance with the law of the foreign country concerned.<sup>101</sup>

In *Sykes v Cleary* the majority of the High Court examined the international law approach<sup>102</sup> in relation to determining nationality but considered it did not apply in interpreting s.44(i).

The Court did achieve the same result however based on principles of Australia's sovereignty and public policy.<sup>103</sup>

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98 *Sykes v Cleary*, p.38.

99 Lumb, R.D., *The Constitution of the Commonwealth Annotated*, 4th ed., Butterworths, 1986: p. 61, para 167; Lane, P.H., *Lane's Commentary on the Australian Constitution*, Law Book Co. Ltd: p. 64; G. Lindell, Explanatory Paper on the Constitutional Recommendations of the Report of the Senate Standing Committee on Constitutional and Legal Affairs on the *Constitutional Qualifications of Members of Parliament*, February 1983.

100 Pryles, M., 'Nationality Qualifications for Members of Parliament' (1982) *Monash Law Review* 163, at p.173.

101 Pryles, M., 'Nationality Qualifications for Members of Parliament' (1982) 8 *Monash Law Review* 163, at p.174. Some exceptions have developed to this rule: see the discussion in Sykes, E.I., and Pryles, M.C., *Australian Private International Law*, Law Book Co., 1987: pp.338-39.

102 With the majority of the Court reviewing the *Nottebohm case*

103 *Sykes v Cleary* per Brennan J at p. 24, which was foreshadowed in the 1989 edition of this paper p. 23.

## 2.5 Drafting history

The second test as it appeared in the *Union Act* of 1840 disqualified a person who:

concur[red] in, or adopt[ed] any Act whereby he may become a Subject or Citizen of any Foreign State or Power, or whereby he may become entitled to the Rights, Privileges, or Immunities of a Subject or Citizen of any Foreign State or Power...<sup>104</sup>

This was much more specific than the earlier 1791 provision. Similar words were contained in the *British North America Act* 1867 but with the deletion of 'Foreign Prince' and replacement of 'concur in or adopt' with 'does' any Act giving citizenship rights of a foreign power.<sup>105</sup> The 1867 Act also deleted the word 'immunities' and 'foreign state' leaving only a foreign power.

The Australian drafting history of the second test (which can be referred to by the High Court) seems to confirm that it is intended to disqualify persons with dual citizenship regardless of whether they acquire their other citizenship voluntarily or involuntarily. Again, the 1891 version of the second test was virtually identical to the provision in the *British North America Act* (differing only in the use of the past tense) and this was the wording debated in the 1897 Debates. Clause 46(1) disqualified any person who:

... has done any act whereby he has become a subject or citizen or entitled to the rights or privileges of a subject or a citizen of a Foreign Power.<sup>106</sup>

Like the first test the second test was changed sometime after the 1897 Debates to the wording found in the present s.44(i), i.e. referring to any person who:

is a subject or a citizen or entitled to the rights or privileges of a subject or a citizen of a foreign power.

This had the effect of changing the test from one requiring the performance of a positive act to acquire the citizenship of another

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104 Section 7.

105 Section 31(2).

106 Clause 46(1).

country to a wider test of whether the person is technically such a citizen and entitled to such rights and privileges.<sup>107</sup>

The practical significance is that the earlier provision would not have disqualified a person who had acquired his or her 'other' nationality by birth or descent. On a plain reading the later (and present) provision does exclude such persons. It looks only at the 'end result', whether a person does have another citizenship and not whether that person did something him or herself to acquire it.

This change probably occurred in the 1898 Debates in Melbourne, where the new wording seems to have first appeared, but the change does not appear to have been discussed.<sup>108</sup>

## 2.6 1897-8 Convention Debates

During the Convention Debates questions were raised concerning the operation of s.44(i).<sup>109</sup> The High Court has in recent cases shown a willingness to look at the Convention Debates 'for the purpose of seeing what was the subject matter of the discussion, what was the evil to be remedied, and so forth'<sup>110</sup> i.e. to ascertain the 'mischief' of a certain provision<sup>111</sup> without actually elaborating the extent to which they may be used to interpret the *Constitution*.<sup>112</sup> In *Nile v Wood* itself the Court referred to Quick and Garran and the Convention

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107 In contrast to a similar provision in the *Western Australia Constitution Act 1889* appears only to exclude persons who become subject to a foreign power after they have become a member of the Western Australia Parliament. Section 29(3) disqualifies a person who takes an oath, declaration or concurs in any act whereby he or she 'may become' the subject of a foreign power.

108 *Official Record of the Debates of the Australasian Federal Convention*, Third Session, Melbourne 20 January to 17 March 1898. Vol 2: pp.1931 et seq.

109 *Originally the High Court did not pay regard to these Debates in interpreting the Constitution: Municipal Council of Sydney v the Commonwealth* (1904) 1 CLR 208 at 213-214; *Attorney-General (Cth) ex rel McKinlay v The Commonwealth* (1975) 135 CLR 1 at 17, 47.

110 *Municipal Council of Sydney* at 213-19, see Zines, L., *The High Court and the Constitution* Butterworths, 1987: pp. 12, 379 and fn. 21.

111 *Re Pearson; Ex parte Sipka* (1983) 57 ALJR 225 at 227. See also *Cole v Whitfield* (1988) 78 ALR 42. See Burmester, 'The Convention Debates and the Interpretation of the Constitution' in *The Covention Debates 1891-1898: Commentaries, Indices and Guides*, ed. Craven, G., Legal Books Pty Ltd, Sydney 1986: p.25.

112 *Re Pearson; Ex parte Sipka* (1983) 57 ALJR 225, at 227.



Debates in discussing the intention of the framers of the *Constitution*.<sup>113</sup> In *Sykes v Cleary* however the High Court did not refer to the Convention Debates.

A change to clause 44 (sometimes appearing as clause 45) was suggested at the Adelaide Convention Debates in 1897 as being necessary to soften its impact on dual nationals. It was suggested that persons who had taken an oath of foreign allegiance (i.e. German colonists who may have taken an oath of allegiance to Germany and served in the German army) should not be disqualified if they had since become naturalised as British subjects.<sup>114</sup> The proponent, Mr Gordon asked 'would it not be necessary to add [to clause 44(i)] ... the words 'or who has not since been naturalised' ...?'<sup>115</sup>

The suggestion was not received favourably:

Mr GLYNN: You cannot have two allegiances.

Mr BARTON: No; a man might have to go out of our Parliament to serve against us.

Sir GEORGE TURNER: He may be Minister of Defence.<sup>116</sup>

At the Sydney Debates of 1897 an amendment to give the federal Parliament power to change the disqualification tests by inserting in clause 45 (ie s.44) the words 'until parliament otherwise provides', was defeated 26 votes to 8.<sup>117</sup>

## 2.7 Comment

The main concern in relation to the second part of s.44(i) was its operation in respect of persons with dual citizenship. A literal reading of s.44(i) tended to indicate that all dual citizens were excluded, regardless of whether the other nationality is actually renounced and the renunciation is accepted by the other country. The High Court's

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113 *Nile v Wood* (1988) 167 CLR 133, at 140.

114 Presumably the proponent Mr Gordon would have been referring to German nationals who later acquired dual nationality when they became British subjects.

115 Interestingly, this would have changed the s.44(i) requirement to the present formula provided the interaction of the *Australian Citizenship Act* and the *Commonwealth Electoral Act*.

116 *Official Record of the Debates of the Australasian Federal Convention*, Adelaide, 22 March to 5 May 1897: p.736.

117 Moved by Mr Glynn (SA) *Official Record of the Debates of Australasian Federal Convention*, Sydney, Second Session 21 September 1897: pp. 1011-1015.

decision in *Sykes v Cleary* however has clarified this. It qualified s.44(i) so that it only disqualifies persons who have not renounced or attempted to renounce their other citizenship.

Although the drafting history tended to support this interpretation. The early draft only excluded persons who had performed some act to acquire the other citizenship because they were imputed to have a desire to retain that other. Can this impute the present version with intention to only disqualify dual citizens who have not at least tried to renounce their other citizenship.

The fact that a person had not made any attempts to renounce would be evidence of a desire to retain that nationality.

The Convention Debates also tended however to indicate that s.44(i) imposed a blanket disqualification on all persons with dual citizenship. The participants in the Debates do not appear to have discussed what the position would or should be in relation to a person who wanted to, but could not, renounce. This may have been because the framers wanted to disqualify all regardless as evidenced by the rejection of the proposed amendment by Mr Carruthers. On the other hand it could have been because renunciation was not a common procedure in those times.

### 2.7.1 Effect of oaths/affirmations of allegiance

What is the interaction between the *Australian Citizenship Act*, the oath of allegiance undertaken in citizenship ceremonies; and the oath of allegiance by Members and Senators and s.44(i) of the Constitution?

#### *Oath and affirmation of citizenship*

Today the oath or affirmation of allegiance taken by persons becoming Australian citizens does not require express renunciation. At the time Mr Kardamitsis and Mr Delacretaz became Australian citizens an express renunciation was required either in the oath or as part of the citizenship ceremony as noted by Deane and Gaudron JJ in *Sykes v Cleary*. The requirement for express renunciation was removed in 1986. The oath and affirmation of citizenship still however require 'true allegiance'. 'True allegiance' for the purposes of Australian citizenship is probably satisfied even where there is dual citizenship as prior dual citizenship is recognised government policy and in the *Australian Citizenship Act*. An outline of the changes to the oath and affirmation of allegiance for Australian citizenship is in Attachment B.

It is not clear whether 'true allegiance' alone implies a sufficient element of renunciation to satisfy the test proposed by Deane and Gaudron JJ. The facts in *Sykes v Cleary* did not require Deane or

Gaudron JJ to consider that point. Deane or Gaudron JJ did not note the absence of an express renunciation in the present oath or affirmation.

Whether or not a renunciation is contained in the oath or affirmation of allegiance has no real effect in terms of Australia's citizenship laws as s.17 of the *Australian Citizenship Act* reflects Australia's policy to recognise dual citizenship where the other citizenship was acquired prior to the acquisition of Australian citizenship. This was recognised by the Minister's second reading speech for the *Australian Citizenship Bill 1973* which inter alia proposed to delete the phrase 'renounce all other allegiance' from the oath and affirmation of allegiance under the *Australian Citizenship Act*.<sup>118</sup> It was also recognised in the Minister's second reading speech in 1986 when the requirement to renounce was removed.<sup>119</sup>

In *Sykes v Cleary* only the dissenting judges Deane and Gaudron JJ considered that renunciation in the oath satisfied s.44(i) along with the person's intention to renounce, long term association with Australia and that the facts showing the person in question had not been using the benefits of the renounced citizenship.

#### *Parliamentary oath or affirmation for Members and Senators*

What is the effect of the oath or affirmation of allegiance taken or made by persons becoming a Member or Senator as required under s.42 of the *Constitution*? Section 42 requires:

Every senator and every member of the House of Representatives shall before taking his seat make and subscribe before the Governor-General, or some person authorised by him an oath or affirmation of allegiance in the form set forth in the schedule to this Constitution.

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118 Minister for Immigration, Mr Grassby: 'That renunciation has been a cause of great emotional misgivings amongst people who want to become Australians. It has served no legal purpose at all because loss of retention of former citizenship depends entirely on the law of the person's former homeland ... And so I put it to the House that it is both the humane and the sane course to drop these distressing and ineffectual words about renunciation.' Australia. House of Representatives *Debates*, 11 April 1973: p.1313.

119 Minister for Immigration and Ethnic Affairs, Mr Hurford: 'That renunciation is ambiguous and unnecessary. Some candidates think that it requires them to renounce not only other allegiances but also their cultural background and all other ties with their country of origin. In many cases renunciation does not affect the previous nationality or citizenship of candidates because the nationality laws of many countries permit their nationals to have more than one citizenship. Australia. House of Representatives, *Debates*, 19 February 1986: p.869.

The schedule to the *Constitution* contains the following oath and affirmation:

#### OATH

I, A.B., do swear that I will be faithful and bear true allegiance to her Majesty Queen Victoria, Her heirs and successors according to law. SO HELP ME GOD!

#### AFFIRMATION

I, A.B., do solemnly and sincerely affirm and declare that I will be faithful and bear true allegiance to Her Majesty Queen Victoria, Her heirs and successors according to law.

(NOTE. - *The name of the King or Queen of the United Kingdom of Great Britain and Ireland for the time being is to be substituted from time to time.*)

In 1920 the House of Representatives expelled<sup>120</sup> a member, Hugh Mahon, on the grounds that he had given a seditious public speech against the British government in Ireland and had thereby acted inconsistently with the oath of allegiance to the Crown.<sup>121</sup>

This case is not directly relevant to interpretation of s.44(i) because in the Mahon case the House did not use the oath to relax the disqualifications in s.44(i). The House used the oath to impose a requirement on Mr Mahon stricter than s.44 and certainly pre-empting s.44, as s.44(ii) provided for the disqualification of persons if attainted of treason or convicted and under sentence for an offence against a Commonwealth or State law punishable by imprisonment for one year or longer.

The parliamentary oath or affirmation of allegiance is a statement of positive intention, a promise and is based on an assumption that the person is in the position of being able to give 'true allegiance.' An oath or affirmation of allegiance made by a Member or Senator pursuant to s.42 of the Constitution does not appear to 'cancel out' a Member's or Senator's ineligibility under s.44(i)<sup>122</sup>. Section 44(i) requires more than a statement of 'true allegiance' it imposes a certain 'standard of proof' that a Member or Senator has allegiance namely, the absence of

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120 Section 8 of the *Parliamentary Privileges Act 1987* removed the right of the Houses to expel a Member or a Senator.

121 *House of Representatives Practice* 2nd ed, Melbourne AGPS 1989: p.190.

122 The joint judgment in *Sykes v Cleary* noted that it was significant that s.42 required members of Parliament to take an oath or affirmation of allegiance: p.18. Deane J also pursued the effect of the parliamentary oath of allegiance in the directions hearing of 27 August 1992: pp.27-40.

any acknowledgment of foreign allegiance, citizenship or citizenship entitlements of a foreign power.

### 2.7.2 British subjects

What is the position of Australians who are also British subjects under s.44(i)? A full history of the status of British subjects and s.44(i) is beyond the scope of this paper a brief outline of the main developments is contained in Attachment A. It seems clear that today however, Australian citizens who are also British nationals would be regarded as subjects of a 'foreign power' within the meaning of s.44(i). Such a person would be regarded as being both a subject of the Queen of the United Kingdom in addition to being a subject of the Queen of Australia.<sup>123</sup> The issue was briefly referred to in the directions hearing for *Sykes v Cleary* but no conclusion was made.<sup>124</sup>

### 2.7.3 Relationship of ss.34(ii) and 44(i) of Constitution

How does the disqualification in s.44(i) relate to s.34 of the *Constitution*? Section 34 provides:

Until the Parliament otherwise provides, the qualifications of a member of the House of Representatives shall be as follows:-

- (i) He must be of the full age of twenty-one years, and must be an elector entitled to vote at the election of members of the House of Representatives, or a person qualified to become such elector, and must have been for three years at the least a resident within the limits of the Commonwealth as existing at the time when he is chosen:
- (ii) He must be a subject of the Queen, either natural-born or for at least five years naturalised 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.

The Parliament has 'otherwise provided' and enacted the qualifications of Members of Parliament in s.163 of the *Commonwealth Electoral Act*.

The qualifications provided in the *Commonwealth Electoral Act* appear to 'cover the field' of the requisite qualifications for membership of Parliament and therefore preclude s.34(ii) having any residual present operation. The early definition of qualification in the *Commonwealth Electoral Act* merely replaced the long definition of 'subject of the

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123 Issues concerning Australia's development as an entity separate to the United Kingdom were recently discussed by the High Court in *Nolan v Minister for Immigration and Ethnic Affairs* (1988) 165 CLR 178 at pp. 183-186.

124 High Court, Directions Hearing Transcript, 27 August 1992, pp.39-40.

Queen' in s.34(ii) with the shorter term of 'British subject.' In 1984 however the qualification of British subject was removed from the *Commonwealth Electoral Act* and replaced with 'Australian citizen.' This shows the legislative intention of Parliament to remove 'British subject' as a qualification. As a matter of statutory interpretation any part of s.34(ii) which deals with British subjects<sup>125</sup> cannot have a concurrent operation with the present qualification provision in the *Commonwealth Electoral Act*.

Even if s.34(ii) had some concurrent operation, which is doubtful, it could be argued that persons with dual Australian and British citizenship British would nevertheless be disqualified under s.44(i) as they are subjects of a foreign power (see Attachment B). It appears accepted that s.34 is subject to s.44.<sup>126</sup> Section 44 deals with the 'present,' persons may be qualified for membership of Parliament but subsequently become disqualified.

Further indications that s.34(ii) does not have any operation alongside s.44(i) are evident in recent statements of the High Court in *Nolan v Minister for Immigration and Ethnic Affairs*. In that case the Court commented that the phrases 'Crown of the United Kingdom' in the preamble and clause 2 of the *Imperial Commonwealth of Australia Constitution Act 1900* and to 'subject of the Queen' in ss.34(ii) and 17 of the *Constitution*:

cannot alter, or avoid the consequences of, the emergence of Australia as an independent nation, the acceptance of the divisibility of the Crown which was

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125 The High Court could find that today the only phrase which refers to British subjects in s.34(ii) would be persons 'at least five years naturalised under a law of the United Kingdom' or 'of the Commonwealth.' This is because the High Court has indicated that it regards the term Queen in ss.34(ii) and 17 of the *Constitution* to mean 'Queen of Australia.' See *Nolan v Minister for Immigration and Ethnic Affairs* (1988) 165 CLR 178 at pp.183-6. The position is not affected by any right of British subjects to vote under s.93 of the *Commonwealth Electoral Act*.

126 The Explanatory paper to the Senate Standing Committee on Constitutional and Legal Affairs expressed the view that: 'It is probable that the power contained in sections 34 and 51 (xxxvi) enables the parliament to create new disqualifications so long as they do not qualify a person disqualified under sections 44 and 45.' Op.cit. p.4.

This was also the opinion of ss.34 and 44 of J.Drake, one of Australia's early Attorneys-General: The effect of these provisions is that the Parliament has power to define the qualifications - and correlatively the disqualifications - of Members of Parliament; subject to the limitation that cannot qualify any person who is disqualified by section 44. It can add to those disqualifications, but it cannot subtract from them. *Opinions of the Attorneys-General of the Commonwealth of Australia*, Vol 1, 1901-1914 Opinion No.161: p.200.

Lane also comments that the power in s.34 'must be exercised within the limits of ss.43-45.' Op.cit.p.58.

implicit in the development of the Commonwealth as an association of independent nations and the creation of a distinct Australian citizenship.<sup>127</sup>

The Court stated:

We would add that, of the words 'subject of the Queen' in the *Constitution*, it should be resolved by treating those words as referring, in a modern context, to a subject of the Queen in right of Australia: cf *Royal Style and Titles Act 1973* (Cth).<sup>128</sup>

The question of the status of British subjects and s.34(ii) was briefly alluded to in the directions hearing for *Sykes v Cleary*.<sup>129</sup>

### 3. Third test - 'Entitled to the rights ... of ... a citizen'

#### 3.1 Meaning of 'entitled to the rights ... of'

The third part of s.44(i) provision refers to *the* rights or privileges of a subject or citizen. It is unclear whether this means entitlement to *all* the rights or privileges of such a citizen or merely *one* or *some* of such rights or privileges. In some situations it may be difficult to determine whether a person is entitled to merely some rights or entitled to the whole package of citizenship rights: for example the right of Jews to settle in Israel under Israel's *Law of Return*.

#### 3.2 Academic opinion

This question has also not received much attention. One early writer on the *Constitution* however, thought the words may have a more stringent meaning and disqualify a person who was given a particular right or privilege by a foreign power but not full citizenship rights. Professor Harrison Moore writing in 1902 commented that this part of s.44(i):

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127 *Nolan v Minister for Immigration and Ethnic Affairs* (1988) 165 CLR 178 at pp.185-6.

128 *Nolan v Minister for Immigration and Ethnic Affairs* (1988) 165 CLR 178 at p.186.

129 Deane J observed at p. 40: 'Of course that argument is complicated, I suppose by section 34 of the Constitution and the form of the oath of allegiance which, in the schedule, is expressed to be by reference to the monarch of the United Kingdom. But I was not suggesting you embark on it; it was just something that struck me should not just be assumed.'

seems unnecessarily stringent, and may produce unexpected disqualifications. There are many states in which the right to trade or to hold land is a right or privilege of the subject in the sense that the foreigner is excluded from it. Is a British subject, who obtains from a foreign Power a license to trade or to hold land, within the disqualification?<sup>130</sup>

In his 1910 edition however, Harrison Moore did not repeat this comment or make any other comment on this part of s.44(i).<sup>131</sup>

Another question concerning entitlement is *when* is a person regarded as entitled under s.44(i)? Pryles<sup>132</sup> comments that 'entitlement' probably means more than the mere 'right to acquire.' He suggests that there must be more than the right to acquire the nationality of another country as for example a person who merely has a right to be registered and then acquire nationality of the country.<sup>133</sup> Pryles suggests that an Australian person of the Jewish faith for example who possesses the right to acquire Israeli citizenship:

is not necessarily treated as an Israeli until he takes up such citizenship ...<sup>134</sup>

Pryles suggests that the third test only disqualifies a person who

presently enjoys the rights or privileges of a foreign national. A right to acquire a foreign nationality, unless it carries with it the present enjoyment of such benefits, is no more than the right to enjoy the benefits ... at some time in the future.<sup>135</sup>

### 3.3 1897-8 Convention Debates

A question was asked in the Adelaide Convention Debates concerning the phrase 'entitled to the rights of ...'. Mr Carruthers 'put a case' to Mr Barton concerning the position of British subjects gaining

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130 Harrison Moore, W., *The Constitution of the Commonwealth of Australia*, 1st ed. London, 1902: p. 111.

131 Harrison Moore, W., *The Constitution of the Commonwealth of Australia* 2nd ed., London: pp. 127-8.

132 Pryles, M. 'Nationality Qualifications for Members of Parliament', (1982) 8 *Monash Law Review* 163.

133 Pryles, M., 'Nationality Qualifications for Members of Parliament' (1982) 8 *Monash Law Review* 163, at 179.

134 Pryles, M., 'Nationality Qualifications for Members of Parliament' (1982) 8 *Monash Law Review* 163, at 179.

135 Pryles, M., 'Nationality Qualifications for Members of Parliament' (1982) 8 *Monash Law Review* 163, at 180.



particular rights under a treaty with Japan giving practically the same rights and privileges as British subjects enjoyed as citizens of their own country. Mr Carruthers commented:

Surely it is never intended that by a person travelling in another country who becomes entitled to privileges conferred on him by a treaty between two high powers, he should be disqualified from holding a seat in the Federal Parliament. Our Members of Parliament who are hard-worked take their summer trips, and it may be that some of them may come back and find they have lost their seats as a result of this clause.<sup>136</sup>

Unfortunately, there was no reply from Mr Barton or any other participant in the debate!

### 3.4 Comment

As noted above several issues arise in relation to the second part of s.44(i). First, the phrase 'entitled to the rights or privileges of a subject or a citizen of a foreign power' probably means entitlement to all such rights.

There is also the question of when someone is entitled to such rights. Pryles considers that there must be 'present enjoyment' of such rights rather than a mere 'entitlement to acquire them'.

It is possible however that the phrase was meant to apply to a specific class of persons who had the rights or privileges of a citizen but were not actually citizens i.e. 'denizens'. Denizens were aliens who were granted British status by letters patent of the British Sovereign (but this is now obsolete). A person granted letters of denization had to take the oath of allegiance and probably enjoyed all the rights of native-born subjects of the Crown

save that he [could] not, under the Act of Settlement, hold public office or obtain a grant of lands from the Crown.<sup>137</sup>

If the High Court was satisfied that the phrase referred to denizens it would probably read down the phrase so as not to exclude persons who had a mere right to acquire citizenship rights. The High Court may still be faced with the problem of 'categories' of citizenship however, if any other foreign power still gives denizen type rights.

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136 *Official Record of the Debates of the Australasian Federal Convention*, Adelaide, 22 March to 5 May 1897: p.736.

137 *Oxford Companion to Law*, p. 351.

It is not clear whether persons who have passports of other countries would be regarded as being entitled to the rights of a citizen of a foreign power. Overall, the High Court would first look at the nature of the entitlement as to whether it was a substantial or trivial right; and secondly place great emphasis on whether someone was actually enjoying or benefiting from their entitlement.

#### 4. Reports/Recent Constitutional Convention Debates

The question of dual nationality and s.44(i) has been examined in various reports and at the 1985 Constitutional Convention.

- (1) A report by the Joint Committee of Foreign Affairs and Defence entitled *Dual Nationality* presented in October 1976.<sup>138</sup>

The report mainly concerned the international and diplomatic aspects of dual nationality and did not focus on s.44(i). The Committee did however note the concerns and difficulties of persons from certain countries in renouncing their other nationality. It was predominantly those from Czechoslovakia, Hungary, Poland, Yugoslavia, Estonia, Latvia, Lithuania, Italy and Greece who wanted only Australian citizenship. Many were war refugees who fled their former country for political reasons and who faced several obstacles, or outright refusal, when they attempt to relinquish their former nationalities.<sup>139</sup>

The Committee noted that the rules applied by different countries in relation to the renunciation of nationality fall within three broad categories: a simple renunciation procedure; renunciation permitted on compliance with imposed conditions; or a refusal to accept renunciation.<sup>140</sup>

- (2) A report in 1981 by the Senate Standing Committee on Constitutional and Legal Affairs on *The Constitutional Qualifications of Members of Parliament*.<sup>141</sup>

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138 Parliamentary Paper No. 255/1976. The reference of the Committee was: 'The international and diplomatic aspects of the situation of Australians possessing dual or plural nationality'. This arose out of particular concern over the nationality laws of Yugoslavia on persons of Yugoslav origin who visited or wished to visit their former homeland.

139 *Dual Nationality*, Canberra: AGPS, 1976: p. 3.

140 *Dual Nationality* Canberra: AGPS, 1976: p. 4.

141 Parliamentary Paper No. 131 of 1981.

The Committee was of the view that the mere involuntary and unintentional holding of dual nationality would breach s.44(i).

The report recommended that s.44(i) be deleted from the *Constitution* but that certain safeguards be embodied in the *Commonwealth Electoral Act* to require a person seeking nomination to the Commonwealth Parliament to make certain declarations in respect of their nationality status. The recommended provision (to be inserted after the old s.73 of the Act) was as follows:

- (1) A person shall declare at the time of nomination whether, to his knowledge, he holds a non-Australian nationality.
- (2) If the declaration made pursuant to sub-section (1) is in the affirmative, he shall further state:
  - (a) that he has taken every step reasonably open to him to divest himself of the non-Australian nationality; and
  - (b) that for the duration of any service in the Commonwealth parliament, he will not accept, or take conscious advantage of, any rights, privileges or entitlements conferred by his possession of the unsought nationality.<sup>142</sup>

The Committee thought this would place the electorate in the position of being able to judge the commitment of the candidate.

The Senate Committee proposal addressed the main perceived 'injustice' effected by s.44(i) prior to the decision in *Sykes v Cleary* which held it was sufficient for persons to take reasonable steps to renounce.

The Senate Committee proposal covers persons who have acquired their other citizenship either before or after the acquisition of Australian citizenship.

The effectiveness of the proposed declaration procedure depends on the present interaction of certain legislation - s.45 of the *Constitution*, s.162 of the *Commonwealth Electoral Act* and s.17 of the *Australian Citizenship Act*.

Specifically, if s.44(i) were deleted then there would be no ground in s.45 of the *Constitution* to declare vacant the seat of any sitting Senator or Member who has dual citizenship. The regulation of dual citizens in Federal Parliament would be left to the *Commonwealth Electoral Act* and the *Australian Citizenship Act*.

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142 Australia. Senate, Parliamentary Paper No. 131 of 1981: p. 12. See discussion pp. 9-12.

The Senate Committee proposal does not expressly cover the situation envisaged in the first part of s.44(i) where a person is under an acknowledgment of allegiance, obedience or adherence. Some questions of foreign allegiance or obedience may come under proposed para 2(b).

### (3) 1983 Constitutional Convention

The Senate Committee Report was referred to the Structure of Government Sub-Committee (the Sub-Committee) of the Constitutional Convention. The Sub-Committee considered the Senate Committee Report and a Draft Discussion bill on constitutional qualifications prepared by the Commonwealth. The Sub-Committee reported in February 1985 and expressed its agreement with the Senate Committee recommendation that a person should not be disqualified from becoming a Member or Senator because of unsought dual nationality.

The Sub-Committee noted that the recommendation did not cover the situation where a Member or Senator voluntarily acquired another nationality after election<sup>143</sup> (noted above) and therefore recommended that a constitutional disqualification be inserted in the *Constitution* providing that where a Member ceases to be an Australian citizen his or her seat would become vacant. It also recommended that Parliament be empowered to deal with other situations as they arise.<sup>144</sup>

### (4) 1985 Constitution Convention

The Sub-Committee report and the whole question of s.44(i) (together with the rest of s.44) was discussed in the debates of the 1985 Constitutional Convention. Senator Evans moved:

That this Convention -

- (a) notes the report of the Structure of Government Sub-Committee on the Qualifications of Members; and
- (b) supports in principle the enactment of a constitutional amendment to revise and modernise the provisions governing the qualifications of Members of Parliament along the lines of the recommendations of the Senate Standing Committee on Constitutional and Legal Affairs and the Structure of Government Sub-Committee.<sup>145</sup>

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143 *Report of the Structure of Government Sub-Committee*, February 1985, p.1.

144 Also noted by Lindell, G., *Explanatory Paper on the recommendations of the Senate Standing Committee*, prepared for the structure of Government Sub-Committee: p.8, para. 5.5.

145 *Proceedings of the Australian Constitutional Convention*, Volume 1, Official Record of Debates, 29 July - 1 August 1985, Brisbane, p. 248.

The motion with two amendments was agreed to.

Senator Evans tabled the draft bill on Constitutional Qualifications for discussion in relation to s.44(i). This was based on the proposal that the *Constitution* contain a provision requiring a Member of Parliament to be of a least 18 years of age, be an Australian citizen, and be alterable by Parliament.

One proposal<sup>146</sup> was to amend s.44(i) to disqualify persons under any acknowledgment of allegiance to a foreign power or who are voluntarily a subject of a foreign power, but not to disqualify persons who have another nationality involuntarily and who have taken all reasonable efforts to renounce that status. This amendment was agreed to.

Dissatisfaction was expressed<sup>147</sup> concerning possible wide variations in the ability of persons to renounce their other citizenship resulting in possible discriminatory effects between those countries which may allow renunciation and those which do not or make it very hard to do so.<sup>148</sup> Provisions drafted along the lines of the majority decision in *Sykes v Cleary* would remove such disparity.

Mr Wilson expressed the view that it is unnecessarily restrictive to require that Members of Parliament have only Australian citizenship, and that it was a pity that Australia, as a country of immigration in a world of increasing mobility does not recognise the strength of feeling that people have for their country of birth. He suggested the acceptance of dual citizenship but recognition of 'primary citizenship' of the country being their permanent home.<sup>149</sup>

Mr Lindgard (Qld) although supporting the need for change, did not support the motion or proposed amendment to s.44(i) stating that

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146 *Proceedings of the Australian Constitutional Convention*, Volume 1, Official Record of Debates, 29 July - 1 August 1985, Brisbane: per Mr Pickering at p.253.

147 *Proceedings of the Australian Constitutional Convention*, Volume 1, Official Record of Debates, 29 July - 1 August 1985, Brisbane: pp. 258-9.

148 *Proceedings of the Australian Constitutional Convention*, Volume 1, Official Record of Debates, 29 July - 1 August 1985, Brisbane, per Mr Wilson, (Cth) at pp.258-9.

149 *Proceedings of the Australian Constitutional Convention*, Volume 1, Official Record of Debates, 29 July - 1 August 1985, Brisbane: pp.258-9.

much more work was required to make sure all the legal consequences were dealt with.<sup>150</sup>

Senator Macklin (Qld) believed that the simplest course of action was to repeal s.44(i) and leave the whole nationality question to detailed Commonwealth legislation.<sup>151</sup>

#### (5) Final Report of the Constitutional Commission (1988)

The Report commented that the purpose of s.44(i) was to ensure that Members of Parliament do not have a dual allegiance, and are not subject to any improper influence from foreign governments. The Commission considered that technically s.44(i) excludes dual nationals. The Commission was of the view that s.44(i) excluded even dual nationals who had taken all appropriate steps to relinquish the non-Australian nationality with the result that the laws of a foreign country prevented some Australians from taking the fullest part in our representative democracy. The Commission therefore recommended the deletion of s.44(i) and proposed a draft Bill omitting s.34 of the *Constitution*, replacing it with a detailed provision on qualifications and omitting s.44 replacing it with other provisions but not replacing s.44(i).<sup>152</sup>

#### (6) Australian Democrats Bill

The High Court in *Sykes v Cleary* did not interpret s.44(i) in the way envisaged by the Commission. The High Court held that a person is not excluded under s.44(i) if they have taken reasonable steps to renounce regardless of whether the other country actually accepts the renunciation.

On 24 November 1992 Senator Kernot of the Australian Democrats introduced a Bill in the Senate entitled the *Constitution Alteration Qualifications and Disqualifications of Members of the Parliament Bill*. This seeks to amend the way in which the qualifications and disqualifications for membership of Parliament are regulated by the *Constitution*. The proposals in the Bill would have to be passed by referendum. Although the main focus of the Bill is to remove the office of profit disqualification in s.44(i) the Bill does propose other

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150 *Proceedings of the Australian Constitutional Convention*, Volume 1, Official Record of Debates, 29 July - 1 August 1985, Brisbane: p.260.

151 *Proceedings of the Australian Constitutional Convention*, Volume 1, Official Record of Debates, 29 July - 1 August 1985, Brisbane: p.261.

152 *The Constitution Alteration (Qualifications and Disqualifications of Members)* Draft Bill, Appendix K, Bill No. 8: p.1000.

general changes and also removes the disqualification in s.44(i). Briefly the Bill seeks to:

- Repeal the present s.34 of the *Constitution* and replace it with provisions setting out the qualifications of a Member of the House of Representatives and empowering Parliament to enact laws for determining whether a Member or Senator (pursuant to s.16) is qualified or disqualified; and
- Repeal s.44 including the foreign allegiance/dual citizenship disqualification in s.44(i).<sup>153</sup>

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<sup>153</sup> It also proposes the repeal of s.45 and replacing these provisions with provisions relating solely to office of profit and pecuniary interests.

## Part B - Jurisdiction of High Court and consequences of disqualification

### 5. Jurisdiction of High Court/justiciability of s.44(i)

Before discussing the actual consequences of disqualification under s.44(i) it is necessary to raise a fundamental question - who has the role of determining whether a person is disqualified under s.44(i)? Is it the High Court or is it the House of Parliament in which the question arises?

Whether the High Court has any jurisdiction in this area depends on how the s.44(i) issue is brought before the Court. If s.44(i) is relied on in a petition under the *Commonwealth Electoral Act* the High Court has jurisdiction as it would hear the petition in its capacity as the Court of Disputed Returns created under s.354 of the *Commonwealth Electoral Act*.

This jurisdiction of the High Court, acting as the Court of Disputed Returns, can also be exercised when a question concerning the qualifications of a Member or a Senator is referred to the Court of Disputed Returns by the House of Parliament in which the question arises under certain provisions of the *Commonwealth Electoral Act*.

The more difficult question concerns the jurisdiction of the High Court where it is not acting as a Court of Disputed Returns i.e. where it is asked to consider s.44(i) in situations not covered by the *Commonwealth Electoral Act*, or where the High Court in considering a suit for penalties (see below) is asked to decide whether a person is disqualified under s.44(i).

The question whether the High Court has jurisdiction in such cases raises issues of the distribution of powers between the Parliament and the High Court in respect of the qualifications of Members of Parliament. Particularly, the effect of s.47 of the *Constitution* which gives the Parliament power with respect to questions concerning the qualifications of a Senator or a Member, a vacancy arising in either House of Parliament and disputed elections. Does s.47 mean that all questions respecting the qualifications of a Member or a Senator are to be determined by the relevant House of Parliament except questions which can be dealt with by the High Court as the Court of Disputed Returns?<sup>154</sup> Or is the High Court vest with the original jurisdiction

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<sup>154</sup> Vested in the High Court by Parliament in s.354 of the *Commonwealth Electoral Act*.



under the *Constitution* and jurisdiction pursuant to the *Judiciary Act 1903* (Cth) to interpret s.44. independent of Parliament?

As well as considerations of jurisdiction the particular question brought before the Court concerning s.44(i) must be justiciable.

Following is a more detailed outline of the ways in which s.44(i) can be brought before the High Court both in its capacity as the Court of Disputed Returns and in its original constitutional jurisdiction.

## 6. Nomination stage?

### 6.1 Present role of the Australian Electoral Commission

#### 6.1.1 General nomination procedures under *Commonwealth Electoral Act*

The nomination process for either House of Parliament is regulated by the *Commonwealth Electoral Act*. Forms C, CA, CB and CC (for nomination of Senators) and Forms D and DA (for nomination of Members) in the Schedule to the Act set out the actual nomination forms and the declaration that must be made by each candidate. (See Attachment C).

The forms were amended in 1988<sup>155</sup> to require each candidate to state their eligibility by ticking 'yes' or 'no' boxes to various questions (including eligibility under s.44) before completing a declaration in regard to certain matters (including eligibility under s.44(i)). (See Attachment C).

#### 6.1.2 Procedures followed by Australian Electoral Commission prior to an election

At present only naturalised candidates must verify their citizenship with the Commission. Dual citizenship status is not checked by the Commission. The Commission is of the view that it is not authorised to do so under the Act. Specifically, s.170 of the Act provides that a nomination shall not be valid unless a candidate declares that he or she is qualified under the Constitution. Sub-section 172(1) of the Act empowers the relevant officer of the Commission to reject a nomination only if certain provisions (including s.170) 'have not been complied with'. Sub-section 172(2) provides further that no nomination shall be rejected by reason of any formal defect or error in the nomination if the officer to whom the nomination is made is

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155 *Electoral and Referendum Regulations Amendment*, Statutory Rules 1988 No.339.

satisfied that the provisions of section 166, 167, 170 and 171 have been substantially complied with.

This is interpreted by the Commission to mean that it can reject a nomination only on the procedural ground of whether a declaration has been made and that it cannot reject a nomination on the ground that the facts contained in the declaration were inaccurate. The rationale for this limitation is that it is inappropriate for the Commission to perform a judicial function of assessing nominations as that question is more properly dealt with by the Court of Disputed Returns.

## **6.2 Use of s.44(i) under Commonwealth Electoral Act where candidate is ineligible at nomination or polling day.**

This is the basis of the action that was taken by Mr Sykes against Mr Cleary. The decision in *Sykes v Cleary* confirms that s.44(i) can be used to void an election in circumstances where a candidate is ineligible under s.44(i) on the polling day, and possibly at the nomination stage, but subsequently corrects the ineligibility (Mr Cleary, for example, resigned his teaching position before the declaration of the polls).

### **6.2.1 When is the candidate 'chosen' by the people?**

What is the meaning of incapable of 'being chosen'? Does it prevent a person who is disqualified under s.44 from **nominating and seeking** votes from the electorate? This depends on whether 'being chosen' refers to the act of voting by the people or whether it refers to the final outcome of the vote and formal return of the candidate by the Australian Electoral Commission.

In *Sykes v Cleary* the majority High Court held that 'chosen' meant the 'process of being chosen'.<sup>156</sup> This was wide enough to include the polling day:

The people exercise their choice by voting, so that it is the polling day rather than the day on which the poll is declared that marks the time when a candidate is chosen by the people.... The declaration of the poll is the announcement of the choice made; it is not the making of the choice<sup>157</sup>.

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<sup>156</sup> *Sykes v Cleary*, p.10.

<sup>157</sup> *Sykes v Cleary*, p.9.

The Court commented that 'chosen' may also include the time of nomination but put the question aside<sup>158</sup> as it was not necessary to determine this in relation to Mr Cleary as he had been ineligible on the polling day.

The interpretation that the word 'chosen' means the whole nomination and voting process is supported by s.43 of the *Constitution* and practice under s.43 where a Member of one House resigns before nominating for election in the other House, and this was referred to in *Sykes v Cleary*.<sup>159</sup> Lane suggests that ss.7 and 24 of the *Constitution* imply that the 'people' choose a Member or a Senator when they cast their vote.<sup>160</sup>

### 6.3 Options of Houses of Parliament

The question of intervention by the Parliament in the nomination of a candidate would only arise in certain limited situations: i.e. a by-election for a seat in the House of Representatives and the filling of a casual vacancy in the Senate. All other nominations are made when both Houses are dissolved. What action could either House take in these two situations?

#### 6.3.1 Under the Commonwealth Electoral Act

Section 376 of the *Commonwealth Electoral Act* empowers the Senate or the House of Representatives to refer 'any question respecting the qualifications' of a Senator or of a Member to the Court of Disputed Returns. Does this extend to questions which the Senate or the House of Representatives may have concerning the **nomination** of a candidate? For example where it is either publicly alleged in the media or reported to the particular House by an individual citizen that a person nominating or about to nominate as a candidate for the Senate or the House of Representatives is disqualified under s.44(i) can the Senate or the House refer the question to the Court of Disputed Returns?

Whether the Senate or the House can refer a question concerning qualifications at the nomination stage depends on whether the reference in s.376 to questions respecting qualifications 'of a Senator or of a Member' implies that s.376 only covers questions in respect of a person who has actually been elected as a Senator or a Member. If s.376 is not limited in such a way and if the disqualification from

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158 *Sykes v Cleary*, p.10.

159 *Sykes v Cleary*, p.19.

160 Lane, 1992 p.62

'being chosen' in s.44 includes disqualification from nominating then the particular House of Parliament concerned may be able to seek a declaration from the Court of Disputed Returns under the *Commonwealth Electoral Act* that the nominee was disqualified under s.44(i). It is very unlikely a House of Parliament would pursue this course of action.

### 6.3.2 Under s.47 of the Constitution

Section 47 of the *Constitution* gives the Parliament power, until the Parliament otherwise provides, to determine:

'any question respecting the qualification of a Senator or a Member'.

Section 47 gives the Parliament a capacity to determine such questions. However, two questions arise in relation to s.47. First, has the Parliament's power to determine such questions been 'spent' by the enactment of ss.162 and 163 of the *Commonwealth Electoral Act*?

Do these provisions vest exclusive jurisdiction in relation to these questions in the Court of Disputed Returns? A more detailed consideration of this question is contained in para 7.4 of this paper.

Another question concerning s.47 is whether Parliament's power under s.47 extends to determining the qualifications of persons seeking to nominate as a Member in a by-election or the qualifications of a person put forward by a State to fill a casual Senate vacancy?

This is unclear for the same reason noted in respect of the wording of s.376 of the *Commonwealth Electoral Act* above. Like s.376, s.47 refers to the qualification of 'a Senator or a Member'. Does this imply that s.47 applies only to persons already elected?

The Parliament could do this but the resolution or provision would not amend s.44(i) and would not bind the High Court.

### 6.3.3 Under s.44 of the Constitution

Even if the power of the Houses of Parliament under s.47 was limited to determining questions concerning the qualifications of persons already elected as Senators or Members it is not clear whether the relevant House could have some recourse to the High Court under s.44 itself.

The consequence of disqualification under s.44 is that a:

person shall be incapable of being chosen or of sitting.  
[Emphasis added].

If 'incapable of being chosen' includes nomination and the whole voting process or selection of a Senator or Member can the relevant House of Parliament seek a declaration from the High Court that the nomination infringes s.44(i) of the *Constitution*? This is unclear and would depend on the question of justiciability and standing discussed in para 7.3. It is highly unlikely however that the Parliament would pursue such action. In practice the Parliament leaves the regulation of the nomination process and appointment of a Senator to the *Australian Electoral Commission* under the *Commonwealth Electoral Act* and the Court of Disputed Returns.

#### 6.4 Challenge by electors under s.44 of the Constitution

Can individuals seek a declaration from the High Court that a nominee is incapable of 'being chosen' under s.44?<sup>161</sup> The answer to this depends on the answer to several other questions:

- (1) Whether, as noted above, 'being chosen' includes the nomination and voting process or whether it means solely the formal election return;
- (2) Whether the High Court has jurisdiction;
- (3) Whether s.44 is justiciable; and
- (4) Whether the individual elector has standing.

In *Sykes v Cleary* the Court held 'chosen by the people' was the voting process which included the polling day and possibly the nomination day rather than merely the formal declaration of the poll.

If the Court took this view and the issue at stake was a nomination for a seat the matter would be put in 'limbo' as Parliament would be dissolved and not be able to deal with the question anyway. (Other options such as a suit for penalties would not be available until the person was elected and was sitting).

The High Court's recent decisions in the *Political Advertising* case and *Nationwide News* involved interpretations of s.24 of the Constitution. The Court said that s.7 and s.24, as the cornerstone of the

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161 This summary focuses on the capacity of individuals to challenge at nomination or any time before declaration of the polls under s.44, and not a person already elected, because the *Commonwealth Electoral Act* does not provide a mechanism for challenging nominations. Suits can be brought under the *Common Informers (Parliamentary Disqualifications) Act* only after a person has sat.

constitutional system of representative democracy, gave an inherent right to freedom of political expression.

A further hurdle to the granting of a declaration is that the granting of a declaration is discretionary. The High Court would be very likely to refuse a declaration preferring to wait and see whether the candidate was elected anyway.

But perhaps the Court would grant a declaration where a candidate him or herself sought a declaration before the prescribed election date to establish his or her eligibility under s.44(i) where mischievous rumours or misinformation as to his or her eligibility were hindering his or her chances of election.

Issues concerning the High Court's jurisdiction and justiciability of s.44(i) are discussed in para 7.3.

## **7. After election**

Once a person has been elected as a Senator or a Member what are the ways in which s.44(i) can be brought before the High Court?

### **7.1 Petition lodged under *Commonwealth Electoral Act* by electors and/or Electoral Commission**

The mechanisms of the *Commonwealth Electoral Act* are available to dispute an election on the grounds that the candidate is not qualified under the *Commonwealth Electoral Act* or disqualified under s.44.

Under ss.353 and 357 of the *Commonwealth Electoral Act* any person or the Australian Electoral Commission may dispute the validity of any election or return by petition to the Court of Disputed Returns. Section 355 requires the petition to set out, inter alia the grounds relied on to dispute the election or return and a prayer asking for the relief to which the petitioner claims to be entitled.

Paragraph 355(e) puts a time limit of 40 days for filing of the petition with the High Court. The petition must:

be filed in the Registry of the High Court within 40 days after the return of the writ; 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*, within 40 days after the notification of that choice or appointment.

Under s.360 of the Act the Court of Disputed Returns has power:

- ...
- (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;
  - (viii) To dismiss or uphold the petition in whole or in part;
  - (ix) To award costs; and
  - (x) To punish any contempt of its authority by fine or imprisonment.

The effect to be given to any decision of the Court is provided in s.374 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.

## 7.2 Reference of question by Parliament to the Court of Disputed Returns

As noted above s.376 of the *Commonwealth Electoral Act* empowers the House in which the question arises to refer by resolution any question respecting the qualifications of a Senator or a Member or any question respecting a vacancy to the Court of Disputed Returns. Section 377 of the Act requires the President of the Senate or the Speaker of the House, depending on where the question arises, to transmit to the Court a statement of the question and any proceedings, papers, reports or documents relating to the question in the possession of the House in which the question arises.

### 7.2.1 *Re Wood*:<sup>162</sup> reference of questions by the Senate

In February 1988 the Senate referred certain questions (pursuant to s.377 of the *Commonwealth Electoral Act*) to the High Court acting as the Court of Disputed returns. Among other questions, the Senate asked:

whether there is a vacancy in the representation of New South Wales in the Senate for the place for which Senator Wood was returned?

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162 (1988) 167 CLR 145.

The Court declared there was a vacancy on the ground that Senator Wood was not an Australian citizen at the time of his nomination and had therefore not been qualified under s.163 of the *Commonwealth Electoral Act*.<sup>163</sup>

On hearing any references by either House of Parliament the Court has the general powers conferred by s.360 of the *Commonwealth Electoral Act* and certain other powers specified in s.379. The powers under s.379 are:

- (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.

### 7.3 Elector seeking Declaration from High Court

Can an elector, candidate or other Member of Parliament seek a declaration from the High Court that a person is incapable of sitting under s.44(i)? This would depend on three factors: First, whether the High Court had jurisdiction; second, whether s.44(i) was justiciable; and third, whether the person had standing. This may be relevant if the *Common Informers (Parliamentary Disqualifications) Act* were ever repealed<sup>164</sup>.

The Court would first have to determine whether s.47 of the *Constitution* vested in the Parliament the sole power to assess eligibility under s.44(i). Whether the High Court has jurisdiction to make a declaration under s.44(i) is not clear. Section 44(i) does not expressly give the High Court a role to play. It is unclear whether the Court would take the view that in the absence of any express power the matter must be left to the Parliament by virtue of s.47 of the *Constitution*.<sup>165</sup>

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163 i.e. although s.44(i) applies to 'Any person' who has a foreign allegiance or who is a citizen of another country in practice it will only need to be applied to Australian citizens.

164 The British common informers procedures were repealed in 1975 except for a certain limited operation.

165 *R v The Governor of the State of South Australia*, (1907) 4 CLR 1497 at 1513; *Stott v Parker* [1939] SASR 98.



The Statute [i.e. s.47 of the *Constitution*] which gives [jurisdiction] to the House must be read as taking it away from the Courts ...<sup>166</sup>

The general principle is that pursuant to s.30 of the *Judiciary Act 1903* the High Court is vested with jurisdiction:

- (a) in all matters arising under the Constitution or involving its interpretation.

The High Court has indicated that it considers it has a role to play in relation to provisions of the *Constitution* concerning the Parliament. In the *Petroleum Mineral Authority Case*<sup>167</sup> for example, which concerned s.57 of the *Constitution*, Barwick CJ and Mason J referred to the role of the Court as 'the guardian of the *Constitution*'.<sup>168</sup>

The general issue of the justiciability of political questions under the *Constitution* has been raised in relation to s.24 (which concerns the composition of the House of Representatives) and s.29 of the *Constitution* (concerning electoral divisions) in *Attorney-General (ex rel McKinlay) v The Commonwealth*.<sup>169</sup> In that case three electors brought three suits<sup>170</sup> relating to their representation in the House of Representatives. The electors argued that the phrase 'chosen by the people' in s.24 of the *Constitution* gave electors the right to equal representation.<sup>171</sup> The majority of the High Court agreed.<sup>172</sup>

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166 *Stott v Parker* [1939] SASR 98 at 105.

167 *Victoria v The Commonwealth* (O'Connor) (1974) 131 CLR 81.

168 (1974) 131 CLR 81, per Barwick CJ at 118-119; Mason J at 181; See also *Cormack v Cope* (1974) 131 CLR 432; and Evans, G., (ed.) *Labor and the Constitution, 1972 - 75*, Melbourne: Heinemann, 1977: pp. 227-233.

169 (1975) 135 C.L.R. 1.

170 One suit was brought at the relation of the Attorney-General of Australia; another suit was brought by the State Attorney-General of South Australia and an elector; and another suit was brought by an elector alone.

171 They sought declarations that certain provisions of the *Commonwealth Electoral Act* and the *Representation Act 1905 - 1974* dealing with State electoral distributions were invalid as they facilitated unequal representation. They also sought injunctions to restrain the Commonwealth from holding any election for the House of Representatives in electoral divisions in which the number of electors were too disparate.

172 The Court held that s.24 did not require the number of people or the number of electors in electoral divisions to be equal. Murphy J found that s.24 required equal electoral divisions. Murphy J specifically mentioned the justiciability of the issue and stated that protection of a political right is not merely a political question: (1975) 135 CLR 1, at 75.

It is not clear whether the recent decisions of the High Court in the *Political Advertising* case and *Nationwide News* indicate that the High Court would regard s.44 as justiciable<sup>173</sup>. In those cases the High Court held that ss.7 and 24 of the *Constitution* gave a right to freedom of political expression. This was based on three established doctrines which have been implied in the *Constitution*:

- (1) the separation of powers;
- (2) federalism; and
- (3) representative government

Brennan J concluded:

... where a representative democracy is constitutionally entrenched, it carries with it those legal incidents which are essential to the effective maintenance of that form of government.<sup>174</sup>

and Gaudron J stated:

Fundamental constitutional doctrines are not always the subject of exhaustive constitutional provision, either because they are assumed in the *Constitution* or because what they entail is taken to be so obvious that detailed specification is unnecessary ... Representative democracy is a fundamental part of the *Constitution*.<sup>175</sup>

If the Court considered that it had jurisdiction with respect to s.44(i) it would then have to determine whether an individual elector had standing.

In *McKinlay's case* some judges of the High Court considered the standing of an individual elector to challenge the *Representation Act*.<sup>176</sup> Barwick CJ however commented that the individual citizen had no standing to challenge the validity of the *Representation Act* on

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173 On the justiciability of issues under the *Constitution* (and the US *Constitution*) see Lindell, G., *Justiciability of Political Questions under the Australian and United States Constitutions*, Thesis for Master of Laws, University of Adelaide.

174 (1992) 108 ALR 681 at 704-5.

175 (1992) 108 ALR 681 at 650.

176 There have been some cases in which the standing of electors has been considered. Standing has been granted to electors to challenge legislation which transferred them to the electoral rolls of a different electorate: *McDonald v Cain* [1953] VLR 411, at 420; and to seek declarations concerning the duty of the Executive Council of a State to advise the Governor to issue a proclamation creating electoral commissioners to review electoral boundaries: *Tonkin v Brand* [1952] WAR 2, at 14, cited in The Law Reform Commission, *Standing in Public Interest Litigation*, Report No. 27, 1985: p.67.

the basis that an elector suffered no particular damage or inconvenience.<sup>177</sup> Murphy J would have granted standing on the basis that any elector can challenge legislative or administrative measures on the ground that they adversely affect his or her right to vote.<sup>178</sup> The other members of the Court made no comment on the question of standing.

It is unclear whether the High Court would grant an elector standing on the grounds that there is an inherent right in a system of representative democracy for electors to be represented by Members of Parliament who comply with the requirements of the *Constitution*.

#### 7.4 S47:Determination of qualification issues by Parliament itself under s.47

As noted above, although Parliament has provided in the *Commonwealth Electoral Act* that it may refer questions respecting qualifications and vacancies to the Court of Disputed Returns Parliament probably still has power to make a determination itself on such questions.

This question was briefly examined in the 1981 report of the Senate Standing Committee on Constitutional and Legal Affairs on *The Constitutional Qualifications of Members of Parliament*. The Committee noted that s.376 of the *Commonwealth Electoral Act* does not declare unequivocally that Parliament shall not determine questions regarding qualifications and vacancies. It noted that another provision of the Act i.e. s.353 concerning the validity of an election or return does expressly give the Court of Disputed Returns exclusive jurisdiction in that particular area. The Committee thought that the absence of any express total referral of powers to the Court of Disputed Returns in ss.376 and 377 indicated that the relevant House of Parliament had a discretion to determine these issues itself or to refer them to the Court of Disputed Returns.<sup>179</sup>

But any determination made by a House of the Parliament under s.47 is not necessarily the final decision. The Parliament's interpretation of its powers under the *Constitution* is not binding on the High Court (or the Court of Disputed Returns). Professor Campbell has commented however, that if a determination by a House of Parliament were challenged in the High Court the Court might confine itself to

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177 (1975) 135 CLR 1, at 26.

178 (1975) 135 CLR 1, at 76.

179 Parliamentary Paper No. 131 of 1981, pp.93 - 94.

looking only at whether the Parliament did have jurisdiction under s.47 to make the decision and not reassess the decision itself.<sup>180</sup>

Professor Campbell has also commented that determination by either House under s.47 as to whether a Senator or a Member was disqualified by s.44 could be challenged indirectly in the High Court in a suit for penalties under the *Common Informers (Parliamentary Disqualifications) Act*.<sup>181</sup>

The High Court would have to determine for itself whether the Senator or Member in question was disqualified under s.44(i) in order to determine whether he or she was subject to penalties.

## 7.5 Vacancy of place under s.45 of the Constitution

The ultimate sanction for disqualification under s.44(i) is loss of a seat in the Parliament under s.45 of the *Constitution*. Section 45 provides:

If a Senator or Member of the House of Representatives -

- (a) becomes subject to any of the disabilities mentioned in [s.44] ... his place shall thereupon become vacant.

## 7.6 Possible penalties arising from disqualification

### 7.6.1 Fine or imprisonment for contempt of Court of Disputed Returns

Paragraph 360(1)(x) of the *Commonwealth Electoral Act* empowers the Court of Disputed Returns:

- (x) To punish any contempt of its authority by fine or imprisonment.

### 7.6.2 S.46 of Constitution: Common Informers (Parliamentary Disqualifications) Act 1975

Section 46 of the *Constitution* imposes a penalty for sitting when disqualified. It 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

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<sup>180</sup> A paper in *Royal Commission on Australian Government Administration* (the Coombs Commission): Vol. 1, Appendix, Parliamentary Paper 186 of 1976 cited in *The Constitutional Qualifications of Members of Parliament*, Parliamentary Paper No. 131 of 1981, p.94, paras 813-84.

<sup>181</sup> Parliamentary Paper 186 of 1976, cited in *The Constitutional Qualifications of Members of Parliament*, Parliamentary Paper No. 131 of 1981, pp.94-5.

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.<sup>182</sup> [Emphasis added].

This provision retained the 'common informer' suit which enabled a private individual to sue a Senator or a Member who was incapable of sitting.

Parliament has 'otherwise provided,' as it is empowered to do under s.46, and enacted the *Common Informers (Parliamentary Disqualifications) Act 1975*<sup>183</sup> (which provides that suits may no longer be brought under s.46). The *Common Informers (Parliamentary Disqualifications) Act* empowers an individual to sue any person who has sat as a Senator or a Member while that person:

was a person declared by the Constitution to be capable of so sitting ...

The penalty recoverable is limited to:

- (a) \$200 in respect of the person having sat on or before the day on which the originating process in the suit is served on him or her; and
- (b) \$200 for every day subsequent to the day on which he or she is proved in the suit to have sat while incapable of sitting.

The Act imposes three new limitations (ie: that were not in s.46 of the *Constitution*) on the scope of the suit. First, suits are limited to applying to a period of not more than 12 months that a person so sits and this calculated from the commencement of the Parliament for over a year. A suit could not be commenced therefore for someone who has left the Parliament for over a year.<sup>184</sup>

Second, a person so sitting may be sued only once in respect of a particular period of sitting. Sub-section 3(3) provides:

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.

182 Lumb, R.D., *The Constitution of the Commonwealth Annotated*, 4th ed., Butterworths, 1986: p.72 para 175.

183 This was enacted in response to questions concerning the possible disqualification of Senator Webster under s.44(v) of the Constitution. See Odgers, J.R., *Australian Senate Practice*, 5th edition, 1976; pp. 116-7.

184 Section 3(2).

And, third, suits may be brought before the High Court only.

The advantage for an elector in instituting a suit for penalties is that the elector would be indirectly relying on s.44(i) itself but without having to satisfy the High Court that s.44(i) is justiciable or that he or she has standing.

*Effect of a decision on penalties*

When a suit for penalties is instituted in the High Court does the Court have jurisdiction to make a finding as to whether the Member or Senator is disqualified or does the Court have to refer the substantive issue to the House in which the Member seeks to continue sitting?

The High Court would appear to have power to make a finding for three reasons. First, liability for penalties under the *Common Informers Act* arises where a Member or Senator is *declared by the Constitution* to be incapable of sitting. There is no requirement for a determination to have been made by the relevant House of Parliament.

Second, the High Court is vested with the judicial power of the Commonwealth under Chapter III of the *Constitution* and s.30 of the *Judiciary Act* vests the High Court with original jurisdiction in interpreting the *Constitution*.

The Parliament has vested the High Court with exclusive jurisdiction with regard to penalties. If the High Court has jurisdiction to hear a suit it has power to make whatever finding is required in order to fulfil its obligations.

... the general principle [is] that while the Courts of law will not interfere with any questions of right exercisable within the House itself or concerning the procedure of the House, they will not allow a claim of privilege to hinder them from hearing and determining any question of fact or law, when a determination is necessary for the purpose of doing justice between party and party. The distinction is between rights to be exercised within the House, and rights to be exercised out of and independently of the House.<sup>185</sup>

But what is the practical consequence of the High Court reaching a different conclusion from the Parliament? For example, what happens if the High Court finds a person, considered by the Parliament to be disqualified, not liable for penalties? That person would not be subject to penalties but would he or she have a right to sit in Parliament?

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185 *Stott v Parker* [1939] SASR 98 at 104 per Napier J referring to the general principle affirmed in *Bradlugh v Gossett* (1884) 12 QBD 271. See also *R v Hutchins; Ex parte Chapman and Cockington* 1959 S.A.S.R. 189 at 202-3.

What happens in the converse situation, where the High Court finds a Member or a Senator, considered by the Parliament not to be disqualified, nonetheless subject to penalties? Does a High Court decision that someone is ineligible and subject to penalties mean there is a vacancy pursuant to s.45 of the Constitution? Campbell suggests that the Senator or Member may technically be able to sit in Parliament but in practical terms would have to resign to avoid continuing penalties.<sup>186</sup>

Can the House of Parliament in which the Senator or Member was or is sitting protect that Senator or Member from the imposition of penalties? This could be achieved only if Parliament amended the *Common Informers (Parliamentary Disqualifications) Act* itself, see below. But it is doubtful whether the House concerned could protect the Senator or Member by merely passing a resolution in the House that the Senator or Member was not disqualified. Comments to that effect were made in *Bradlaugh v Gossett*.<sup>187</sup>

if the House had resolved ever so decidedly that Mr Bradlaugh was entitled to make the statutory declaration instead of taking the oath, and had attempted by resolution or otherwise to protect him against an action for penalties, it would have been our duty to disregard such resolutions, and, if an action for penalties were brought, to hear and determine it according to our own interpretation of the statute ...<sup>188</sup>

### 7.6.3 Senate Committee recommendations re common informer suits

In its report on the *Constitutional Qualification of Members of Parliament* the Senate Standing Committee on Constitutional and Legal Affairs noted that the informer provisions provide an alternative mechanism to test the qualifications of Members of Parliament. The theory is:

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<sup>186</sup> 'Needless to say, any Member who had been successfully sued for the penalty would hardly be inclined to risk the imposition of further penalties by continuing to sit and vote in Parliament. Even if the House to which he had been elected as a Member did not agree with the Court's ruling, the Member concerned might avoid further difficulties by resigning his seat'. Professor Enid Campbell, *Parliamentary Privilege in Australia*, Melbourne: University Press, 1966: p. 103.

<sup>187</sup> (1884) 12 QBD 271

<sup>188</sup> (1884) 12 QBD 271, per Stephen J at 281-2.

any member of the public who feels that Parliament is being unduly protective of one of its own members can force the issue and have the matter canvassed in a totally impartial forum.<sup>189</sup>

Senator Evans thought, however, that the operation of the suit was awkward in that the amounts recoverable were too low to attract the 'greedy' but were sufficiently high to embarrass other potential litigants.<sup>190</sup>

The Committee considered the provisions were worthwhile but recommended the deletion of the (pecuniary) penalty provisions and the provision instead for an action for a declaration to be brought in the High Court:

at the suit of any person, as to whether or not a Senator or a Member ... is disqualified.<sup>191</sup>

#### 7.6.4 Options regarding pecuniary penalty

At present a person who is declared incapable/disqualified under s.44(i) is liable to a suit brought under the *Common Informers (Parliamentary Disqualifications) Act*. Although amendment of that Act cannot affect the main sanction against a contravention of s.44(i) (ie: disqualification and removal from sitting) it could be amended to remove or lessen the resultant financial penalty by providing that suits cannot be brought in relation to a person who is incapable of sitting pursuant to s.44(i);<sup>192</sup> or by deleting the right to sue for money but creating a right for individuals to seek a declaration from the High Court that a person is disqualified under the *Constitution* (as suggested by the Senate Committee above).

## 8. Conclusion

Section 44(i) of the *Constitution* was drafted when Australia was a series of colonies. Concern for protection of the new federation from

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189 Parliamentary Paper No. 131 of 1981, per Senator Evans at p.92 para 8.6.

190 Parliamentary Paper 131 of 1981 per Senator Evans at p. 92, para 8.6.

191 Parliamentary Paper 131 of 1981, p.92 para 8.19. The same recommendation that was made by the Western Australian Law Reform Committee in considering the equivalent Western Australian constitutional provision.

192 This approach has been used by some States in granting an indemnity to penalties for certain actions which might otherwise attract penalties. See *Clysdale v Hughes* (1934) 51 CLR 518. Although in that case the action was instituted before legislation indemnifying Members from suit was passed.



foreign influence would have been an important issue for the framers of the *Constitution*. In this context the wording of s.44(i) is not really surprising.

Critics of the High Court's interpretation of s.44(i) in *Sykes v Cleary* would argue membership of the Federal Parliament is 'under the influence' of foreign powers, namely the nationality laws of other countries. But this is not entirely accurate. The majority of the High Court held that in determining whether a person in fact has the nationality of another country the Court must look at the citizenship law of the country. The High Court also held however, that it was Australian law which had the 'final word' on renunciation.

The High Court concluded that s.44(i) only requires Australian citizens to take all 'reasonable steps' to renounce their other citizenship using the available procedures of the other country. Where the other country refuses renunciation or the procedures are not reasonable s.44(i) would still be satisfied where reasonable steps are taken. The High Court firmly rejected the concept that another country could determine the eligibility of Australians for membership of Parliament.

*Sykes v Cleary* has clarified the main issue under s.44(i) concerning the position of Australians with dual citizenship who are unable to renounce their other nationality or only renounce with great difficulty. There are many other situations however, in which s.44(i) may still pose a problem for dual citizens such as: where a person does not know or did not know at particular times in the election process that they had dual citizenship and where citizenship status changes as a result of the creation of new countries or the absorption of existing countries into another. These questions did not arise for consideration in *Sykes v Cleary*.

Other parts of s.44(i) have yet to be considered by the High Court such as when persons might have an acknowledgment of foreign allegiance or 'be entitled to the rights of citizenship' of another country. It is likely that the High Court would attempt to interpret these concepts as narrowly as possible and in a modern context.

Issues of interpretation are not the only questions which arise in relation to s.44(i). Important procedural questions concerning jurisdiction and justiciability may arise, such as - *when* is a person disqualified under s.44(i); *which* body is entitled to hear the issue, the High Court or the Parliament? and *who* can enforce compliance with s.44?

Section 44(i) is a fascinating mixture of ancient concepts of feudal allegiance alongside the most contemporary concepts of rights inherent in the Australian system of representative democracy under the

*Constitution.* The workings of the qualification and disqualification provisions for membership of Parliament are a microcosm of the whole system of separation of powers in Australia's political system. It provides checks and balances in the enforcement of the political process. Any changes to s.44(i) and to s.44 as a whole should retain this constitutional balance ensuring a role to be played by all the interested parties - the Parliament, the High Court and the people.

Section 44(i) goes right to the heart of a representative democracy. Henry Lawson was right, but now many more flowers have been gathered - to 'bloom alongside the wattle.'

## ATTACHMENT A

Main Developments in Oath/Affirmation of Allegiance under  
*Australian Citizenship Act*26 January 1949 Nationality and Citizenship Act 1948<sup>193</sup>

## Oath of Allegiance

I, A.B; swear by Almighty God that I will be faithful and bear true allegiance to His Majesty King George the Sixth, his heirs and successors according to law, and that I will faithfully observe the laws of Australia and fulfil my duties as an Australian citizen.

## 1966 Nationality and Citizenship Act: insertion of renunciation

## OATH OF ALLEGIANCE

I, A.B., renouncing all other allegiance, swear by Almighty God that I will be faithful and bear true allegiance to Her Majesty, Queen Elizabeth the Second, Her Heirs and Successors according to law.

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193 Commenced 26 January 1949. The form below was used between 1949-1953 (a similar form was used until 1966 but with reference to Queen Elizabeth):

## Renunciation of Allegiance

1. Name in full I .....renounce all allegiance to any sovereign or State of whom or of which I may be a subject or citizen.

## AFFIRMATION OR OATH OF ALLEGIANCE... as above

1. Name in full I.....  
 2. Judge/magistrate .....do hereby certify that on the .....day of .....19...  
 3. Name of applicant .....  
 4. Address of applicant .....  
 5. State/Territory in.....an applicant for a Certificate of Naturalization, appeared before me at...renounced his/her former allegiance, and took the oath/made the declaration of Allegiance to Her Majesty the Queen in the above form.

Signature....

## AFFIRMATION OF ALLEGIANCE

I, A.B., renouncing all other allegiance, solemnly and sincerely promise and declare that I will be faithful and bear true allegiance to Her Majesty, Queen Elizabeth and Second, Her Heirs and Successors according to law.

**1973 Australian Citizenship Act: insertion of reference to Queen of Australia<sup>194</sup>**

## Oath of Allegiance

I, A.B; renouncing all other allegiance, swear by Almighty God that I will be faithful and bear true allegiance to Her Majesty Elizabeth the second, Queen of Australia, Her heirs and successors according to law, and that I will faithfully observe the laws of Australia and fulfil my duties as an Australian citizen.

## Affirmation of Allegiance

I, A.B; renouncing all other allegiance, solemnly and sincerely promise and declare that I will be faithful and bear true allegiance to Her Majesty Elizabeth the Second, Queen of Australia, Her heirs and successors according to law, and that I will faithfully observe the laws of Australia and fulfil my duties as an Australian citizen.

**1986 Australian Citizenship Act: removal of renunciation<sup>195</sup>**

## Oath of Allegiance

I swear by Almighty God that I will be faithful and bear true allegiance to Her Majesty Elizabeth the Second, Queen of Australia, Her heirs and successors according to law, and that I will faithfully observe the laws of Australia and fulfil my duties as an Australian citizen.

## Affirmation of Allegiance

I solemnly and sincerely promise and declare that I will be faithful and bear true allegiance to Her Majesty Elizabeth the Second, Queen of Australia, Her heirs and successors according to law, and that I will faithfully observe the laws of Australia and fulfil my duties as an Australian citizen.

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194 The *Australian Citizenship Act 1973* (Cth) effective 1 December 1973 : also sought to remove the renunciation in the oath but this was defeated in the Senate.

195 Repeal of renunciation on oath by *Australian Citizenship Amendment Act 1986*, effective 20 August 1986.

## ATTACHMENT B

### Historical developments regarding British Subjects and s.44(i)

When did persons with dual Australian and British citizenship become ineligible under s.44(i)?<sup>196</sup>

The answer to this question depends on when British subjects were regarded to be subjects of a 'foreign power' within the meaning of s.44(i). This in turn is dependent on when Australia became an independent nation and the development of Australian citizenship'.

#### 1900-1949 British subjects

At the time of federation until the enactment of the *Australian Citizenship Act 1948* (which commenced on 26 January 1949) there was no such thing as 'Australian citizenship'. Australians were British subjects. Persons born in any part of the British dominions were British subjects. This nationality was a nationality of the British Empire or the Commonwealth and not a specific nationality of any one part of the Empire such as Australia. Those who were not British subjects were aliens (i.e. they were either nationals of a foreign state or were stateless).<sup>197</sup>

This position in 1900 was reflected in ss.16 and 34 of the *Australian Constitution* which specified the qualifications of Senators and Members. Section 34(ii) required a Senator or Member to be:

a subject of the Queen, either natural-born or for at least five years naturalised 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. [Emphasis added]

The *Commonwealth Electoral Act 1902* defined qualifications by reference to these provisions in the Constitution.<sup>198</sup> This was

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196 Where persons have only one citizenship, that of British subject they would be ineligible under s.44(i) but would also not be qualified under s.163 of the *Commonwealth Electoral Act* and their election subject to dispute under that Act. This is what occurred with Robert Woods. The use of s.44(i) would become relevant however where the 40 days for lodging the petition disputing a persons election under the *Commonwealth Electoral Act* had expired.

197 Pryles, M., *Australian Citizenship Law*, Sydney: Law Book Co, 1981: p.7. See Wishart, D., 'Allegiance and Citizenship as Concepts in Constitutional Law' (1986) 15 *Melbourne University Law Review* 662 for an outline of the developments 1900-1949.

198 Section 95.

continued by the *Commonwealth Electoral Act 1918*.<sup>199</sup> 1925 saw a change in format with the allegiance requirements of the *Constitution* being inserted in the *Commonwealth Electoral Act* itself.<sup>200</sup>

### 26 January 1949    Creation of Australian citizenship

The next relevant development was on 26 January 1949 with the commencement of the *Nationality and Citizenship Act 1948* which 'created' the status of Australian citizenship.<sup>201</sup> In his second reading speech the Minister for Immigration, Mr Calwell stated that the Act was:

Not designed to make an Australian any less a British subject, but to help him [sic] to express his pride in citizenship of this great country.<sup>202</sup> [Emphasis added]

The *Nationality and Citizenship Act* did not appear to make British subjects ineligible under s.44(i). The United Kingdom and the various Commonwealth countries were not regarded as 'foreign power.'

### *British Nationality Act 1948*

The citizens of the Commonwealth had a common status as British subjects in addition to any specific nationality of a particular Commonwealth country. Australian citizenship was a category, or local version of British subject status.

The *Nationality and Citizenship Act* did not disadvantage British subjects who were not Australian citizens; they were 'free from the disabilities and restrictions that apply to aliens.'<sup>203</sup> They retained the right to vote and to become Members of Parliament.

### 1969

The *Citizenship Act 1969* provided that Australian citizenship was paramount. Citizens of the countries to which s.7 of the *Australian*

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199 Section 69.

200 *Commonwealth Electoral Act* 1925, but slightly abbreviated by deleting the phrase 'or of a Colony which has become or becomes a State'.

201 The Australian Act followed 1946 Canadian legislation which created Canadian citizenship.

202 Australia. House of Representatives. *Debates*, 30 September 1948: p.1060.

203 Australia. House of Representatives. *Debates*, 30 September 1948: p. 1062.

*Citizenship Act* applied were stated to be British subjects 'by virtue of their Australian citizenship.

### 1973

In 1973 the *Australian Citizenship Act* was amended to provide that an Australian citizen had 'the status of a British subject' and was not a 'British subject'. Wishart writes that this implied that the status of British subject 'was merely an addition to the status of an individual as an Australian citizen'.<sup>204</sup>

### 1973 Queen of Australia

In 1973 the Federal Parliament enacted the *Royal Style and Titles Act 1973* which proposed that the Queen use the title 'Queen of Australia' in relation to Australia and its Territories. This was assented to and proclaimed by the Queen on 19 October 1973.

It is unclear whether this would be regarded as the formal beginning of the separate Crown of Australia or merely declaratory of the existence of a divisible Crown.

Amendments in 1973 also ended the distinction between applicants for citizenship who were citizens of Commonwealth countries and applicants who were aliens (by repealing the provisions relating to citizenship by notification, or registration available to British subjects).

### 1981 British Nationality Act

The *British Nationality Act 1981* UK ceased to accord every Commonwealth citizen with the status of British subject and restricted this to a narrower group.

### 1984 Australian citizenship qualification for parliament

British subject status was a qualification for Members of the Parliament in the *Commonwealth Electoral Act* until 1984. In 1981 but commencing on 26 January 1984,<sup>205</sup> the *Commonwealth Electoral Act* was amended to require that a Senator or a Member:

must be an Australian citizen.

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204 Wishart, D., 'Allegiance and Citizenship as Concepts in Constitutional Law', (1986) 15 *Melbourne University Law Review* 662, at 683.

205 *Gazette*, S247 1983. Any right of British subjects to vote under s.93 of the *Commonwealth Electoral Act* would not appear to cancel out ineligibility under s.44(i).

### 1986 Australia Act

In 1986 the Federal Parliament, State parliaments and the British parliament enacted various 'request and consent' Acts known as the *Australia Acts*. The *Australia Act 1986 (Cth)* was proclaimed on 2 March 1986. The Act ended all power of the British Parliament over Australia.

### Post 1 May 1987 Status of British subject repealed

In 1984 Part II of the *Australian Citizenship Act* which had provided that Australian citizens also had the 'status of British subject' was repealed. This repeal was effective from 1 May 1987. The transitional arrangements which allowed the automatic acquisition of Australian citizenship by British subjects resident in Australia in 1949 were also repealed.

### 1988 Recent High Court statements

In 1988 *Nolan v Minister for Immigration and Ethnic Affairs*<sup>206</sup> the High Court stated that phrases in the *Constitution* such as 'subject of the Queen' in ss.34(ii) and 17 must be read in the context of Australia's status as an independent nation with its own Australian citizenship and the divisibility of the Crown as the Queen of Australia.

### Conclusion

It is unclear when British subjects became subjects of a 'foreign power' within the meaning of s.44(i). However, the actual time at which Great Britain became a foreign power within the meaning of s.44(i) does not appear to affect the operation of s.44(i). Section 44(i) applies to the *present* situation and this involves regarding Great Britain as a foreign power. Liability under the *Common Informers (Parliamentary Disqualifications) Act* is limited to ineligibility that has occurred within the period twelve months preceding the commencement of the suit. Great Britain has been a foreign power over any period of twelve months that could be used as the relevant time period under the Act.

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206. (1988) 165 CLR 178, at pp 183-186. See the discussion in para 2.7.3.



# NOMINATION OF A MEMBER OF THE HOUSE OF REPRESENTATIVES

FORM USED  
FOR WILLS  
BY ELECTION

**NOMINATORS:** Complete either section A or section B.

Section A may only be used to nominate a candidate who is endorsed by a registered party.

Registered means registered under the Commonwealth Electoral Act 1918.

## A NOMINATION BY REGISTERED OFFICER OR DEPUTY REGISTERED OFFICER OF PARTY ENDORSING CANDIDATE

To the Divisional Returning Officer for the Division of .....

I, ....., the registered officer/deputy registered officer\* of  
the ..... hereby nominate .....  
(Name of registered party) (name of candidate)

..... as a Member of the House of Representatives for the above Division.

The registered name/registered abbreviation\* of the party is to be printed adjacent to the candidate's  
name on the ballot paper.

Signature of officer.....

Dated ..... 19.....

\*Delete one.

GO TO C

## B NOMINATION BY SIX ELECTORS

To the Divisional Returning Officer for the Division of .....

We, electors on the electoral roll for the above Division and entitled to vote at the election of a

Member of the House of Representatives for that Division, hereby nominate .....  
(name of candidate)

..... as a Member of that House for the above Division.

Dated ..... 19.....

**NOMINATORS:**

PLEASE PRINT

Surname or family name	Christian or given names	Residential address for which enrolled		Date of birth	Signature
		No.	Street Suburb/Town		

GO TO C

OFFICE USE

Received: Date ..... Time ..... am/pm Signature .....  
Divisional Returning Officer

**C CANDIDATE** PLEASE PRINT:

Name of candidate, as enrolled Surname or family name		Christian or given names	Form of Christian or given names to appear on ballot paper
Residential address			Occupation

I, the candidate named above, state that:

- |  |  |
|--|--|
| - I am an Australian citizen   | Please tick <input checked="" type="checkbox"/>          |
| - I am at least 18 years of age  | Yes <input type="checkbox"/> No <input type="checkbox"/> |
| - I am an elector or qualified to be an elector  | Yes <input type="checkbox"/> No <input type="checkbox"/> |
| - I am not, by virtue of section 44 of the Constitution,<br>(copy attached) Incapable of being chosen or of sitting<br>as a Member of the House of Representatives | Yes <input type="checkbox"/> No <input type="checkbox"/> |

and I declare that:--

- I am qualified under the Constitution and the laws of the Commonwealth to be elected as a Member of the House of Representatives;
- I am not, and do not intend to be, a candidate for any other election to be held on same day as the election to which the above nomination relates;
- I consent to act as a Member of the House of Representatives for the above Division if elected.

I wish my Christian or given names to appear on the ballot paper in the form shown above.

Signature of candidate.....

UNENDORSED CANDIDATES GO TO D

ENDORSED CANDIDATES GO TO E

**D UNENDORSED CANDIDATE**

Please tick one box

- ☐ I wish the word "Independent" to be printed adjacent to my name on the ballot paper.
- ☐ I do not wish the word "Independent" to be printed adjacent to my name on the ballot paper.

Signature of candidate.....

GO TO F

**E** NEED NOT BE COMPLETED IF SECTION 'A' HAS BEEN USED - OR - IF VERIFICATION IS TO BE EFFECTED BY A SEPARATE LIST WHICH INCLUDES THE CANDIDATE'S NAME, GIVEN BY THE REGISTERED OFFICER OR DEPUTY REGISTERED OFFICER TO THE AUSTRALIAN ELECTORAL OFFICER FOR THE STATE/TERRITORY BEFORE THE CLOSE OF NOMINATIONS

**VERIFICATION OF ENDORSEMENT BY REGISTERED PARTY**The candidate named above is endorsed by .....  
(Name of registered party)

The registered name/registered abbreviation\* of the party is to be printed adjacent to the candidate's name on the ballot paper.

Signature of registered officer/deputy registered officer\* of party .....

Name in full (BLOCK LETTERS PLEASE) .....

\*Delete one.

Dated..... 19 .....

GO TO F

**F CONTACT NUMBERS FOR CANDIDATE**

The person named as contact officer should be someone who can readily relay information to the candidate.

Contact officer

Phone Numbers

Business hours

After hours

# **NOMINATION OF A MEMBER OF THE HOUSE OF REPRESENTATIVES**

(Single nomination)

**NOTE: 1** Information on this form is collected under provisions of the *Commonwealth Electoral Act 1918*.

This form will be publicly produced on nomination day and may be inspected by any member of the public, in accordance with the *Commonwealth Electoral Act 1918*.

**NOTE: 2** A person must not make a false or misleading statement or leave out details which would make a statement misleading on a nomination form.

**PENALTY:** Imprisonment for 6 months.

To the Divisional Returning Officer for the Division of \_\_\_\_\_

Complete • PART A if a candidate is nominated/endorsed by a Registered Party.

• PART B if a candidate is nominated by 6 electors.

**PART A - Nomination/Endorsement by a Registered Party**

I, \_\_\_\_\_, the <sup>\*</sup>registered officer/deputy registered officer of the \_\_\_\_\_  
name of registered party

hereby nominate /endorse \_\_\_\_\_  
name of candidate as a Member of the House of Representatives for the above named Division.

I request that printed on the ballot paper adjacent to the name of the candidate appears the

registered abbreviation of the party name. ☐

OR

registered party name. ☐

Signature of registered officer/deputy registered officer

/ /

\* Delete one

**PART B - Nomination by 6 electors**

We, electors on the electoral roll for the above named Division and entitled to vote at the election of a Member of the House of Representatives for that Division, hereby nominate \_\_\_\_\_  
name of candidate as a member of the House of Representatives for the above named Division.

Date / /

**Details of electors**

Name as enrolled		Residential address for which enrolled	Date of birth	Signature of elector
Surname or family name	Christian or given names			

**PART C - Candidate to complete**Please tick relevant boxes ☒

Name of candidate as enrolled (If not enrolled the name under which you are entitled)

Surname or family name	
Christian or given names	
Form in which Christian or given names to appear on ballot paper	

Do you have silent enrolment? Yes ☐ No ☐

*Residential address	
	Postcode

*If you are a sitting member who does not reside within the Division you represent, but you are enrolled for that Division, you may show your enrolled address rather than your place of residence.*

Occupation		Male <input type="checkbox"/> Female <input type="checkbox"/>
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**Contact Details**

Contact name			
Postal address	Postcode		
Contact numbers	Business hours	After hours	Facsimile

I wish the word Independent to be printed on the ballot paper Yes ☐ No ☐

OR

I am endorsed by

Name of Registered Party

**Candidate's Declaration**

I, the candidate named herein, state that:

• I am an Australian citizen Yes ☐ No ☐ If yes, by☐ birth →

Date of birth

Place of birth

☐ naturalisation →

Date granted citizenship

☐ other means → Details

• I am at least 18 years of age

Yes ☐ No ☐

• I am an elector or qualified to be an elector

Yes ☐ No ☐

• I am not, by virtue of section 44 of the Constitution (see reverse), incapable of being chosen or of sitting as a member of the House of Representatives

Yes ☐ No ☐

and I declare that:

• I am qualified under the Constitution and the laws of the Commonwealth to be elected as a Member of the House of Representatives;

• I am not, and do not intend to be, a candidate for any other election held on the same day as the election to which this nomination relates;

• I consent to act as a Member of the House of Representatives for the above Division if elected.

I wish my Christian or given names to appear on the ballot paper in the form shown opposite.

Signature of candidate

**OFFICE USE**

Consecutive No.

Received: Date

Time

am/pm

Receipt No.

DRO's signature

## Nomination Checklist

Have you included the following information on this form?

- ☐ name of Division for which you are nominating

### Part A (for candidates nominated/endorsed by a registered party)

- ☐ name of registered officer/deputy registered officer
- ☐ indicated whether registered officer or deputy registered officer
- ☐ name of registered party
- ☐ name of candidate
- ☐ party name or party abbreviation request
- ☐ signature of registered officer/deputy registered officer

### Part B (for candidates nominated by 6 electors)

- ☐ name of candidate
- ☐ signatures and full details of at least 6 electors

### Part C (candidate's particulars)

- ☐ full name
- ☐ form of name to appear on ballot paper
- ☐ residential address, occupation and sex
- ☐ contact details
- ☐ Independent/party name choice for ballot paper
- ☐ candidate's declaration - citizenship details  
- other questions answered  
- signature and date
- ☐ candidate's deposit enclosed (\$250 in cash or bankers cheque)

## Section 44 of *The Constitution* of the Commonwealth of Australia

Any person who -

- (i.) Is under any acknowledgment of allegiance, obedience, or adherence to a foreign power, or is a subject or a citizen or entitled to the rights or privileges of a subject or a citizen of a foreign power: or
- (ii.) Is attainted of treason, or has been convicted and is under sentence, or subject to be sentenced, for any offence punishable under the law of the Commonwealth or of a State by imprisonment for one year or longer: or
- (iii.) Is an undischarged bankrupt or insolvent: or
- (iv.) Holds any office of profit under the Crown, or any pension payable during the pleasure of the Crown out of any of the revenues of the Commonwealth: or
- (v.) Has any direct or indirect pecuniary interest in any agreement with the Public Service of the Commonwealth otherwise than as a member and in common with the other members of an incorporated company consisting of more than twenty-five persons:

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

But sub-section iv. does not apply to the office of any of the Queen's Ministers of State for the Commonwealth, or of any of the Queen's Ministers for a State, or to the receipt of pay, half pay, or a pension, by any person as an officer or member of the Queen's navy or army; or to the receipt of pay as an officer or member of the naval or military forces of the Commonwealth by any person whose services are not wholly employed by the Commonwealth.