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# Who May Sit? An Examination of the Parliamentary Disqualification Provisions of the Commonwealth Constitution\*

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## THE PLACE OF SECTION 44 IN CONTEMPORARY AUSTRALIAN PARLIAMENTARY DEMOCRACY

The right to choose political representatives is a fundamental right of the citizens of a democratic polity. Section 44<sup>1</sup> of the Commonwealth Constitution sets out the disqualification provisions for persons seeking to sit in the Senate or the House of Representatives in order to ensure that Australia's parliamentarians have an undivided loyalty to Australia and to the Parliament. Using the 1890s Convention Debates, decisions of the Court of Disputed Returns, government reports, and academic commentary, this paper explores the purposes and justification for s 44, and its operation in the contemporary Australian context, to argue that reform is necessary. The paper reviews the latest developments in this dynamic area of the law, examining the most recent litigation, including the *Hill*<sup>2</sup> decision. Particular consideration is given to *Sykes v Cleary*,<sup>3</sup> where the High Court held that three of the candidates for election to the seat of Wills were ineligible, raising the question whether this rate of disqualification is extraordinary or simply demonstrative of the pressing need for reform of s 44.

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<sup>1</sup> The full text of ss 44 and 45 is set out in the Appendix below.

<sup>2</sup> *Sue v Hill* (1999) 163 ALR 648.

<sup>3</sup> *Sykes v Cleary* (1992) 176 CLR 77.

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I conclude that the existing disqualifications are deficient. Indeed, s 44 was labelled ‘vestigial’ by Barwick CJ.<sup>4</sup> The provisions are anachronistic and inequitable, and should be deleted, or replaced with legislative provisions which are less rigid, and capable of being updated by the Parliament as and when appropriate. As a general policy, there should be a presumption against limitations on eligibility. Two principles underpin this policy. First, in a democracy, any citizen should be eligible to stand for Parliament. This principle is consistent with representative democracy, a principle inherent in the Constitution.<sup>5</sup> Secondly, there should be very few restraints on elector choice. Further, because of the difficulty of constitutional change in Australia, the disqualifications should not be contained in the Constitution, which entrenches ‘archaic language devised in circumstances that prevailed a century ago’.<sup>6</sup> They are more properly dealt with through legislation. In 1981, in arguing the impropriety of constitutional disqualifications, Sawyer noted that disqualifications are by their nature technical, and must be flexible to deal with social and economic change and to remain relevant.<sup>7</sup> Legislative protections are more ‘flexible and equitable’, and can be amended to deal with new dangers as they emerge.<sup>8</sup>

Despite the unsuccessful record of constitutional reform in Australia, such a proposal would have real prospects of success when its bipartisan nature is recognised, and particularly if put as part of a broader program to update the Constitution. Significant constitutional reform is needed to produce a disqualification provision more appropriate to parliamentary democracy in Australia in the twenty-first century.

#### SECTION 44(I): FOREIGN ALLEGIANCE AND DUAL CITIZENSHIP

Section 44(i) disqualifies any person who 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’ from being chosen or sitting in Parliament. Section 44(i) contains several deficiencies, in particular the vagueness of its archaic wording, and the uncertainty this engenders in the minds of persons considering running for Parliament. Further, considerable political and practical implications for Australian democracy flow from the operation of s 44(i). The most significant problem is the fact that around five million Australian citizens who

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<sup>4</sup> *Re Webster* (1975) 132 CLR 270 at 278.

<sup>5</sup> *Attorney-General (Cth); Ex rel McKinlay v Commonwealth* (1975) 135 CLR 1 per Stephen J at 56; *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 per Brennan J at 46–48, 50; *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 per Mason CJ at 137.

<sup>6</sup> House of Representatives Standing Committee on Legal and Constitutional Affairs, *Aspects of Section 44 of the Australian Constitution*, (Parliamentary Paper Number 85 of 1997), AGPS, Canberra, 1997, p. 34 (henceforth cited as ‘1997 House of Representatives Committee, Report’).

<sup>7</sup> Professor Geoffrey Sawyer, Senate Standing Committee on Constitutional and Legal Affairs, *The Constitutional Qualifications of Members of Parliament*, AGPS, Canberra, 1981, p. 4 (henceforth cited as ‘1981 Senate Committee, Report’).

<sup>8</sup> 1997 House of Representatives Committee, *Report*, pp. 37, 42.

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currently possess the citizenship of a foreign nation,<sup>9</sup> are unable to sit in the Commonwealth Parliament by virtue of s 44(i).

The object of s 44 is to protect Australia's system of parliamentary democracy by disqualifying persons who could be affected by conflicts of loyalty.<sup>10</sup> Section 44(i) was included by the framers of the Constitution to ensure that members of Parliament did not have a divided allegiance and were not subject to improper influence from foreign governments.<sup>11</sup> Similar equivalent provisions may be found in legislation of each of the states.<sup>12</sup> In *Sykes v Cleary*, Brennan J affirmed that the purpose of s 44(i) is 'to ensure that no candidate, senator or member of the House of Representatives owes allegiance or obedience to a foreign power or adheres to a foreign power', and 'to ensure that foreign powers command no allegiance from or obedience by candidates, senators and members of the House of Representatives.'<sup>13</sup>

Section 44(i) consists of three discrete limbs,<sup>14</sup> each limb disqualifying a distinct category of person. I shall examine each of the limbs in turn.

### **Acknowledgment of allegiance, obedience, or adherence to a foreign power**

The class of persons disqualified under the first limb are those persons who, although lacking foreign citizenship, possess some other allegiance to a foreign nation. The scope of operation of the first limb is uncertain as the High Court has not to date disqualified any person on the ground of 'acknowledgment of allegiance, obedience, or adherence to a foreign power'. However, some guidance may be gleaned from an analysis of its terms and examination of its drafting context.

In their early commentary on the Constitution, Quick and Garran defined the term 'allegiance' in s 44 as the lawful obedience which a subject is bound to render to the

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<sup>9</sup> The estimate that around five million Australians hold dual or multiple citizenship has been provided by the Department of Immigration and Multicultural Affairs to the House of Representatives Standing Committee on Legal and Constitutional Affairs, published in *Inquiry into Section 44(i) and (iv) of the Australian Constitution: Submissions*, vol. 1, S141 and *Transcript of Hearings*, pp. 215–216. This figure includes many people who are eligible to adopt the nationality of their parents, but who may not necessarily be aware of their eligibility: *Transcript*, pp. 216–217.

<sup>10</sup> Kevin Andrews, MP, *Commonwealth Parliamentary Debates (CPD)* (H of R), vol. 215, 25 August 1997, p. 6665.

<sup>11</sup> *The Official Record of the Debates of the Australasian Federal Conventions*, Greg Craven (ed.) (*Convention Debates*). Legal Books, Sydney, 1986, vol. III, p. 736 (Glynn, Barton and Sir George Turner at the 1897 Adelaide Convention). See also 1981 Senate Committee, *Report*, p. 10; Associate Professor Gerard Carney, 1997 House of Representatives Committee, *Submissions*, vol. 1, S147; 1997 House of Representatives Committee, *Report*, p. 11.

<sup>12</sup> For discussion and analysis of the state equivalents of s 44(i), see M. Pryles, 'Nationality Qualifications for Members of Parliament' *Monash University Law Review*, vol. 8, 1982, p. 163 and ff.

<sup>13</sup> *Sykes v Cleary* (1992) 176 CLR 77 at 109 and 113 per Brennan J.

<sup>14</sup> Brennan J has recognised the three-limb division of s 44(i): *Sykes v Cleary* (1992) 176 CLR 77 at 109.

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sovereign.<sup>15</sup> ‘Adherence’ to a foreign power is a form of treason dating from the Treason Act of Edward III in 1351, and encompasses overt acts done with intent to assist the sovereign’s enemies.<sup>16</sup>

The early case of *Crittenden v Anderson* throws some light on its meaning. Crittenden challenged the election of Mr Anderson to the House of Representatives on the ground that he was under ‘acknowledgment of allegiance, obedience, or adherence’ to the Papal State by virtue of being a member of the Roman Catholic Church. Sitting as the Court of Disputed Returns, Fullagar J observed that if the petition were to succeed, it would mean that s 44(i) would operate to disqualify every professed member of the Roman Catholic Church, thereby denying to millions the fundamental right to stand for Parliament on sectarian grounds. His Honour distinguished between adherence to a religion and allegiance to a foreign state, holding that s 116 of the Constitution (prohibiting the imposition of any religious test for qualification to any Commonwealth office) has the effect of disallowing the imposition of a religious test via s 44(i). His Honour found the petitioner’s argument untenable and made an order to permanently stay proceedings on the ground of abuse of process.<sup>17</sup>

*Nile v Wood*<sup>18</sup> (an action arising out of the 1987 election) was another attempt to rely on s 44(i). Elaine Nile brought a wide-ranging petition objecting to the declaration of Robert Wood of the Nuclear Disarmament Party as a senator for NSW, alleging breaches of paragraphs (i), (ii), and (iii) of s 44.<sup>19</sup> On the ground relating to s 44(i), the petitioner alleged that Wood’s actions against the naval vessels of a friendly nation indicated allegiance, obedience or adherence to a foreign power.<sup>20</sup>

Sitting as the Court of Disputed Returns, Brennan, Deane and Toohey JJ held that the petition had set out insufficient facts to establish any acknowledgment of allegiance, obedience or adherence to a foreign power, failing even to identify the relevant foreign power. Speaking *obiter*, their Honours made the following comment about the first limb:

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<sup>15</sup> J. Quick and R.R. Garran, *The Annotated Constitution of the Australian Commonwealth*, Legal Books, Sydney, 1995, p. 491; S. O’Brien, ‘Dual Citizenship, Foreign Allegiance and s 44(i) of the Australian Constitution’, Department of the Parliamentary Library, (Background Paper Number 29), 1992, at 1.1.

<sup>16</sup> O’Brien, *ibid* at 1.1.

<sup>17</sup> Unreported, 23 August 1950, HCA, Fullagar J, noted in ‘An Unpublished Judgment on s 116 of the Constitution’, *Australian Law Journal*, vol. 51, 1977, pp. 171–172.

<sup>18</sup> *Nile v Wood* (1988) 167 CLR 133.

<sup>19</sup> Although all of Nile’s arguments based on s 44 failed, the Court later found that Wood had contravened s 163(b) of the *Commonwealth Electoral Act 1918* (Cth), as he was not an Australian citizen at the time of his nomination, and hence was not qualified to be elected: *Re Wood* (1988) 167 CLR 145.

<sup>20</sup> *Nile v Wood* (1988) 167 CLR 133 at 134, 140.

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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.<sup>21</sup>

From *Nile*, then, certain requirements are necessary to enliven the first limb of s 44(i). First, a relevant foreign power must be identified. Secondly, there must be a formal or informal acknowledgment of allegiance, obedience, or adherence by the individual in question. Thirdly, the acknowledgment must not have been withdrawn or revoked.

Although the question of the application of the first limb did not arise for consideration before the full bench in *Cleary*,<sup>22</sup> in his dissenting judgment, Deane J nevertheless commented that it ‘involves an element of acceptance or at least acquiescence on the part of the relevant person’.<sup>23</sup>

Although subsequent cases have not overturned the *Nile* test, linguistic and conceptual ambiguities make its application uncertain in the contemporary Australian context. What of the many Australians who possess strong links to former homelands or to the homelands of their ancestors? Does s 44(i) apply to Australian citizens who take an active interest in the affairs of foreign nations? In both of these situations the affections—although informal—may be strong, regardless of the possession of foreign citizenship, and may or may not be covered by s 44(i).

The ambiguities surrounding the first limb of s 44(i) have led to differing opinions as to the types of situations and conduct that would fall within it. Lumb and Moens, and Burmester,<sup>24</sup> are of the opinion that the acceptance of a foreign award or honour would be insufficient to establish allegiance to a foreign power.<sup>25</sup> Lumb and Moens assert that acting as honorary consul for a foreign power would also not be a ground for disqualification under s 44(i).<sup>26</sup> Formal acknowledgment of allegiance is probably

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<sup>21</sup> *Nile v Wood* (1988) 167 CLR 133 at 140.

<sup>22</sup> *Sykes v Cleary* (1992) 176 CLR 77. O’Brien notes that at the directions hearing before Dawson J, Sykes argued that as an officer of the Greek Orthodox Church, Kardamitsis owed an allegiance to a foreign power (presumably the Greek Orthodox Patriarchate at Constantinople). Confirming Fullagar J’s decision in *Crittenden*, Dawson J struck out the petition on the ground that religious adherence, even to a religion with a foreign origin, is not a ground of disqualification under s 44(i); O’Brien, op. cit., at 1.2.4.

<sup>23</sup> *Sykes v Cleary* (1992) 176 CLR 77 at 127.

<sup>24</sup> Mr Henry Burmester, QC, Chief General Counsel, Commonwealth Attorney-General’s Department.

<sup>25</sup> R.D. Lumb and G.A. Moens, *The Constitution of the Commonwealth of Australia Annotated*, Butterworths, Sydney, 1995, p. 97; H. Burmester, 1997 House of Representatives Committee, *Transcript*, pp. 70-71

<sup>26</sup> Lumb and Moens, op. cit., p. 97. The Court of Disputed Returns declined to decide on the s 44(i) ground in *Maloney v McEachern* (1904) 1 CLR 77 (which involved the claim that Sir Malcolm McEachern was under ‘an acknowledgment of allegiance, obedience or adherence to a foreign power’ because he was Honorary Consul for the Empire of Japan): O’Brien, op. cit., at 1.2.1.

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established by the acceptance of a foreign passport.<sup>27</sup> Acts contrary to Australia's national security interests, for example providing comfort to, raising funds for, or assisting with the military operations of countries or causes unfriendly to Australia, would be likely to constitute an acknowledgment of adherence, and thus contravene s 44(i). Serving in foreign armed forces has been cited as conduct that would constitute formal allegiance.<sup>28</sup> However, where military service is imposed compulsorily upon individuals, without any formal or informal acknowledgment, I submit that it would not necessarily constitute an acknowledgment of allegiance, but such a situation has yet to arise in court.<sup>29</sup>

Further, s 44(i) provides ineffective protection from contemporary forms of foreign influence. For example, it probably does not shield the Parliament from insidious 'foreign commercial interests', such as donations to political parties from foreign corporations or individuals.<sup>30</sup>

### **Subject or a citizen of a foreign power**

The second limb of s 44(i) imposes an objective test, disqualifying any person who is 'a subject or a citizen of a foreign power'. Regarding the interpretation of 'subject or citizen', Quick and Garran note that 'subject' is the appropriate term when the foreign power is a monarch of feudal origin, whereas 'citizen' applies when the foreign power is a republic.<sup>31</sup> Gleeson CJ, Gummow and Hayne JJ have held that term 'foreign power' involves questions of sovereignty, and is not concerned with questions of whether Australia's relationship with other nations is friendly or otherwise.<sup>32</sup>

The second limb of s 44(i) was first judicially considered in *Sykes v Cleary*, the leading case on the interpretation of paragraphs (i) and (iv) of s 44. *Cleary* arose out of the Wills by-election of April 1992. The eighth-ranking candidate (Ian Sykes) challenged the election of Philip Cleary on the ground that he held an office of profit under the Crown at the time of being chosen, thereby contravening s 44(iv). Sykes also challenged the eligibility of Mr Bill Kardamitsis (the candidate for the Australian Labor Party) and Mr John Delacretaz (the candidate representing the Liberal Party of Australia), the second and third ranking candidates, respectively. Kardamitsis and Delacretaz were dual citizens, of Australia, and of Greece and Switzerland,

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<sup>27</sup> Lumb and Moens, op. cit., p. 97, citing *Joyce v DPP* [1946] AC 347, where the House of Lords held that the holding of a British passport created a duty of allegiance to the sovereign.

<sup>28</sup> H. Burmester, 1997 House of Representatives Committee, *Report*, p. 16; Lumb and Moens, op. cit., p. 97.

<sup>29</sup> The situation has arisen in the past for Greek-Australians who returned to Greece and were called up—to their surprise—for national service; Dr James Jupp, 1997 House of Representatives Committee, *Transcript*, p. 232.

<sup>30</sup> Such as the recent Democratic Party foreign fundraising scandals in the US: C Hughes, 1997 House of Representatives Committee, *Submissions*, vol. 1, p. S94.

<sup>31</sup> Quick and Garran, op. cit., p. 491, noted by Brennan J in *Sykes v Cleary* (1992) 176 CLR 77 at 109.

<sup>32</sup> *Sue v Hill* (1999) 163 ALR 648 at 662.

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respectively. As the Court delivered five separate judgments on s 44(i), some detailed consideration of the facts of the case and the reasoning of the Court is warranted.

Bill Kardamitsis was born in Greece in 1952, but had lived in Australia since 1969. He became an Australian citizen in 1975 and in so doing renounced all other allegiances and swore the oath of allegiance to the Queen of Australia. He had made Australia his home, raising his children in Australia, not Greece, and had participated in public life in Australia, serving as a Justice of the Peace and as a councillor on the Coburg City Council. John Delacretaz was born in Switzerland in 1923, but had lived in Australia for over forty years at the time of the by-election. In 1960 he was naturalised as an Australian citizen, renouncing all other allegiances and swearing an oath of allegiance to the Queen.<sup>33</sup>

Because s 163(1)(a) of the *Commonwealth Electoral Act 1918* (Cth) makes Australian citizenship a qualification for election, s 44(i) operates directly upon individuals with dual citizenship. The Court examined the requirements for renunciation of citizenship of each country and found that they differed widely. Under Swiss law, a citizen will be released from citizenship upon his or her demand if the person has no residence in Switzerland and has acquired another citizenship. In contradistinction, under Greek law, citizenship may only be discharged with the approval of the relevant Greek government Minister.<sup>34</sup> Crucially, however, neither candidate applied to discharge their respective citizenship. Thus, both candidates held dual citizenship, a status recognised in Australian common law, and in international law,<sup>35</sup> subject to certain limits. For example, Brennan J hypothesised about the absurdity of recognising foreign citizenship law in a situation where a foreign power was to ‘mischievously’ confer its citizenship upon members of the Australian Parliament so as to disqualify them all.<sup>36</sup>

The Court noted that under Australian law, the issue of whether a person is a citizen of a foreign state is determined according to the law of the relevant foreign state.<sup>37</sup> The majority took judicial notice of the historical setting of the provision, noting that

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<sup>33</sup> *Sykes v Cleary* (1992) 176 CLR 77 at 103–105.

<sup>34</sup> *Sykes v Cleary* (1992) 176 CLR 77 at 103–104.

<sup>35</sup> *Sykes v Cleary* (1992) 176 CLR 77 at 105–106, citing *R v Burgess; Ex parte Henry* (1936) 55 CLR 608, *Oppenheimer v Cattermole* (1976) AC 249 at 263–264, 278, and *Liechtenstein v Guatemala (the Nottebohm Case)* (1955) ICJ 4 at 20. Dual citizenship is recognised implicitly under s 17 of the *Australian Citizenship Act 1948* (Cth), whereby a person can hold Australian citizenship only where the foreign citizenship was acquired previously: O’Brien, op. cit., at 2.1. Notably, the Citizenship Council, and the ALP have called for reform of the Act to allow acquisition of foreign citizenship after Australian citizenship: Con Sciacca, MP, Shadow Minister for Immigration, ‘Labor Gives Green Light to Dual Citizenship’ (Media Release), 11 April 2000.

<sup>36</sup> *Sykes v Cleary* (1992) 176 CLR 77 at 113; compare Deane J at 126–127. See also Pryles, op. cit., p. 174.

<sup>37</sup> *Sykes v Cleary* (1992) 176 CLR 77 per Mason CJ, Toohey and McHugh JJ at 105–107, Brennan J at 112, Deane J at 127, Dawson J at 131, and Gaudron J at 135, citing *R v Burgess; Ex parte Henry* (1936) 55 CLR 608, *Oppenheimer v Cattermole* (1976) AC 249, and *Liechtenstein v Guatemala (the Nottebohm Case)* (1955) ICJ 4.

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s 44(i) is ‘in a Constitution which was enacted at a time, like the present, when a high proportion of Australians, though born overseas, had adopted this country as their home’.<sup>38</sup> The majority held that it was not the intention of the founders to disqualify an Australian citizen for election to Parliament because that person continued to possess a foreign citizenship, if that person had taken reasonable steps to renounce that citizenship.<sup>39</sup>

The majority noted that it is a difficult and sometimes lengthy process to renounce the citizenship of some nations. Accordingly, in order to avoid the injustice which could be inflicted upon candidates holding citizenship from a nation with complex or discretionary renunciation procedures, the Court held that renunciation of foreign citizenship is not an absolute requirement to avoid disqualification under s 44(i).<sup>40</sup> The Court held that the appropriate test is that an Australian citizen will be disqualified by s 44(i) if that person has not taken all reasonable steps to renounce that foreign citizenship.<sup>41</sup> This conclusion was at one with Deane J’s view that it was not the intent of s 44(i) to disqualify ‘any Australian citizen whose origins lay in, or who has had some past association with, some foreign country which asserts an entitlement to refuse to allow or recognise his or her genuine and unconditional renunciation of past allegiance or citizenship’.<sup>42</sup> Hence, the result in *Cleary* balanced the principle of protection of parliamentary sovereignty with the reality that a significant proportion of potential candidates hold dual citizenship.

The Court divided as to what amounts to reasonable steps, holding 5–2 (Deane and Gaudron JJ dissenting), that neither Kardamitsis nor Delacretaz had taken all reasonable steps. Mason CJ, Toohey and McHugh JJ considered that ‘reasonable steps’ depends upon the situation of the individual, the requirements of the foreign law regarding renunciation, the connection between the individual and the foreign state, and the subjective belief of a naturalised person that by becoming an Australian citizen, that person has effectively renounced any foreign citizenship.<sup>43</sup> Deane J held that the oath of allegiance to the Sovereign, the unreserved renunciation of other allegiances made during their citizenship ceremonies, and their years spent as Australian citizens constituted all that could reasonably be expected of Kardamitsis and Delacretaz. Gaudron J considered that the question whether reasonable steps have

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<sup>38</sup> *Sykes v Cleary* (1992) 176 CLR 77 at 107.

<sup>39</sup> *Sykes v Cleary* (1992) 176 CLR 77 at 107. In further support of this interpretation, the majority cited s 42 of the Constitution, which requires a member of Parliament to take an oath or affirmation of allegiance, at 107–108.

<sup>40</sup> *Sykes v Cleary* (1992) 176 CLR 77 per Mason CJ, Toohey and McHugh JJ at 107, Brennan J at 113, Deane J at 128, Dawson J at 131–132, and Gaudron J at 139.

<sup>41</sup> *Sykes v Cleary* (1992) 176 CLR 77 per Mason CJ, Toohey and McHugh JJ at 107, Brennan J at 114, Deane J at 127–128, Dawson J at 131, and Gaudron J at 139.

<sup>42</sup> *Sykes v Cleary* (1992) 176 CLR 77 at 127.

<sup>43</sup> *Sykes v Cleary* (1992) 176 CLR 77 at 108.



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been taken is principally a question for Australian law,<sup>44</sup> and that in the circumstances, the formal renunciation of foreign citizenship and oath of allegiance to the Sovereign, and the fact that the foreign citizenship had not been reasserted, were sufficient to constitute reasonable steps. Both of the dissentients posited the view that an application to a foreign government for release from citizenship—a step required by the majority as a reasonable step—would constitute an acknowledgment of a citizenship already renounced, and would therefore offend the first limb of s 44(i).<sup>45</sup>

Doubts had been expressed for some time about the status of British citizens under the s 44(i) disqualification,<sup>46</sup> and whether Britain constitutes a ‘foreign power’ for the purposes of s 44(i). These doubts were finally resolved in *Sue v Hill*,<sup>47</sup> which involved a challenge to the eligibility of Heather Hill, a One Nation Party candidate for the Senate in the October 1998 election. Hill won a Senate seat, but was subsequently declared disqualified under s 44(i) by a 4–3 majority of the Court of Disputed Returns.<sup>48</sup>

Hill was born in the UK in 1960 and migrated to Australia with her parents in 1971. She became an Australian citizen in January 1998, but did not renounce her British citizenship until at least one month after her election.<sup>49</sup> Gaudron J noted that the renunciation pledge was no longer contained in the oath of allegiance to Australia at the time that Hill became a citizen.<sup>50</sup>

At the time of the enactment of the Constitution, the UK would not have been considered a ‘foreign power’. The majority noted that Australians were British subjects from Federation until the creation of ‘Australian citizenship’ under the *Australian Citizenship Act 1948* (Cth). However, whether Britain was at this time regarded as a ‘foreign power’ is doubtful. The precise point at which Australia obtained full legal and political independence from Britain is a question of considerable controversy. The majority found that, following an evolutionary process of independence from the UK, Australia could be said to have reached a distinct

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<sup>44</sup> *Sykes v Cleary* (1992) 176 CLR 77 at 139–140. Kirby J has, in *obiter*, supported Gaudron J’s approach: *Sue v Hill* (1999) 163 ALR 648 at 729.

<sup>45</sup> *Sykes v Cleary* (1992) 176 CLR 77 per Deane J at 128–129 and Gaudron J at 140.

<sup>46</sup> *Re Wood* (1988) 167 CLR 145 at 169.

<sup>47</sup> *Sue v Hill* (1999) 163 ALR 648.

<sup>48</sup> McHugh, Kirby and Callinan JJ dissented from the majority on the question of the Court’s power to hear the challenge under the *Commonwealth Electoral Act 1918* (Cth), and accordingly found it unnecessary to determine the s 44 issue.

<sup>49</sup> Hill completed a declaration of renunciation of British citizenship in November 1998: *Sue v Hill* (1999) 163 ALR 648 per Gaudron J at 676–677. It is unclear whether Hill’s declaration of renunciation had been registered at the time of the Court’s decision per Gaudron J at 677.

<sup>50</sup> *Sue v Hill* (1999) 163 ALR 648 per Gaudron J at 677.

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turning point and become an independent nation with the passage of the *Australia Act 1986* (Cth) and the parallel legislation in the UK, the *Australia Act 1986* (UK).<sup>51</sup>

Thus the UK is a ‘foreign power’ for the purposes of s 44(i).<sup>52</sup> Consequently, a dual citizen holding citizenship of the UK and Australia is a subject both of the Queen of the UK, and of the Queen of Australia, and is disqualified under s 44(i).

Two further questions in relation to the second limb of s 44(i) remain unanswered. First, the application of Deane and Gaudron JJ’s view in *Cleary* of ‘reasonable steps’ in relation to individuals who have been naturalised since the removal of the oath of allegiance in 1986.<sup>53</sup> Secondly, s 42 provides that members and senators must take an oath of allegiance to the Queen of the UK.<sup>54</sup> Does this mean, in light of the *Australia Act* and *Hill*, that in complying with s 42, prospective parliamentarians are breaching s 44? These questions have yet to arise before the court.

### **Entitled to the rights or privileges of a subject or a citizen of a foreign power**

The third limb of s 44(i) disqualifies any person who is ‘entitled to the rights or privileges of a subject or a citizen of a foreign power’. This limb has received little judicial attention and hence considerable uncertainty exists about its interpretation.

It is unclear whether the provision disqualifies a person who is entitled to all or merely to some of the rights and privileges. Rubinstein has argued that ‘rights and privileges’ may include the right to vote, the right to hold a passport, social security rights and migration rights.<sup>55</sup> The extent of the uncertainty surrounding the limb is evinced by the controversy that arose in the 1980s when honorary citizenship of Israel was conferred upon Prime Minister Hawke, and it was argued that this entitled him to the rights and privileges of a citizen of Israel, and that he was therefore disqualified.<sup>56</sup> It would be unjust to bar persons in such circumstances from serving in Parliament, but these are situations upon which s 44(i) may operate.

*Prima facie*, it would appear that the third limb of s 44(i) disqualifies any Australian citizen holding a foreign passport, the right to hold a passport being one of the rights

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<sup>51</sup> *Sue v Hill* (1999) 163 ALR 648 per Gleeson CJ Gummow and Hayne JJ at 665, 675 and Gaudron J at 694–695.

<sup>52</sup> *Sue v Hill* (1999) 163 ALR 648 per Gleeson CJ Gummow and Hayne JJ at 665, 675, and Gaudron J at 695.

<sup>53</sup> The explicit renunciation of foreign allegiance was removed from the oath of allegiance by the *Australian Citizenship Amendment Act 1986* (Cth), and replaced by an oath or affirmation of ‘true allegiance’: *Sykes v Cleary* (1992) 176 CLR 77 per Gaudron J at 133–134.

<sup>54</sup> On the effect of breach of s 42 see E. Campbell, ‘Oaths and Affirmations of Public Office’, *Monash University Law Review*, vol. 25, no. 1, pp. 132, 155–6.

<sup>55</sup> 1997 House of Representatives Committee, *Report*, p. 17; Ms Kim Rubinstein, 1997 House of Representatives Committee, *Transcript*, p. 97.

<sup>56</sup> 1997 House of Representatives Committee, *Report*, p. 18.

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of citizenship.<sup>57</sup> This aspect of the disqualification alone disqualifies the millions of Australian citizens who hold foreign passports. The situation becomes more problematic when further situations are considered. Take, for example, the situation of a former foreign citizen who is eligible to continue receiving social security benefits in Australia. Such a person would be disqualified, even if that person renounces his or her foreign citizenship.<sup>58</sup> A further problem may lie with cases of nations that offer their former citizens the right to regain their citizenship at some time in the future, notwithstanding that they have renounced it and become citizens of a foreign nation.<sup>59</sup>

Pryles has argued that the third limb applies to persons who presently enjoy the rights or privileges of foreign citizens, rather than persons who merely have a right to acquire citizenship of the foreign state. Thus, under this interpretation, a person born in Australia to parents who are foreign citizens, who has a right to acquire, but is not presently entitled to, the benefits associated with that foreign citizenship, is not disqualified by s 44(i) until he or she actually acquires that citizenship or those benefits.<sup>60</sup> A contrary interpretation would bar the children (and, in some cases, grandchildren) of migrants to Australia from the Commonwealth Parliament.<sup>61</sup>

### **The need for reform**

Clearly then, there are problems both with the interpretation and operation of s 44(i). This section examines some of the broader problems surrounding s 44(i). I submit that the decision of the majority in *Cleary*, that a person who makes no attempt to renounce citizenship of a foreign power evidences a desire to retain citizenship, does not give full weight to the significance of the Australian citizenship ceremony and long-term residency in Australia for the purposes of s 44(i). Deane and Gaudron JJ place great emphasis on unilateral acts of renunciation, such as the swearing of the oath of allegiance, pointing to the express renunciation of foreign citizenship contained in the oath until 1986.<sup>62</sup> They note that an action of this nature, along with a long-term association with Australia, constitutes a ‘clear’ and ‘public’ severance of formal ties to any nation other than Australia, and a formal renunciation for the purposes of Australian law.<sup>63</sup> In the future, given that there is no longer a renunciation requirement in the citizenship ceremony, long-term residency in Australia may assume a greater

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<sup>57</sup> *Sue v Hill*, S179/1998, *Transcript of Hearing*, 13 May 1999, per Hayne J at 15.

<sup>58</sup> Such as US emigrants, Mr Bob Charles, MP, 1997 House of Representatives Committee, *Transcript*, p. 78; 1997 House of Representatives Committee, *Report*, pp. 17–18.

<sup>59</sup> Such as the US: Mr Bob Charles, MP, 1997 House of Representatives Committee, *Transcript*, p. 77; Mr Bob Charles, MP, 1997 House of Representatives Committee, *Submissions*, vol. 1, S6.

<sup>60</sup> Pryles, *op. cit.* pp. 179–80.

<sup>61</sup> From nations (such as Greece, Italy, Israel and Ireland) which recognise *jus sanguinis* (citizenship by ethnic origin), Department of Immigration and Multicultural Affairs; 1997 House of Representatives Committee, *Transcript*, pp. 226, 228–229; Dr James Jupp, 1997 House of Representatives Committee, *Transcript*, p. 233.

<sup>62</sup> *Sykes v Cleary* (1992) 176 CLR 77 per Gaudron J at 133–134.

<sup>63</sup> *Sykes v Cleary* (1992) 176 CLR 77 per Deane J at 128 and Gaudron J at 139.

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significance in the future as a reasonable step for the purposes of the second limb of s 44(i).

A related problem is the vagueness and obscurity of the language of s 44(i). In presenting the report of the House of Representatives Standing Committee on Legal and Constitutional Affairs on s 44(i) and (iv) to the House, the Committee Chairman noted that the archaic language of the section ‘is a serious hindrance to ensuring that it will continue to protect this parliament and hence national sovereignty.’<sup>64</sup> Although there are problems associated with the uncertainty of its interpretation, the fact of its unjust operation is clear. Nonetheless, the very fact that the interpretation of the first and third limbs is unresolved may operate to dissuade many prospective candidates from standing. Moreover, the exact meaning and extent of the ‘reasonable steps’ required to renounce a foreign citizenship so as to avoid disqualification under the second limb is uncertain, dependant as it is upon the requirements of the foreign nation, and the Court’s view of the adequacy of those steps. Until we receive further guidance from the Court on its precise meaning, considerable uncertainty about the interpretation of s 44(i) will persist.<sup>65</sup>

In interpreting s 44(i) Deane J’s approach must be regarded as more appropriate from a policy perspective at a time when around five million Australians possess dual citizenship, with the likelihood of future increases. The Joint Committee on Foreign Affairs and Defence has noted that the trend towards large levels of dual citizenship is a consequence of Australia’s massive postwar immigration, and the classification of migrant Australians as dual citizens by virtue of the legislation of their former homelands.<sup>66</sup> Added to this is the fact that for several reasons, including the multifarious methods of citizenship acquisition,<sup>67</sup> many Australian-born citizens are unaware of their dual citizenship. The problem is singularly acute for British citizens, since under British law, British citizenship is not surrendered by the acquisition of the citizenship of another nation. As a consequence, virtually all British-born Australians have dual citizenship. Hence, Kirby J has felt compelled to speak of the ‘defects’ of s 44(i) affecting ‘millions’ of Australians.<sup>68</sup>

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<sup>64</sup> Kevin Andrews, *CPD* (H of R), vol. 215, 25 August 1997, p. 6665.

<sup>65</sup> In 1999, for example, One Nation Senator Len Harris challenged the right of thirty members and senators to sit in the Commonwealth Parliament on the ground that they were born overseas, *CPD* (Senate), vol. 198, 23 August 1999, pp. 7538–7539; Senator Len Harris, Media Release, ‘Harris moves motion to force all Senators to prove eligibility to sit under s 44 of the Constitution’, 9 August 1999; A. Fitzgerald, ‘Thirty Senators and Members’ Seats in Doubt Because Of Their Dual Nationality’ *Australian National Review*, vol. 4, August 1999, pp. 7–8.

<sup>66</sup> Joint Committee on Foreign Affairs and Defence, *Dual Nationality: Report from the Joint Committee on Foreign Affairs and Defence*, (Parliamentary Paper Number 255 of 1976), AGPS, Canberra, 1977, p. 2.

<sup>67</sup> Department of Immigration and Multicultural Affairs, 1997 House of Representatives Committee, *Submissions*, vol. 1, S141–142; 1997 House of Representatives Committee, *Report*, pp. 21–22.

<sup>68</sup> *Sue v Hill* (1999) 163 ALR 648 at 729.

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The significance of this is that by disqualifying all Australians holding a second citizenship, the right of millions of Australians to stand for, and be elected to the Commonwealth Parliament is forfeited, and the choices for the electorate as to who should represent it are severely curtailed. Gaudron J has noted the significance of the principle that as wide a pool of persons as possible should be eligible to directly participate in government processes, stating in *Cleary*: ‘what is at stake is the right to participate in the democratic process as a member of Parliament—a right ordinarily attaching to citizenship.’<sup>69</sup> In reaching his conclusions, Brennan J also expressly endorsed the principle that Australians should not be needlessly deprived of the right to seek election, and, conversely, that the electors should not be deprived of the right to choose from the widest possible pool of candidates.<sup>70</sup> The fundamental right of Australian citizens to stand for Parliament is abrogated by s 44(i).

It should also be noted that s 44(i) puts Australia out of step with international practice. The House of Representatives Standing Committee on Legal and Constitutional Affairs noted that neither Britain nor the US impose any bar on dual citizens sitting in their respective national legislatures.<sup>71</sup> Further, s 44(i) may be in breach of Article 25 of the International Covenant on Civil and Political Rights, which provides that ‘[e]very citizen shall have the right and the opportunity ... to vote and to be elected at periodic elections’.<sup>72</sup>

Deane J considered that s 44(i) contains a mental element, holding that the second limb applies only to cases where the relevant status has been ‘sought, accepted, asserted or acquiesced in by the person concerned.’<sup>73</sup> The refusal of the *Cleary* majority to include a mental element in the second limb indicates a doctrinal inconsistency with *Nile*, where the Court implied a mental element into the first limb, holding that the disqualification only applied to a person who has ‘formally or informally acknowledged allegiance, obedience or adherence to a foreign power’. A proposal for the reform of s 44(i) follows, but for the purposes of interpreting the existing provision, some mental element similar to that proposed by Deane J should be implied. That mental element may simply be a requirement of an awareness on the part of the individual of his or her foreign citizenship.

## Proposals

Because of its inadequacy and problems surrounding its interpretation, s 44(i) fails to achieve its aims. Further, the provision seeks to ensure that the sole loyalty of all members of parliament is to Australia, yet the Constitution imposes no express positive requirement that a person must be an Australian citizen to sit. It is appropriate

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<sup>69</sup> *Sykes v Cleary* (1992) 176 CLR 77 at 138.

<sup>70</sup> *Sykes v Cleary* (1992) 176 CLR 77 at 113.

<sup>71</sup> K. Rubenstein, 1997 House of Representatives Committee, *Report*, p. 37. Article 1, s 2 of the US Constitution imposes a US citizenship requirement for membership of Congress; K. Rubenstein, 1997 House of Representatives Committee, *Submissions*, vol. 2, S186.

<sup>72</sup> ICCPR, article 25(b), 1997 House of Representatives Committee, *Submissions*, vol. 1, S175–S181.

<sup>73</sup> *Sykes v Cleary* (1992) 176 CLR 77 at 127.

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to delete the s 44(i) disqualification and to replace it with the requirement of Australian citizenship as a qualification for membership of the Parliament, and a corresponding disqualification for failure to retain Australian citizenship.<sup>74</sup> Such a change would eradicate the ambiguities associated with s 44(i), and has the advantage of imposing a clear and simple test. Section 34 of the Constitution provides that the Parliament may legislate as to the qualifications of members of the House of Representatives. Section 16 provides that the qualifications of a senator shall be the same as those of a member of the House of Representatives. Pursuant to these provisions, the Commonwealth has legislated to provide that Australian citizenship is a qualification for nomination or election to the Commonwealth Parliament.<sup>75</sup> However, it is more appropriate that such a fundamental qualification should be contained in the Constitution. Certainty is an important objective for electoral law. Reform of this nature eliminates the uncertainty presently surrounding the interpretation of s 44(i).

I also propose amendment of the *Commonwealth Electoral Act 1918* (Cth) to require a prospective candidate to declare, at the time of nomination, whether, to his or her knowledge, he or she holds a non-Australian citizenship, and to make a declaration to the Australian Electoral Commission accordingly, without any renunciation requirement.<sup>76</sup> Reform along these lines would substantially uphold the policy behind s 44(i), and would also improve its efficacy.

This proposal eliminates the uncertainties associated with the present law, substantially increases the number of persons from which Australia's future parliamentarians may be drawn, and affords increased choice to the electorate in selecting candidates. The electorate, consistently with representative democracy, may then decide for itself the loyalty of future candidates for the Commonwealth Parliament.

#### SECTIONS 44(II) AND 44(III): TREASON, CRIMINAL CONVICTION AND BANKRUPTCY

Sections 44(ii) and (iii) deal with treason, criminal conviction, and bankruptcy. In light of the conclusion that I reach—that criminality and bankruptcy are matters which ought to be for the electors to consider—I have grouped together discussion of s 44(ii) and (iii).

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<sup>74</sup> Amendment to this effect has been proposed in other fora: 1981 Senate Committee, *Report*, pp. ix, 14; Constitutional Commission, *The Final Report of the Constitutional Commission 1988*, AGPS, Canberra, 1988, vol. 1, p. 283; Joint Standing Committee on Electoral Matters, *Report of the Inquiry Into All Aspects of the Conduct of the 1996 Federal Election and Matters Related Thereto*, (Parliamentary Paper Number 93 of 1997), AGPS, Canberra, 1997, pp. 73–74; 1997 House of Representatives Committee, *Report*, pp. xiii, 43; Constitution Alteration (Electors' Initiative, Fixed Term Parliaments and Qualifications of Members) Bill 2000.

<sup>75</sup> *Commonwealth Electoral Act 1918* (Cth), s 163.

<sup>76</sup> Comparable reform was suggested by the Attorney-General's Department, 1997 House of Representatives Committee, *Transcript*, pp. 64, 67; Sir Maurice Byers, 1997 House of Representatives Committee, *Report*, pp. 46–47, and the 1997 Joint Standing Committee on Electoral Matters, op. cit., p. 74.

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### Section 44(ii): treason

Section 44(ii) disqualifies any person who 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’. Although the first part of s 44(ii) has yet to be judicially considered, it is likely that it operates to permanently disqualify any person convicted and then ‘attainted’ of treason. The second part of the s 44(ii) disqualification operates upon any person under sentence or awaiting sentence for an offence which carries a minimum of one year’s imprisonment. The Court held in *Nile v Wood* that the disqualification ends once the sentence has been served.

Questions arise, principally, about three aspects of s 44(ii). The first question relates to ambiguities in its meaning: the use of the archaic term ‘attainted’, rather than the more straightforward contemporary ‘convicted’, has given rise to disagreement about the scope and meaning of the first limb. The second question relates to the incongruity of the lack of provision for release from the disqualification following a pardon. Thirdly, given the proliferation of sentencing systems and diversity of penalties between jurisdictions for similar offences, is it appropriate to use sentencing as a criterion for disqualification? In light of these problems, the fairness and efficacy of s 44(ii) and its continuing ability to accomplish its objectives must be questioned, and serious consideration must be given to its reform.

#### *The treason limb and the meaning of ‘attainted’*

Treason has traditionally been regarded as a grave offence, indeed one which the 1981 Senate Committee regarded as ‘the most serious offence which a citizen can commit against his fellow countrymen, striking at the very roots of the nation’s security.’<sup>77</sup> The framers included the provision in order to permanently disqualify a person guilty of treason from sitting.

Attainder is an obscure concept derived from archaic English law. Under it, civil rights were extinguished ‘when judgment of death or outlawry was recorded against a person who had committed treason or felony.’<sup>78</sup> Lane, and other commentators have argued that ‘attainder’ in the s 44 context would mean ‘convicted’ in Australia today,<sup>79</sup> and thus a conviction would be required for disqualification under the treason limb of s 44(ii). This uncertainty could thus easily be remedied by adopting the 1981 Senate Committee recommendation that the word ‘attainted’ be replaced with ‘convicted’.<sup>80</sup>

A further uncertainty arises as to the basis in law of the conviction. The Constitutional Commission noted that different treason provisions in Commonwealth and State legislation and at common law make the basis upon which disqualification rests

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<sup>77</sup> 1981 Senate Committee, *Report*, p. 17.

<sup>78</sup> Attainder was abolished in Britain by the *Forfeiture Act 1870*; L. Rutherford & S. Bone (eds), *Osborn’s Concise Law Dictionary*, Sweet & Maxwell, London, 1993, p. 36.

<sup>79</sup> P.H. Lane, *Lane’s Commentary on the Australian Constitution* (2nd ed.), Law Book Company, Sydney, 1997, p. 106; 1981 Senate Committee, *Report*, pp. 16–17; Lumb and Moens, *op. cit.*, p. 98.

<sup>80</sup> 1981 Senate Committee, *Report*, p. 18.

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unclear.<sup>81</sup> To ensure control by the Commonwealth Parliament, any amendment to s 44(ii) should make clear that the conviction must be under Commonwealth law.<sup>82</sup>

### *Pardon*

There are several policy problems associated with the fact that the treason disqualification makes no provision for pardon. A person may be convicted of treason, and over time evidence may emerge, or political circumstances may change, to the extent that actions that once constituted treason may no longer be viewed as such. Yet a pardon would not remove the disqualification. The 1981 Senate Committee recommended that provision be made for lifting the disqualification where a person is subsequently pardoned.<sup>83</sup> I propose that such a reform of s 44(ii) would maintain the policy of the existing law, and would provide for a more equitable disqualification.

### **Section 44(ii): criminal conviction**

The second limb of s 44(ii) disqualifies any person who ‘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’.<sup>84</sup> Its purpose is to disqualify persons convicted of an offence of a particular degree of seriousness from either standing for or sitting in Parliament during the period of their sentence. As noted by the 1981 Senate Committee, the provision is based on the view that such a person is not a fit and proper person to hold parliamentary office while he or she is under sentence.<sup>85</sup>

Some insight as to its intended operation may be gleaned from the Convention Debates. The delegates considered whether the provision should operate to disqualify persons only while serving or awaiting sentence for an offence punishable by one year’s imprisonment or longer, or whether it should operate to permanently disqualify.<sup>86</sup> The delegates voted resoundingly against the insertion of a permanent disqualification on the ground that it would effectively impose an additional penalty on the offender, an ‘eternal punishment’,<sup>87</sup> which would eliminate any opportunity for full public rehabilitation, regardless of the circumstances in which the offence took place. Particularly notable in this debate was the express recognition by several delegates of the principle that as few impediments as possible should be placed in the

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<sup>81</sup> 1988 Constitutional Commission, op. cit., vol. 1, pp. 291–292. For a more certain view, see 1981 Senate Committee, *Report*, pp. 17–18.

<sup>82</sup> *Crimes Act 1914* (Cth), s 24.

<sup>83</sup> 1981 Senate Committee, *Report*, p. 18.

<sup>84</sup> Lane has argued that the disqualification would also be triggered by breaches of relevant common law and territory law: Lane, op. cit., p. 106.

<sup>85</sup> 1981 Senate Committee, *Report*, p. 19.

<sup>86</sup> *Convention Debates*, op. cit., vol. I, pp. 655–659.

<sup>87</sup> *ibid*, p. 658.



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way of the free choice of the electors: ‘We may very well trust the electors to do what is right’.<sup>88</sup>

The Court considerably clarified the operation of the second limb of s 44(ii) in *Nile v Wood*. The petitioner asserted that: ‘Robert Wood has been convicted of the offence of obstructing shipping, being an offence which carries a term of imprisonment’, and that ‘[h]e was convicted in 1972 of offences in relation to National Service, and served a term of imprisonment’.<sup>89</sup>

In dismissing these arguments, the Court found:

It is not conviction of an offence *per se* of which s 44(ii) speaks. The disqualification operates on a person who has been convicted of an offence punishable by imprisonment for one year or more *and* is under sentence or subject to be sentenced for that offence.<sup>90</sup>

Further, the Court took judicial notice of the Convention Debates, and held that, as a matter of construction, ‘[t]he references to conviction and sentence are clearly conjunctive’.<sup>91</sup> Once the sentence has been served, the disqualification is at an end.

Changes in sentencing systems and diversity in penalties make sentencing an inappropriate and irrelevant criterion for parliamentary disqualification.<sup>92</sup> There are inconsistencies in the applicable terms of imprisonment for similar offences, and between the penalties provided for in the multitude of offences created by the Commonwealth, State and Territory jurisdictions. For example, possession of a small amount of cannabis in the ACT is punishable merely by a \$100 fine, whilst in NSW the same offence is punishable by two years imprisonment.<sup>93</sup> A person could therefore be disqualified for a conviction in Queanbeyan, but would not be disqualified for conviction for the same activity across the border in Canberra. Also, some relatively insignificant offences are punishable by long periods of imprisonment but may not warrant disqualification from Parliament. For example, the 1981 Senate Committee has noted the inappropriateness of disqualification for breach of s 19(2) of the *Antarctic Treaty (Environment Protection) Act 1980* (Cth), which provides that any person who, whether on foot or by aircraft, disturbs a concentration of birds is liable to a fine of \$2000, or imprisonment for 12 months, or both.<sup>94</sup> Conversely, certain serious

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<sup>88</sup> *ibid*, Dibbs, p. 658 and see also Clark at p. 655.

<sup>89</sup> *Nile v Wood* (1988) 167 CLR 133 at 134.

<sup>90</sup> *Nile v Wood* (1988) 167 CLR 133 at 139.

<sup>91</sup> *Nile v Wood* (1988) 167 CLR 133 at 139.

<sup>92</sup> The inflexibility of constitutional disqualification was recognised at the 1897 Convention: see the *Convention Debates*, *op. cit.*, vol. II, p. 1012 (Glynn).

<sup>93</sup> *Drugs of Dependence Act 1989* (ACT) s 171(1), *Drug Misuse and Trafficking Act 1985* (NSW) ss 23(1), 30.

<sup>94</sup> 1981 Senate Committee, *Report*, p. 20.

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offences, particularly in the areas of trade practices and tax, are punishable only by the imposition of a fine, without any provision for imprisonment:<sup>95</sup> such convictions do not attract disqualification.

Further, the disqualification does not take modern developments in sentencing methods into account. Where an order for a suspended sentence or a conditional discharge is made for an offence carrying a penalty of imprisonment for a year, an offender may enter into a recognisance to be of good behaviour for a period extending beyond the sentence. The offender would be liable to sentence at any time during this period and would, therefore, be disqualified throughout this period, falling squarely within the terms of s 44(ii)—‘under sentence, or subject to be sentenced’: an inappropriate result.<sup>96</sup>

The current disqualification effectively entrenches a criterion based on irrelevant nineteenth century notions of punishment. I propose two possible solutions to the problem, both involving deletion of the existing disqualification. The first would be constitutional amendment to empower the Commonwealth Parliament to determine a legislative disqualification based on criminal conviction, making appropriate provision for disqualification for conviction for serious offences, and for offences punishable by a significant term of imprisonment or a significant fine. The second possible solution would be simply to leave the matter to the judgment of the electors: ‘[u]ltimately, it must be the electorate which makes decisions about the quality of representation which it demands in the national Parliament.’<sup>97</sup> As Sawyer has noted, the position of sitting members sentenced to imprisonment would be covered by ss 20 and 38 of the Constitution, which provide that the place of a member or senator shall become vacant if that person fails to attend for two consecutive months of any session of Parliament.<sup>98</sup> Both of the above courses maintain the policy of the second limb of s 44(ii), ensure greater fairness in the treatment of those seeking election to Parliament, and both take changes in sentencing methods into account.

### **Section 44(iii): the bankruptcy disqualification**

Section 44(iii) disqualifies any person who is ‘an undischarged bankrupt or insolvent’, and has been held to operate on any person formally declared bankrupt or insolvent, and not discharged from that condition. The provision is meant to address concerns about the protection of the state,<sup>99</sup> and the scope for financial persuasion to influence a bankrupt candidate or parliamentarian. However, in light of changed public attitudes to

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<sup>95</sup> Only pecuniary penalties are imposed for breaches of the *Trade Practices Act 1974* (Cth) (except for non-payment of fines, s 79A).

<sup>96</sup> Australian Constitutional Convention, *Proceedings of the Australian Constitutional Convention: Official Record of Debates and Biographical Notes*, AGPS, Canberra, 1985, p. 228; 1981 Senate Committee, *Report*, pp. 22–23.

<sup>97</sup> 1981 Senate Committee, *Report*, p. 25.

<sup>98</sup> 1981 Senate Committee, *Report*, p. 24.

<sup>99</sup> 1981 Senate Committee, *Report*, p. 35.

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debt and bankruptcy, the growth in consumer credit, and the importance of elector choice, I submit that the s 44(iii) disqualification is no longer justified.

Discussion at the Federal Conventions over the progenitors to s 44(iii) was heated, and much light on the reasons for its inclusion may be gleaned from an examination of them. At the time, bankruptcy was generally viewed with considerable moral opprobrium. A comment by Sir John Downer exemplifies this view: ‘it will be a bad day for Australia, as it would be for any country, if bankruptcy is considered merely a venial matter, and not one that involves great disgrace’.<sup>100</sup> However, several delegates took the view that the Constitution should not contain a bankruptcy disqualification. Mr Carruthers spoke in impassioned terms: ‘Why should men who, through some misfortune, are compelled to take advantage of the insolvency or bankruptcy laws, be kept out of public life until they can get their certificate of discharge?’<sup>101</sup> According to Carruthers, it is testimony to the honesty of public men in Australia that they have been poor men, and in many cases politicians have been financially impoverished because of close attention to public affairs, and corresponding neglect of their personal affairs, ‘without any injury to public business’.<sup>102</sup> Carruthers went on to suggest that the provision would be used by creditors as ‘a lever of destruction’, in order to disqualify candidates or sitting members to whom they were opposed.<sup>103</sup>

In *Nile*, the Court considerably clarified the scope of s 44(iii). Among the petitioner’s grounds of challenge was the stark claim: ‘Robert Wood is insolvent.’<sup>104</sup> The Court held that s 44(iii) is not enlivened merely by an allegation that a person is unable to pay his or her debts.<sup>105</sup> Using the Convention Debates and turn of the century bankruptcy laws, the Court held that the adjective ‘undischarged’ qualifies both the word ‘bankrupt’ and the word ‘insolvent’: ‘insolvent’ does not merely describe a person who cannot pay his debts as they fall due. The test is whether a court has declared a person bankrupt or insolvent and that person has not been discharged from that condition.<sup>106</sup>

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<sup>100</sup> *Convention Debates*, op. cit., vol. V, p. 1934.

<sup>101</sup> *Convention Debates*, op. cit., vol. II, p. 1015.

<sup>102</sup> *Convention Debates*, op. cit., vol. V, p. 1933, vol. II, p. 1016. Carruthers went on to refer indirectly to the notable precedent of NSW Premier Sir Henry Parkes who was thrice declared bankrupt, and won his way back into the NSW Parliament each time after resigning: 1981 Senate Committee, *Report*, p. 35.

<sup>103</sup> *Convention Debates*, op. cit., vol. II, p. 1016; vol. V, pp. 1932–1933; Mr Reid concurred, at p. 1935.

<sup>104</sup> *Nile v Wood* (1988) 167 CLR 133 at 134.

<sup>105</sup> *Nile v Wood* (1988) 167 CLR 133 at 140.

<sup>106</sup> *Nile v Wood* (1988) 167 CLR 133 at 139–140; followed by Dawson J in *Sykes v Australian Electoral Commission* (1993) 115 ALR 645 at 650.

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Attitudes to bankruptcy have changed enormously since 1901, and it no longer imports moral turpitude.<sup>107</sup> Further, the increased availability of consumer credit has made debt widespread and an ordinary part of life. There has been a significant increase in the level of bankruptcies in Australia,<sup>108</sup> and the harshness of the disqualification is compounded by the fact that many of these bankruptcies occur through misfortune, illness, unemployment, or unstable economic conditions.<sup>109</sup> Changed financial circumstances and community attitudes to debt and to bankruptcy make s 44(iii) difficult to justify today. Accordingly, I propose its deletion.<sup>110</sup> Such reform would remove the temptation for members and candidates to act dishonestly to avoid indebtedness and the perception thereof,<sup>111</sup> and would eliminate any possibility of political uses of the disqualification by prospective creditors.<sup>112</sup> As Carruthers argued over 100 years ago, the electors should have the right to choose to be represented by a person who is compelled by necessity to become bankrupt.<sup>113</sup> Such a person is not necessarily unfit for Parliament, and if that person has acted improperly, the electorate will judge him or her appropriately.

SECTIONS 44(IV) AND 44(V): OFFICES OF PROFIT UNDER THE CROWN, CONTRACTS WITH THE EXECUTIVE, CONFLICTS OF INTEREST AND THE INTERPRETATION OF 'INCAPABLE OF BEING CHOSEN'

Section 44(iv) and (v) seek to address conflicts of interest and undue influence by the executive. I argue that these provisions are outmoded and ineffective, and that once again the evils which they seek to remedy are better dealt with by legislation, rather than through the Constitution.

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<sup>107</sup> The 1981 Senate Committee has outlined some of the extraordinary 17<sup>th</sup> century punishments for bankruptcy: 1981 Senate Committee, *Report*, p. 34.

<sup>108</sup> The trend is towards an increase in the number of bankruptcies: 4 979 bankruptcies were recorded in Australia in 1979–1980; 8 552 in 1989–1990; 26 376 in 1998–99: Attorney-General's Department, *Annual Report by the Attorney-General on the Operation of the Bankruptcy Act 1966: 1 July 1979–30 June 1980*, AGPS, Canberra, 1980, p. 8; Attorney-General's Department, *Annual Report by the Attorney-General on the Operation of the Bankruptcy Act 1966: 1 July 1989–30 June 1990*, AGPS, Canberra, 1990, p. 30; Inspector-General in Bankruptcy, Insolvency and Trustee Service, *Annual Report on the Operation of the Bankruptcy Act*, 1999: [http://law.gov.au/aghome/commaff/itsa/frame\\_statistics.html](http://law.gov.au/aghome/commaff/itsa/frame_statistics.html).

<sup>109</sup> J. McMillan, G. Evans, H. Storey, *Australia's Constitution: Time For Change?*, The Law Foundation of New South Wales and George Allen & Unwin Australia, Sydney, 1983, p. 271.

<sup>110</sup> Section 45(ii) would also require deletion under this proposal. Similar recommendations were made by the 1981 Senate Committee, and the 1988 Constitutional Commission: 1981 Senate Committee, *Report*, p. 37; 1988 Constitutional Commission, *op. cit.*, vol. 1, pp. 293–294.

<sup>111</sup> 1981 Senate Committee, *Report*, p. 36.

<sup>112</sup> Mr Stephen Mutch, MP, 1997 House of Representatives Committee, *Transcript*, p. 218.

<sup>113</sup> *Convention Debates*, *op. cit.*, vol. V, p. 1933.

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### Section 44(iv): offices of profit

Section 44(iv) exists to protect the Parliament from the influence of the executive, and to prevent conflicts of loyalty. These principles remain valid today. In *Cleary*, the Court applied a broad interpretation of ‘office of profit’, but because of the archaic language and concepts used in the provision, many questions persist about its reach and whether it disqualifies employees and members of statutory corporations, local government councillors and employees, assistant ministers and parliamentary secretaries. Further, the provision operates unfairly, as it requires public servants to resign their employment in order to stand for election, affecting perhaps twenty percent of the population. While seeking to maintain the principle upon which s 44(iv) is based, I recommend deletion of s 44(iv) and its replacement with legislation preventing conflicts of loyalty, clarifying the position of public sector employees, and alleviating the unfair operation of s 44(iv).

Section 44(iv) is based on early eighteenth century English law,<sup>114</sup> and gives effect to the principle that the Crown and the Executive should be separate from the legislature. In order to operate independently, the Parliament must be free from executive influence: s 44(iv) bars the use of executive appointments to influence parliamentarians.<sup>115</sup> Apart from preventing conflicts of loyalty, and acting as an ‘anti-bribery’ provision,<sup>116</sup> s 44(iv) also prohibits ‘double-dipping’: the receipt of two incomes.<sup>117</sup> It also addresses the incompatibility and physical impossibility of combining parliamentary service and all the associated duties towards Parliament and constituency, with the fulfilment of public service duties.<sup>118</sup>

#### *The interpretation of ‘office of profit under the Crown’*

Although considerable uncertainty has existed about the coverage of ‘office of profit under the Crown’,<sup>119</sup> this uncertainty was alleviated, but not wholly eliminated in

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<sup>114</sup> The Act of Settlement, 1701, 12 and 13 Wm III c 2, and the Succession to the Crown Act, 1707, 6 Anne c 41, ss 24 and 25: *Sykes v Cleary* (1992) 176 CLR 77 per Mason CJ, Toohey and McHugh JJ at 95.

<sup>115</sup> House of Commons Select Committee on Places or Offices of Profit under the Crown, *Report from the Select Committee on Places or Offices of Profit under the Crown*, House of Commons, 1941, pp. xiii–xiv: *Sykes v Cleary* (1992) 176 CLR 77 per Mason CJ, Toohey and McHugh JJ at 95, Deane J at 122; A. R. Blackshield, 1997 House of Representatives Committee, *Transcript*, p. 260; Campbell Sharman, 1997 House of Representatives Committee, *Submissions*, vol. 1, S80; Geoffrey Lindell, 1997 House of Representatives Committee, *Transcript*, p. 108.

<sup>116</sup> Harry Evans, Clerk of the Senate, 1997 House of Representatives Committee, *Submissions*, vol. 1, S49.

<sup>117</sup> Attorney-General’s Department, 1997 House of Representatives Committee, *Submissions*, vol. 1, S167; 1997 House of Representatives Committee, *Report*, p. 55; H. Burmester, 1997 House of Representatives Committee, *Transcript*, p. 65.

<sup>118</sup> *Sykes v Cleary* (1992) 176 CLR 77 per Mason CJ, Toohey and McHugh JJ at 96; G Lindell, 1997 House of Representatives Committee, *Transcript*, p. 108.

<sup>119</sup> 1981 Senate Committee, *Report*, Chapter 5.

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*Cleary*, where the Court unanimously held that Cleary (employed as a schoolteacher by the Victorian Government) held an office of profit under the Crown.<sup>120</sup>

The majority held that s 44(iv) disqualifies public servants (as officers of government departments), noting that their exclusion from Parliament reinforces the principle that public servants should not participate in party politics.<sup>121</sup> The majority rejected arguments that s 44(iv) operates to disqualify only senior public servants, stating that such a restricted meaning could not be supported by history, nor by its legislative context: ‘the disqualification must be understood as embracing at least those who are permanently employed by government’.<sup>122</sup> The majority provided several policy justifications, including the inability to adequately perform public service duties and parliamentary functions concurrently, and the risk that permanent public servants would not exercise independent judgment in Parliament, but would be constrained by the views of the executive.

Although not the archetypal person at whom the disqualification is aimed, s 44(iv) disqualifies public school teachers, even when on leave without pay. The majority held that taking leave does not alter the character of the office.<sup>123</sup> Deane J concurred: ‘the fact that the holder of such an office is temporarily on leave without pay or other emoluments does not deprive the office itself of its character as an office of profit’.<sup>124</sup> Hence, public servants must resign to contest an election.

#### *Problems and issues relating to s 44(iv) and proposals*

To date, *Cleary* is the only judicial guidance we have on s 44(iv).<sup>125</sup> Using textual<sup>126</sup> and policy arguments, the majority interpreted the reference to ‘office of profit under

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<sup>120</sup> *Sykes v Cleary* (1992) 176 CLR 77 per Mason CJ, Toohey and McHugh JJ at 98; Brennan at 108, Deane at 116–119, Dawson at 130–131 and Gaudron JJ at 132. The leading judgment was that of the majority (Mason CJ, Toohey and McHugh JJ) (at 95–102), with whom Brennan (at 108), Dawson (at 130–131) and Gaudron JJ (at 132) agreed.

<sup>121</sup> *Sykes v Cleary* (1992) 176 CLR 77 at 95–96.

<sup>122</sup> *Sykes v Cleary* (1992) 176 CLR 77 at 96.

<sup>123</sup> *Sykes v Cleary* (1992) 176 CLR 77 at 97–98.

<sup>124</sup> *Sykes v Cleary* (1992) 176 CLR 77 at 117, citing *Re The Warrego Election Petition (Bowman v Hood)* (1899) 9 QLJ 272 at 278. See also: K Cole, ‘Office of Profit under the Crown and Membership of the Commonwealth Parliament’, Department of the Parliamentary Library, (Issues Brief Number 5), 1993, pp. 5–6.

<sup>125</sup> *Free v Kelly* (1996) 185 CLR 296 involved the claim that Jackie Kelly, the Liberal candidate for the seat of Lindsay at the March 1996 election was disqualified by virtue of ss 44(i) and (iv). She held dual citizenship (Australia and New Zealand) and was an officer of the Royal Australian Air Force at the time of her nomination. However, Kelly conceded her disqualification and hence s 44 was not an issue before the court: *Free v Kelly* (1996) 185 CLR 296 at 301. Some commentators have expressed doubts about whether a concession the breadth of Kelly’s was entirely necessary: A.R. Blackshield, 1997 House of Representatives Committee, *Transcript*, p. 262; and H. Evans (ed.), *Odgers’ Australian Senate Practice*, (8th ed.), AGPS, Canberra, 1997, p. 150.

<sup>126</sup> *Sykes v Cleary* (1992) 176 CLR 77 per Mason CJ, Toohey and McHugh JJ at 98; Deane J at 118.

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the Crown' broadly, holding that it encompasses the Crown in the right of the States. The Court expressly noted the risk of conflict between obligations to their State and duties as a parliamentarian.<sup>127</sup> Although opinions have been proffered on the application of s 44(iv) in various situations, its breadth remains uncertain. It is likely, for example, to apply to ambassadors.<sup>128</sup> Whether s 44(iv) applies to local government councillors and employees has yet to be determined.<sup>129</sup> Does it include employees and members of statutory corporations? What about university staff? The test may simply be to examine whether the position in each particular situation is:

- (1) an office
- (2) of profit
- (3) under the Crown,

but because the Court has not determined the precise meaning and reach of each of these elements, debate continues.<sup>130</sup>

The position of senators-elect is also unclear as no pertinent case has arisen. Following the 1996 election, Jeannie Ferris (a candidate for the Senate) accepted a position as a member of Senator Minchin's staff at a time when the writ for her election had not been returned; she was still technically in the process of being chosen, and was not a senator-elect.<sup>131</sup> Some commentators have argued that s 44(iv) and the principles underlying it apply to senators-elect,<sup>132</sup> and in light of the imprecision of s 44(iv), this is the safe view to adopt.

Section 44(iv) also disqualifies persons holding 'any pension payable during the pleasure of the Crown out of any of the revenues of the Commonwealth'. The dominant interpretation of this limb—supported by the Convention Debates<sup>133</sup>—is that

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<sup>127</sup> *Sykes v Cleary* (1992) 176 CLR 77 per Mason CJ, Toohey and McHugh JJ at 98, citing Quick and Garran, op.cit., at 492–493; Deane J concurring at 118–119. Presumably s 44(iv) also extends to territory public servants, although the court made no specific holding to that effect.

<sup>128</sup> Note the Gair affair of 1974; 1981 Senate Committee, *Report*, pp. 40–41 (particularly Sawyer's view, at p. 41); 1988 Constitutional Commission, op. cit., vol. 1, p. 299.

<sup>129</sup> Australian Electoral Commission, *Electoral Background Number 4: Candidate Disqualifications: Section 44 of the Constitution*, AGPS, Canberra, 1998, p. 8; Cole, op. cit., pp. 19–21.

<sup>130</sup> 1981 Senate Committee, *Report*, pp. 51–53; 1997 House of Representatives Committee, *Report*, pp. 64–66; G. Williams, 1997 House of Representatives Committee, *Transcript*, p. 29.

<sup>131</sup> H. Evans, 'Constitution, s 44: Disqualification of Senators: Senator-Elect Jeannie Ferris', advice to Senator Bolkus, tabled, *CPD* (Senate), vol. 178, 29 May 1996, p. 1254.

<sup>132</sup> 'Letter from Attorney-General Senator Durack to Senator Evans regarding employment of Senator-elect as 'Legislative Assistant'', 1981 Senate Committee, *Report*, Appendix 2; H. Evans, advice to Senator Bolkus, op. cit., at 1253–1255; H. Evans, 1997 House of Representatives Committee, *Submissions*, vol. 1, S50; G. Williams, 1997 House of Representatives Committee, *Transcript*, p. 36.

<sup>133</sup> *Convention Debates*, op. cit., vol. I, pp. 660, 898 (Sir Samuel Griffith).

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it only applies to pensions payable at the discretion of the executive,<sup>134</sup> but does not disqualify recipients of pensions granted under legislation.<sup>135</sup> Although some doubts exist about this interpretation,<sup>136</sup> I believe the narrower reading is to be preferred as this limb serves no real purpose and is of historical interest only.

The proviso to s 44(iv) exempts from the disqualification Commonwealth ministers, state ministers, officers or members of the Queen's navy or army in receipt of pay, half pay, or a pension, and any person in receipt of pay as an officer or member of the Commonwealth naval or military forces whose services are not wholly employed by the Commonwealth. There is confusion about the extent and operation of the exemptions, and doubt about their continuing relevance.

Although the proviso exempts Commonwealth ministers from disqualification,<sup>137</sup> there is some doubt about the position of quasi-ministerial appointments, such as assistant ministers and parliamentary secretaries.<sup>138</sup> It is arguable whether disqualification for holding such an office accords with the aim of limiting executive influence over the Parliament,<sup>139</sup> in light of the exemption of ministers. Further, Professor Howard has noted that the fact that ministers must dually serve as ministers and as representatives highlights the fact that Australia's entire system of cabinet government is premised upon conflict of interest—a principle directly contradicted by s 44(iv).<sup>140</sup>

State government ministers were exempted to allow the Founders—often state parliamentarians themselves—to stand for the Commonwealth Parliament.<sup>141</sup> Thus, for example, s 44(iv) disqualifies teachers and public servants, but not Bob Carr or Richard Court. Contemporaneous service in the Commonwealth and state or territory parliaments would be impracticable and constitutionally inappropriate in the Federal system today. The Founders envisaged that the exemption of state ministers be only

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<sup>134</sup> Such pensions used to apply for certain military posts, but are now defunct: 1981 Senate Committee, *Report*, pp. 57–58.

<sup>135</sup> Cole, *op. cit.*, p. 17; Attorney-General's Department, 1997 House of Representatives Committee, *Submissions*, vol. 1, S169; Australian Electoral Commission, *Electoral Backgrounder Number 4*, *op. cit.*, p. 8.

<sup>136</sup> A.R. Blackshield, 1997 House of Representatives Committee, *Transcript*, pp. 263–264, citing *Laffer v Minister For Justice (WA)* (1924) 35 CLR 325.

<sup>137</sup> *Sykes v Cleary* (1992) 176 CLR 77 per Mason CJ, Toohey and McHugh JJ at 98; *Convention Debates*, *op. cit.*, vol. V, p. 1941–1942 (Sir John Forrest, R.E. O'Connor); W. Harrison Moore, *The Constitution of the Commonwealth of Australia*, (2nd ed), Sweet & Maxwell, Melbourne, 1910, p. 128.

<sup>138</sup> For a historical outline of the issue, see L.F. Crisp, *Australian National Government*, Longman Cheshire, Melbourne, 1978, pp. 384–389; 1981 Senate Committee, *Report*, Chapter 6.

<sup>139</sup> House of Commons Select Committee on Places or Offices of Profit under the Crown, *op. cit.*, p. xiv.

<sup>140</sup> C. Howard, *The Constitution, Power and Politics*, Fontana, Melbourne, 1980, p. 86.

<sup>141</sup> It was envisaged to be only a temporary exemption: *Convention Debates*, *op. cit.*, vol. V, pp. 1941–1942, (Sir John Forrest and R.E. O'Connor).



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temporary, and as the rationale for its existence no longer exists, it should be removed.<sup>142</sup>

In light of Britain's changed relations with Australia, the exemption for officers and members of the Imperial navy and army is clearly no longer appropriate and should be deleted.<sup>143</sup> The exemption for officers and members of the Commonwealth naval or military forces (including the air force<sup>144</sup>) 'not wholly employed by the Commonwealth' is generally interpreted to mean that reservists are exempted from disqualification.<sup>145</sup> The underlying rationale for the disqualification—to prevent any conflict between responsibilities to the armed forces, and to the Parliament and the electorate<sup>146</sup>—remains valid, but a reformulation would resolve its significant ambiguities.<sup>147</sup>

The problems with s 44(iv) may be grouped into three main categories. First, the uncertainty surrounding its interpretation leads to practical problems for the electoral process.<sup>148</sup> Secondly, the office of profit test and the language used in the proviso are complex and archaic. The test is dissonant with modern circumstances where government uses private or semi-private bodies (for instance, Qantas) to undertake activities once the province of the Crown. Thirdly, and most significantly, because of the Court's interpretation of 'chosen', the provision operates unfairly, requiring public servants to resign their employment in order to stand for election and to forgo their income for at least the duration of the campaign. The problem is estimated to affect perhaps twenty percent of the population,<sup>149</sup> and is, therefore, a severe restriction and penalty imposed on candidates. Although legislation guarantees reinstatement in the event of failure, the guarantee is not uniform in all jurisdictions,<sup>150</sup> and there may be constitutional problems with such a guarantee.<sup>151</sup>

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<sup>142</sup> A.R. Blackshield, 1997 House of Representatives Committee, *Transcript*, p. 268.

<sup>143</sup> Sir Maurice Byers, 1997 House of Representatives Committee, *Submissions*, vol. 1, S64–S65.

<sup>144</sup> G. Williams, 1997 House of Representatives Committee, *Transcript*, pp. 35–36.

<sup>145</sup> H. Burmester, 1997 House of Representatives Committee, *Transcript*, p. 68.

<sup>146</sup> 1981 Senate Committee, *Report*, 1981, p. 56.

<sup>147</sup> Sir Maurice Byers, 1997 House of Representatives Committee, *Submissions*, vol. 1, S65; A.R. Blackshield, 1997 House of Representatives Committee, *Transcript*, p. 280.

<sup>148</sup> Senator Minchin, 1997 House of Representatives Committee, *Transcript*, p. 42.

<sup>149</sup> Senator Andrew Murray, 1997 House of Representatives Committee, *Transcript*, p. 16; Deane J put the figure at 'more than 10%' in 1992; *Sykes v Cleary* (1992) 176 CLR 77 at 122.

<sup>150</sup> Australian Electoral Commission, *op. cit.*, pp. 8–11; Attorney-General's Department, 1997 House of Representatives Committee, *Submissions*, vol. 2, S194–S215.

<sup>151</sup> G. Williams, 1997 House of Representatives Committee, *Transcript*, p. 39, citing *Australian Communist Party v Commonwealth (The Communist Party Case)* (1951) 83 CLR 1; Attorney-General's Department, 1997 House of Representatives Committee, *Submissions*, vol. 1, S172, vol. 2, S194.

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The policies behind s 44(iv) are important and should be maintained, but because of its unnecessarily broad scope and unjust operation regarding public sector employees, the provision requires reform. Some commentators have suggested a ‘minimalist’ solution of simply removing the words ‘being chosen or of’ from s 44,<sup>152</sup> but there are problems with this proposal. It does not eliminate the ambiguities in the provision, but simply delays the point at which the problems of interpretation must be resolved, and it allows those disqualified under s 44(ii), (iii) and (v) to be elected to Parliament, and it may lead to abuse through protest candidacies.<sup>153</sup>

Reform comparable to that proposed by the Constitutional Commission should be implemented.<sup>154</sup> That is, s 44(iv) should be deleted and replaced with legislative disqualifications targeting those most at risk of conflicts of loyalty, for example, judicial and legal officers, members of the defence forces, officers of certain public authorities, heads of federal, state, and territory government departments and other senior public servants. Such legislation could make provision for automatic vacation of the office in question at the time of nomination, election, or at the point at which the parliamentary seat is assumed, as appropriate for the particular office. Further, any sitting Commonwealth parliamentarian taking up such a public service position would automatically forfeit his or her seat. This solution eradicates the ambiguities associated with s 44(iv), and affords greater flexibility and equity because the disqualifications can be amended by Parliament to take account of changing circumstances.<sup>155</sup>

### **The interpretation of ‘incapable of being chosen’**

Section 44 provides that any person falling within it ‘shall be incapable of being chosen or of sitting’. The meaning of ‘chosen’ was considered in *Cleary*,<sup>156</sup> where argument revolved around whether it includes all the steps necessary for election, or only the election itself, or alternatively, the declaration of the poll. The majority cited precedent,<sup>157</sup> and policy reasons (clearer elector choice and certainty) to hold that ‘chosen’ refers to ‘the process of being chosen, of which nomination is an essential part.’<sup>158</sup> In a vigorous dissent rejecting the broad interpretation, Deane J considered the content and context of s 44 to find that ‘chosen’ refers to the final stage in the process,

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<sup>152</sup> Liberal Party of Australia, 1997 House of Representatives Committee, *Submissions*, vol. 1, S138–139; Australian Labor Party, 1997 House of Representatives Committee, *Submissions*, vol. 1, S184.

<sup>153</sup> 1997 House of Representatives Committee, *Report*, pp. 75–82; Professor A.R. Blackshield, 1997 House of Representatives Committee, *Transcript*, p. 265; G. Williams, 1997 House of Representatives Committee, *Submissions*, vol. 1, S174; Attorney-General’s Department, 1997 House of Representatives Committee, *Submissions*, vol. 2, S222.

<sup>154</sup> 1988 Constitutional Commission, *op. cit.*, vol. 1, p. 296.

<sup>155</sup> A.R. Blackshield, 1997 House of Representatives Committee, *Transcript*, p. 259.

<sup>156</sup> *Sykes v Cleary* (1992) 176 CLR 77 per Mason CJ, Toohey and McHugh JJ at 99–101; Deane J at 119–125.

<sup>157</sup> *Harford v Linskey* [1899] 1 QB 852 per Wright J (Bruce J concurring) at 858.

<sup>158</sup> *Sykes v Cleary* (1992) 176 CLR 77 at 100, Brennan, Dawson and Gaudron JJ agreeing (108, 130,132).

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the declaration of the poll.<sup>159</sup> In reaching his narrow interpretation, his Honour found *Harford* to be ‘quite unpersuasive’, because *inter alia*, the wording and purposes of s 44(iv) and the provision in *Harford* differed significantly.<sup>160</sup> Deane J also distinguished the process of statutory interpretation from constitutional interpretation.<sup>161</sup> Finally, his Honour took practical considerations into account to find that the broad interpretation would ‘confine the democratic rights of many citizens’ to stand for Parliament.<sup>162</sup>

*Cleary* was an opportunity for the Court to avoid the harsher effects of s 44. Blackshield has termed as ‘unfortunate’ the majority’s interpretation of ‘chosen’,<sup>163</sup> and Williams has noted that the policy of s 44(iv) only applies upon election to Parliament, not to the pre-election period.<sup>164</sup> The majority’s interpretation of ‘chosen’<sup>165</sup> exacerbates the unjust exclusionary effects of s 44 upon the Australian polity, and further justifies constitutional reform.

#### **Section 44(v): contracts with the executive and conflicts of interest**

Section 44(v) disqualifies any person who has ‘any direct or indirect pecuniary interest in any agreement’ with the Public Service of the Commonwealth otherwise than as a member of a company consisting of more than twenty-five persons. The provision is designed to prevent the executive exerting a corrupting influence over parliamentarians and to prevent conflicts of interest.

The purpose of s 44(v) is to protect the Parliament. This purpose is fulfilled in two ways. The first was expressly recognised by Barwick CJ in *Re Webster* as securing ‘the freedom and independence of the Parliament from the Crown and its influence’.<sup>166</sup> The second, manifest in the Convention Debates<sup>167</sup> and deducible from the wording of

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<sup>159</sup> *Sykes v Cleary* (1992) 176 CLR 77 at 120–125.

<sup>160</sup> *Sykes v Cleary* (1992) 176 CLR 77 at 124. In addition to Deane J’s reasons for rejecting *Harford*, it should also be noted that Wright and Bruce JJ expressly limited their decision in *Harford* to cases of local government elections under the *Municipal Corporations Act 1882* (UK); *Harford v Linskey* [1899] 1 QB 852 at 858.

<sup>161</sup> *Sykes v Cleary* (1992) 176 CLR 77 at 121, 124–125.

<sup>162</sup> *Sykes v Cleary* (1992) 176 CLR 77 at 122–125. A consequence recognised by the majority at 101.

<sup>163</sup> A.R. Blackshield, 1997 House of Representatives Committee, *Transcript of Hearings*, p. 260.

<sup>164</sup> G. Williams, 1997 House of Representatives Committee, *Transcript*, p. 26; *contra* Associate Professor Gerard Carney, 1997 House of Representatives Committee, *Submissions*, vol. 1, S154.

<sup>165</sup> Followed by Brennan CJ in *Free v Kelly* (1996) 185 CLR 296 at 301. See also *Free v Kelly*, S94/1996, Transcript of Proceedings, 2 August 1996, pp. 3–7 (R.E. Williams QC).

<sup>166</sup> *Re Webster* (1975) 132 CLR 270, at 278, citing ‘the precise progenitor’ of s 44(v), the House of Commons *Disqualification Act, 1782*, 22 Geo III c 45, s 1. See also Quick and Garran, *op. cit.*, p. 493.

<sup>167</sup> ‘The object of the clause is to prevent individuals making a personal profit out of their public positions’, *Convention Debates*, *op. cit.*, vol. II, pp. 1023 (Isaac Isaacs).

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s 44(v),<sup>168</sup> is to prevent use of the parliamentary office for personal gain, conflicts between public duty and private interest, and the appearance thereof.<sup>169</sup> Barwick CJ's dictum that 'in its construction and application, the purpose it seeks to attain must always be kept in mind',<sup>170</sup> suggests that the recognition of both purposes must affect the interpretation of s 44(v).<sup>171</sup>

### *Webster's Case*

Section 44(v) was considered at length in *Webster* by Barwick CJ sitting alone as the Court of Disputed Returns. In his Honour's view, to fall within s 44(v) there must be an agreement which 'must have a currency for a substantial period of time', and it 'must be one under which the Crown could conceivably influence the contractor in relation to parliamentary affairs'.<sup>172</sup>

*Webster* involved Country Party Senator James Joseph Webster, one of nine shareholders in, Managing Director and Secretary of, JJ Webster Pty Ltd. Agreements for the supply of timber from his firm to government departments stretched back to 1964,<sup>173</sup> coincidentally the year he entered the Senate. In a narrow judgment, confined to the facts before him, Barwick CJ held that Webster's dealings did not fall within s 44(v), because, first, they consisted of a series of small, discrete contracts, and second, in his Honour's estimation, the Crown would be incapable of exerting any influence in parliamentary affairs by anything it could do in relation to the agreement.<sup>174</sup> Having decided in Webster's favour, Barwick CJ considered the proviso to s 44(v) relating to membership of a company, holding that mere shareholding in a company does not alone create a pecuniary interest in any agreement the company may have with the Public Service. Although Barwick CJ found that 'other circumstances' may possibly combine with a shareholding to create a pecuniary interest, such circumstances were held not to exist in *Webster*.<sup>175</sup>

Barwick CJ exonerated Senator Webster through an adroit use of technical principles of contract, and a narrow interpretation of the Constitution. Accordingly, the decision

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<sup>168</sup> 'Pecuniary interest': a term used to regulate conflicts of interest and duty: 1981 Senate Committee, *Report*, p. 77.

<sup>169</sup> Although rejected by Barwick CJ in *Webster* (at 278–279), Hanks has argued that this second purpose may be deduced from the 1890s Convention Debates, and from the drafting history of s 44(v); P.J. Hanks, 'Parliamentarians and the Electorate', in G. Evans, *Labor and the Constitution: 1972–1975*, Heinemann, Melbourne, 1977, pp. 196–197. See further, J.D. Hammond, 'Pecuniary Interest of Parliamentarians: a Comment on the Webster Case', *Monash Law Review* vol. 3, 1976, p. 91.

<sup>170</sup> *Re Webster* (1975) 132 CLR 270 per Barwick CJ at 278.

<sup>171</sup> G. Evans, *Labor and the Constitution: 1972–1975*, Heinemann, Melbourne, 1977, p. 197.

<sup>172</sup> *Re Webster* (1975) 132 CLR 270 at 280.

<sup>173</sup> *Re Webster* (1975) 132 CLR 270 at 271.

<sup>174</sup> *Re Webster* (1975) 132 CLR 270 at 280–286.

<sup>175</sup> *Re Webster* (1975) 132 CLR 270 at 287.

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has been subjected to significant and valid criticism.<sup>176</sup> Hammond has argued that in choosing to exclude the conflict of interest purpose, Barwick CJ's view of the objects and operation of s 44(v) is flawed.<sup>177</sup> Hanks argues that the wording of the provision and its drafting history suggest that s 44(v) was intended to go behind the corporate veil and catch corporate contracting.<sup>178</sup> In light of a fuller consideration of the Convention Debates,<sup>179</sup> Barwick CJ's conception of the purpose and scope of s 44(v) is unduly restrictive, and that it effectively denudes the words 'direct and indirect pecuniary interest', and the proviso of any meaning.

*Contemporary operation, problems, and proposals*

Although s 44(v) has been deprived of most of its efficacy by *Webster*, the 1981 Senate Committee has noted that a range of ordinary transactions (such as government insurance and loans, and acquisition of government property) could still potentially

fall afoul of s 44(v).<sup>180</sup> More significantly, conflict between public duties and indirect pecuniary interests is not addressed under the current interpretation of the provision: an acute problem given the quantity of business carried on through corporate structures.

The deficiencies of s 44(v) were highlighted recently by allegations raised in Parliament that Mr Warren Entsch MP,<sup>181</sup> a shareholder, director and company secretary of Cape York Concrete Pty Limited, was disqualified by virtue of s 44(v) because of contracts for the supply of concrete—totalling \$175,500—concluded between the company and the Department of Defence in 1999.<sup>182</sup> Although vindicated by the Acting Solicitor-General citing *Webster*,<sup>183</sup> legal opinions about Entsch's position differed. A contrary opinion suggested that should s 44(v) arise for reconsideration by the court, Barwick CJ's exposition would be rejected in favour of a

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<sup>176</sup> *Declaration of Interests: Report of the Joint Committee on Pecuniary Interests of Members of Parliament*, AGPS, Canberra, 1975; *Public Duty and Private Interest: Report of the Committee of Inquiry*, AGPS, Canberra, 1979; P.J. Hanks, 'Parliamentarians and the Electorate', in G. Evans, *Labor and the Constitution: 1972–1975*, Heinemann, Melbourne, 1977; G. Evans, 'Pecuniary Interests of Members of Parliament under the Australian Constitution', *Australian Law Journal* vol. 49, 1975, p. 464; Hammond, op. cit., p. 91.

<sup>177</sup> Hammond, op. cit., p. 99.

<sup>178</sup> G. Evans, *Labor and the Constitution*, op. cit., pp. 197–198.

<sup>179</sup> The full Court has subsequently held that the Convention Debates are admissible: *Cole v Whitfield* (1988) 165 CLR 360 at 385.

<sup>180</sup> 1981 Senate Committee, *Report*, p. 79.

<sup>181</sup> Member for Leichhardt, Parliamentary Secretary to the Minister for Industry, Science and Resources.

<sup>182</sup> *CPD* (H of R), vol. 226, 9 June 1999, pp. 6479, 6481.

<sup>183</sup> *CPD* (H of R), vol. 226, 9 June 1999, p. 6480; H. Burmester, *Section 44(v) of the Constitution—Possible Disqualification of a Member* (Legal Opinion), 9 June 1999.

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broader interpretation.<sup>184</sup> Such an interpretation would entail a liberal construction of ‘agreement’ (encompassing short-term contracts), giving efficacy to ‘direct or indirect pecuniary interest’, and a recognition that the provision captures shareholder interests.<sup>185</sup> In light of the Court’s recent broader interpretation of paragraphs (i) and (iv) of s 44 in *Cleary and Hill*, and the admissibility of the Convention Debates, it is probable that the Court would recognise the conflict of interest aim, and apply a more purposive, less technical, construction of s 44(v).

Parliamentary disqualifications should provide for regulation of executive influence and conflicts of interest. Nonetheless, as part of any wholesale proposal to reform s 44, I suggest the deletion of s 44(v) (and s 45(iii))<sup>186</sup> and its replacement with a provision empowering the Parliament to legislate with respect to the direct or indirect pecuniary interests of parliamentarians. The 1981 Senate Committee<sup>187</sup> and the Constitutional Commission<sup>188</sup> recommended similar changes, and as uncertainty has grown in the intervening years, the impetus for reform is now even more stark. This proposal affords flexible and relevant rules, recognising the changes over the last century in types of pecuniary interest. Clear legislative provisions will improve the efficacy of the disqualification and will avoid the problems of interpretation that have plagued s 44(v).

#### THE WAY FORWARD

Section 44 goes to the heart of Australian representative democracy. Increased litigation in the past decade has highlighted its inherent problems, necessitating its re-examination. It has justifiably been termed ‘an obscure and antiquated area’ of the law.<sup>189</sup> The need to have simple and unambiguous disqualification provisions is a central concern of electoral law,<sup>190</sup> yet largely as a result of its nineteenth century origins, a degree of uncertainty surrounds the interpretation of s 44. In light of the unfair discrimination perpetuated by s 44 against dual citizens and public servants, the provision constitutes a blot on contemporary Australian law. Some commentators have noted that it is objectionable on civil rights grounds. As demonstrated above, serious constraints on eligibility have a deleterious effect on the choice afforded to the electors

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<sup>184</sup> S. Gageler, *In the Matter of the Honourable Warren George Entsch MP and Section 44(v) of the Constitution* (Legal Opinion), 10 June 1999.

<sup>185</sup> Gageler, *ibid*, pp. 12–13.

<sup>186</sup> Section 45(iii) deals with related issues and was extensively considered by the 1981 Senate Committee: 1981 Senate Committee, *Report*, pp. 80–90.

<sup>187</sup> 1981 Senate Committee, *Report*, pp. xi, 86.

<sup>188</sup> 1988 Constitutional Commission, vol. 1, p. 302.

<sup>189</sup> C. Howard, *Australian Federal Constitutional Law*, (3rd ed.), Law Book Company, Sydney, 1985, p. 74.

<sup>190</sup> Sir Maurice Byers has stated that ‘Certainty in the conduct of the affairs of the Parliament is essential to the well-being of the nation’: 1997 House of Representatives Committee, *Submissions*, vol. 1, S62.

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and thus potentially on the quality of Australia's parliamentarians. The extent of these constraints brings s 44 into conflict with the principle of representative democracy.

As a solution to the problems of s 44, I have proposed wholesale revision of the disqualification provisions, using legislative, as opposed to constitutional, disqualifications. The proposed reform gives effect to two main principles: first, that some disqualifications are necessary to protect the Parliament, and second, that as few citizens as possible should be ineligible for Parliament, in order to afford maximum elector choice. Naturally, such amendments would require approval at a referendum. It is hoped that the injustices and the unsatisfactory nature of the current system would be recognised by the Australian people.

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## APPENDIX

### THE CONSTITUTION

#### Disqualification

**44.** 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 Minister 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.

#### Vacancy on happening of disqualification

**45.** If a senator or member of the House of Representatives:

- (i) becomes subject to any of the disabilities mentioned in the last preceding section; or
- (ii) takes the benefit, whether by assignment, composition, or otherwise, of any law relating to bankrupt or insolvent debtors; or
- (iii) directly or indirectly takes or agrees to take any fee or honorarium for services rendered to the Commonwealth, or for services rendered in the Parliament to any person or State;

his place shall thereupon become vacant.