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Foreign Allegiance: A Vexed Ground of Parliamentary Disqualification

Abstract
Public disillusionment with the major political parties has had a profound effect on the Australian political landscape during the last decade of the twentieth century. Most significant has been the increased number of independents elected to Australian parliaments resulting in the formation of minority governments in several States. Such a political climate encourages a sharper focus on the grounds of disqualification prescribed for candidates and sitting members of parliament. While often ignored in the past, either deliberately or accidentally, this is unlikely to continue. Such grounds have the potential to destabilize the political process by undermining slim government majorities or the election of crucial independent members. Given these risks, all grounds of disqualification in relation to members of parliament should be revised to ensure they are justified and clearly understood.

This article selects for revision that ground of disqualification concerned with foreign allegiance.

Keywords
parliamentary disqualification, foreign allegiance, Sykes v Cleary, Sue v Hill

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FOREIGN ALLEGIANCE: A VEXED GROUND OF PARLIAMENTARY DISQUALIFICATION

*By Gerard Carney**

Public disillusionment with the major political parties has had a profound effect on the Australian political landscape during the last decade of the twentieth century. Most significant has been the increased number of independents elected to Australian parliaments resulting in the formation of minority governments in several States. Such a political climate encourages a sharper focus on the grounds of disqualification prescribed for candidates and sitting members of parliament. While often ignored in the past, either deliberately or accidentally, this is unlikely to continue. Such grounds have the potential to destabilize the political process by undermining slim government majorities or the election of crucial independent members. Given these risks, all grounds of disqualification in relation to members of parliament should be revised to ensure they are justified and clearly understood.

This article selects for revision that ground of disqualification concerned with foreign allegiance. Not only has it been the subject of contemporary High Court interpretation in *Sykes v Cleary*[1] and *Sue v Hill*,[2] but it also highlights the difficulties involved in assessing the appropriateness of a ground which evolved at a much earlier time in Australia's history.

The obvious rationale for this ground of disqualification is the avoidance of an actual or perceived split-allegiance or divided loyalty on the part

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1 (1992) 176 CLR 77.

2 (1999) 163 ALR 648.

of members of parliament.[3] Its historical origin appears to lie in section III of the *Act of Settlement* 1701 (Imp) which disqualified those born outside the Kingdoms of England, Scotland and Ireland and the Dominions from holding office in the Privy Council or the Parliament, and from holding any office of trust under the Crown.[4] In Australia, since federation, the nature of such a conflict of interest has clearly altered with the demise of the British Empire and the emergence of Australia as a sovereign independent nation. Moreover, the modern phenomenon of globalisation further challenges the perception of dual or multiple citizenship as inimical to the 'national interest'. Whether this ground of disqualification ought to be retained in some form must be assessed in the light of these developments to ensure that it responds to the requirements of the new millenium rather than those at federation.

In reviewing the position both at the Commonwealth and State level, it is important to distinguish between the position of candidates and sitting members. Significantly, the ground of disqualification is most rigorous in relation to the Commonwealth Parliament. This may well be justified as the national parliament.

Commonwealth

Under s 44(i) of the Commonwealth Constitution, various forms of foreign allegiance disqualify candidates from election to the Commonwealth Parliament:

> (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:

3 See the Senate Standing Committee on Constitutional and Legal Affairs, *Report on the Constitutional Qualifications of Members of Parliament*, PP131/1981, par 2.14.

4 Prior to 1701, aliens were disqualified at common law: D Limon & W McKay (eds), *Erskine May's Treatise on The Law, Privileges, Proceedings and Usage of Parliament*, 22nd ed, 1997, at 40.

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A candidate is disqualified if any of these forms of allegiance exist from the date of nomination[5] until he or she becomes a member. Similarly, if they arise after becoming a member, the member' s seat becomes vacant under s 45(i). Accordingly, candidates and members of the Commonwealth Parliament are liable to disqualification on the same grounds whereas the position as noted below differs in relation to State Parliaments.

There are two principal limbs to this ground in s 44(i).

5 See above n 1.

First Limb

The first limb – 'under any acknowledgment of allegiance, obedience, or adherence to a foreign power' – requires an *acknowledgment* of foreign loyalty. This may be a formal or informal acknowledgment.[6] In view of the second limb of this paragraph, this limb includes acts of acknowledgment other than those given by a subject or citizen of a foreign power or by those entitled to the rights or privileges thereof.

An 'acknowledgment' for the purposes of this first limb would appear to cover: acceptance of a foreign passport;[7] service in one of the foreign armed forces;[8] taking an oath of allegiance to a foreign power (not a subject or citizen of that state);[9] seeking the protection of a foreign state; or even describing oneself in an official document as a citizen or subject of a foreign state.[10] But this limb appears not to extend to an appointment as an honorary consul or the acceptance of a foreign award or honour,[11] nor to owing a 'local allegiance' which arises by virtue of temporarily residing in a foreign country.[12]

Second Limb

The second limb prescribes two grounds of disqualification:

> 'a subject or a citizen [of a foreign power]';
>
> 'or entitled to the rights or privileges of a subject or a citizen of a foreign power'.

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6 *Nile v Wood* (1986) 167 CLR 133 at 140. The Court cited *Crittenden v Anderson* unreported decision of Fullagar J on 23 August 1950, noted in (1977) 51 ALJ 171, and Quick & Garran, *The Annotated Constitution of the Australian Commonwealth*, 1901 at 490-1; Official Report of the National Australasian Convention Debates, Adelaide 1897, at 736.

7 R D Lumb, *The Constitution of the Commonwealth of Australia-Annotated*, Butterworths (4th ed 1986) at par 167; see also 5th ed 1995 at par 171.

8 Ibid.

9 Michael Pryles, 'Nationality Qualifications for Members of Parliament' (1982) 8 *Monash University Law Review* 163 at 177.

10 Ibid at 174.

11 See above n 7.

12 See above n 9 at 178.

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The distinction in the first ground between a 'subject' and 'citizen' is no longer significant; it reflected the distinction in 1900 between a subject in a monarchy and a citizen in a republic.[13] At common law and in accordance with international law, citizenship is determined according to the law of the state of which citizenship is in issue.[14] Hence, the application of the second limb will usually be determined according to foreign law.

As for the other ground of disqualification, 'entitled to the rights and privileges' of a subject or citizen of a foreign power, this will apply to persons who, although not in law a subject or citizen, have similar rights, for example, as a permanent resident or even as a refugee. It is unclear whether the entitlement must be to *all* the rights and privileges of a subject or citizen or whether some reduction is allowed. Presumably, the test must be, at least, that the rights and privileges are substantially similar. It also appears that a right to acquire a foreign citizenship is insufficient as the rights and privileges must be presently enjoyed.[15]

Although foreign citizenship and rights equivalent thereto are determined according to the law of the foreign state, the High Court held in *Sykes v Cleary* that for the purpose of s 44(i) an attempt in Australia to renounce foreign citizenship or rights is not entirely dependent on foreign law. A majority of the Court[16] excluded from the operation of the second limb those who, in accordance with the law of the foreign state, take 'all reasonable steps to divest [themselves] of any conflicting allegiance'. That the requirement is to take 'all reasonable steps' overcomes those cases where, according to foreign law, divestment is not permitted or depends on an official act which is requested but not performed. According to the majority,[17] both the second respondent, Mr Delacretaz, and the third respondent, Mr Kardamitsis, had not taken all

13 Quick & Garran, *The Annotated Constitution of the Australian Commonwealth*, 1901, at 957.
14 See above n 1 at 105-106, 135.
15 See above n 9 at 179.
16 See above n 1 at 107-108, per Mason CJ, Toohey and McHugh JJ; at 113, per Brennan J; at 131-132, per Dawson J. Deane J in dissent agreed with the test at 128.
17 Ibid at 108, per Mason CJ, Toohey and McHugh J.

reasonable steps to divest themselves of their respective Swiss and Greek citizenship as neither had applied for an official release of their citizenship.

Both Deane and Gaudron JJ in separate judgments dissented on the ground that reasonable steps had been taken to renounce their foreign citizenship.[18] Their Honours accorded less significance to the foreign law in deciding what constituted reasonable steps. In the view of Deane J (Gaudron J expressing a similar view), Mr Kardamitsis had done all that was reasonably expected of him to renounce his Greek nationality by renouncing that nationality upon obtaining Australian citizenship in 1975, by taking an oath of allegiance to Australia, and by giving up his Greek passport. In being required to take that oath and give up his Greek passport in order to obtain Australian citizenship, a clear representation had been made to Mr Kardamitsis by the Australian Government that he had formally renounced his foreign citizenship. A relevant factor only in his case was that acceptance in Greece of an application to renounce Greek citizenship required the favourable exercise of a ministerial discretion. As regards Mr Delacretaz, despite his ability to simply renounce Swiss citizenship under Swiss law by making the necessary application, his Honour reached the same conclusion after taking into account his thirty years of Australian citizenship since 1960, lack of a residence in Switzerland and acquisition of Australian nationality.

Gaudron J considered the foreign law only relevant when there has been no renunciation of or other reasonable steps taken to renounce foreign citizenship, or where it has been reasserted after a renunciation. Whether reasonable steps have been taken is determined by Australian law. A formal renunciation would be regarded as sufficient.[19]

In relation to members incurring disqualification after being elected, Deane J interpreted both limbs of s 44(i) as requiring some act of acceptance or acquiescence by the person concerned. While this is implicit in the first limb which refers to 'acknowledge', it was also to be implied in the second limb. This approach is particularly important for Australian citizens who develop an association with a foreign state. It

18 Ibid at 128-130, per Deane J; at 139-140, per Gaudron J.
19 Ibid at 139-140, per Gaudron J.

prevents a foreign state from unilaterally disqualifying members or Australian citizens from membership of the Commonwealth Parliament by conferring rights upon them without their consent.

Foreign Power

The current interpretation of 'foreign power' in both limbs of s 44(i) appears to be any polity or state recognised under international law other than the Commonwealth of Australia. Furthermore, it can be said that it refers to a polity whose citizens owe allegiance to that polity rather than to Australia. This would not have been the interpretation of 'foreign power' in 1901. Then it would have referred to those states outside the British Empire whose subjects owed allegiance to a sovereign other than the Crown of the United Kingdom. At that time, all subjects of the British Empire including those resident in Australia owed allegiance to Queen Victoria as an indivisible Crown.

However, Australia's constitutional relationship with the United Kingdom, like that of the other dominions, evolved throughout the twentieth century. At some stage between the First and Second World Wars,[20] Australia acquired international status as an independent polity, eventually assuming full responsibility for the conduct of its own diplomatic relations. This development was accompanied by a recognition that the Crown was no longer indivisible - the Crown in right of Australia developed as a distinct entity from the Crown in right of the United Kingdom. Consequently, there arose an Australian citizenship which owed allegiance to the Sovereign of the United Kingdom as the Crown in right of Australia. Also significant was the gradual renunciation of power by the United Kingdom Parliament and Government first over the Commonwealth and later over the States. This involved, in particular, the principle that the sovereign would act only on the advice of her Australian ministers in relation to Australia. This process was completed by the *Australia Acts* 1986 which declared the

20 See *Bonser v La Maccia* (1969) 122 CLR 177 at 189, per Barwick CJ. See also: J G Starke, 'The Commonwealth in International Affairs' in Else-Mitchell (ed), *Essays on The Australian Constitution*, Law Book Co (1961) at 348; Michael Pryles, *Australian Citizenship Law*, 1981 at 23; Michael Pryles, 'Nationality Qualifications for Members of Parliament' (1982) 8 *Monash University Law Review* 163 at 180-184.

termination of all United Kingdom legal and constitutional power over Australia.

All of these stages in Australia's constitutional evolution were relied on by a majority of the High Court in *Sue v Hill*[21] in holding that the United Kingdom was, at least from the enactment of the *Australia Acts* in 1986, a 'foreign power' within s 44(i). The joint judgment of Gleeson CJ, Gummow and Hayne JJ observed:

> Australia and the United Kingdom have their own laws as to nationality so that their citizens owe different allegiances. The United Kingdom has a distinct legal personality and its exercise of sovereignty, for example on entering military alliances, participating in armed conflicts and acceding to treaties such as the Treaty of Rome, themselves have no legal consequences for this country. Nor, as we have sought to demonstrate in Section III, does the United Kingdom exercise any function with respect to the governmental structures of the Commonwealth or the States.[22]

The Court acknowledged that the denotation of 'foreign power' had changed to include those countries formerly part of the British Empire including the United Kingdom itself:

> Whilst the text of the Constitution has not changed, its operation has. This reflects the changed identity of those upon whose advice the sovereign accepts that he or she is bound to act in Australian matters by reason, among other things, of the attitude taken since 1926 by the sovereign's advisers in the United Kingdom. The Constitution speaks to the present and its interpretation takes account of and moves with these developments.[23]

Despite the uncertainty as to when this change in denotation precisely occurred, the majority had no doubt that it occurred at least upon enactment of the *Australia Acts* in 1986. As Gaudron J put it:

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21 See above n 2.
22 Ibid at par 96.
23 Ibid at par 78.

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> At the very latest, the Commonwealth of Australia was transformed into a sovereign, independent nation with the enactment of the *Australia Acts*. The consequence of that transformation is that the United Kingdom is now a foreign power for the purposes of s 44(i) of the Constitution.

It seems that the United Kingdom and the other Dominions became 'foreign' before 1986. One possibility is that it occurred on the introduction of Australian citizenship by the *Australian Citizenship Act* 1948 (Cth). If that is so, it casts doubt on the validity of s 69 of the *Commonwealth Electoral Act* 1918 (Cth) which until 1984 permitted British subjects to stand for election to the Commonwealth Parliament.

In *Sue v Hill*,[24] two electoral petitions were brought against the election to the Senate in 1998 from Queensland of Ms Heather Hill, a *Pauline Hanson's One Nation Party* candidate. Her election was challenged on the ground that she was at the time of her nomination a citizen of the United Kingdom and hence a subject of a 'foreign power' within s 44(i).[25] The only issue was whether the United Kingdom was a 'foreign power' within s 44(i). The conclusion of the majority that it was, was unsurprising, particularly in view of the Court's earlier decision in *Nolan v Minister for Immigration and Ethnic Affairs*[26] that a British subject was an alien within the Commonwealth's 'naturalization and aliens' power in s 51(xix). In that case, the High Court acknowledged that the denotation of 'alien' had changed since federation to include British subjects as a result of the 'emergence of Australia as an independent nation, the acceptance of the divisibility of the Crown which was implicit in the development of the Commonwealth as an association of independent nations and the creation of a distinct Australian citizenship'.[27] The same transformation occurred in relation to 'office

24 Ibid: 2 petitions – S179 of 1998 and B49 of 1998.

25 She was also an Australian citizen.

26 (1988) 165 CLR 178. See also P H Lane (ed), *Lane's Commentary on The Australian Constitution*, Law Book Co (2nd ed, 1997) at 9 and 106 who refers to Canada and New Zealand as well as the United Kingdom as foreign powers for the purpose of s 44(i). Cf the definition of 'foreign country' in s 22(1)(f) of the *Acts Interpretation Act* 1901 (Cth) to mean 'any country (whether or not an independent sovereign state) outside Australia and the external Territories.'

27 Ibid at 185-186.

of profit under the Crown' in s 44(v) which is now confined to the Crown in right of Australia at the federal and State level[28] and so with 'foreign power' in s 44(i).

What was surprising in *Sue v Hill* were the dissents of McHugh, Kirby and Callinan JJ on the ground that the High Court sitting as the Court of Disputed Returns did not have jurisdiction under the *Commonwealth Electoral Act* to hear a petition which, as McHugh J put it, 'raises the bare question whether a member of the federal Parliament was constitutionally qualified to stand for election.'[29]

It is appropriate to note here the curious challenge brought under s 44(i) to the election of a Roman Catholic to the House of Representatives in 1949. In *Crittenden v Anderson,*[30] the respondent's election was challenged on the basis that as a Roman Catholic, he was disqualified for being 'under acknowledgment of adherence, obedience and/or allegiance to a foreign power', namely, the Papal State. Noting its effect would be to disqualify all Roman Catholics from the Commonwealth Parliament, Fullagar J relied on s 116 of the Commonwealth Constitution to reject the challenge on the basis that it amounted to a religious test which s 116 prohibited as a 'qualification for any office or public trust under the Commonwealth'. Moreover, Fullagar J observed that the ban on Roman Catholics sitting in the United Kingdom Parliament was revoked in 1829.[31] Another approach might have been to distinguish the Papal State as a foreign power from the Roman Catholic Church in Australia and thereby distinguish the secular allegiance to a foreign power which s 44(i) refers to from the *religious* obligation attaching to membership of the Roman Catholic Church.

Assessment

28 See above n 1 at 118-119, per Deane J. See *also McM v C (No 2)* [1980] 1 NSWLR 27.

29 See above n 2 at par 184, per McHugh J; at pars 261-268, per Kirby J; at par 287, per Callinan J (agreed with McHugh J).

30 Unreported decision of Fullagar J on 23 August 1950, noted in (1977) 51 ALJ 171.

31 10 Geo IV c 7 s 2.

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In the light of *Sykes v Cleary*, several issues arise in relation to this ground of disqualification. Is dual citizenship or other foreign allegiance a legitimate basis for disqualification? If so, what should be the parameters of this disqualification? Should it be prescribed by the Constitution or in ordinary legislation?

To remove this disqualification altogether leaves open the possibility of actual or perceived divided loyalty. Clearly, the appearance of divided loyalty on the part of a prime minister or minister with dual citizenship is most undesirable. While not as serious, candidates and members should also avoid any perceived conflict of interest. This accords with the view expressed in the 1997 House of Representatives Report that ' [i]t is essential that new members of parliament owe allegiance and loyalty only to the parliament and the people of Australia' .[32]

A different position could well be justified at the State level where, for instance, the Joint Committee on the ICAC recommended[33] the repeal of a similar disqualification in s 13A of the *Constitution Act* 1902 (NSW) for two reasons: foreign allegiance hardly posed a serious conflict of interest; and disqualification was too grave a penalty especially when it arose in innocent circumstances.

Similar recommendations had earlier been made for the repeal of s 44(i) by the 1981 Senate Report[34] and the Constitutional Commission[35] on the basis that persons with dual citizenship should be allowed to stand for Parliament. But what motivated this recommendation was the impossible position they thought s 44(i) placed candidates who discovered that their foreign citizenship could not be renounced or whose attempts to renounce were frustrated by the foreign state. To avoid these difficulties, the Senate Report recommended that it should be sufficient for a candidate to take ' every step reasonably open' to divest the foreign nationality. As has been seen, this recommendation was actually given effect to by the decision in *Sykes v Cleary*.

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32 In its report entitled, *Aspects of Section 44 of the Australian Constitution - Subsections 44(i) and (iv)*, ('the 1997 House of Representatives Report') July 1997 par 2.114.

33 *Inquiry Into Section 13A Constitution Act 1902*, 1998 pars 5.1-5.20.

34 Ibid at pars 2.19-2.20.

35 *Final Report of the Constitutional Commission* 1988 par 4.797.

While the retention of this ground of disqualification may be justified, there are difficulties with its operation. They include: the problem of unknown citizenship[36] or allegiance; the uncertainty of the *Sykes v Cleary* test of taking all reasonable steps to renounce the foreign allegiance; and various uncertainties in the scope of both limbs of the ground.[37] These uncertainties expose members to electoral challenges which may frustrate the functioning of Parliament especially when the government majority is slight.[38]

One suggestion to resolve these difficulties is to relocate the ground of disqualification in legislation whereby its parameters may be redefined by Parliament. The 1997 House of Representatives Report recommended this be done by repealing s 44(i); inserting a constitutional requirement of Australian citizenship for candidates and members; and conferring on Parliament a power to prescribe disqualification of foreign allegiance.[39] The Report recommended two possible options: prohibit candidates from taking advantage of foreign citizenship; or require their renunciation of dual citizenship. The latter resembles the present scope of s 44(i).[40]

To overcome the difficulty of unknown foreign citizenship, Parliament might require a renunciation of all unknown foreign allegiance at the time of nominating. This ought to be a sufficient declaration for the purpose of assuring the Australian people of the undivided loyalty of its elected representatives.

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36 See the 1997 House of Representatives Report at par 2.10 which cites that according to the Department of Immigration and Multicultural Affairs there are up to 5 million Australians with dual nationality. Many of these may be unaware of their dual nationality. See also Michael Pryles, 'Nationality Qualifications for Members of Parliament' (1982) 8 *Monash University Law Review* 163 at 173-174.

37 For example: foreign pension rights and social security rights may satisfy the second limb (par 2.17 of the 1997 House of Representatives report).

38 See the 1997 House of Representatives Report at pars 2.7-2.10 and the evidence given by Professor Blackshield of a suggested challenge to Prime Minister Hawke in the 1980s over his status as an honorary citizen of Israel (par 2.19).

39 Ibid at 43.

40 Ibid at par 2.107.

There remains to consider the position where disqualification arises if a member accepts foreign citizenship or exercises any privileges of foreign citizenship after election to Parliament. This is clearly more undesirable than a candidate having dual citizenship because it indicates that the member is not focused on the interests of the electorate. It reveals an active rather than a dormant interest in the affairs of a foreign state. Hence, the appearance of a conflict of interest is heightened. Presumably for this reason, most State Constitutions while not prescribing this disqualification for candidates do so for members.

Whether or not this ground of disqualification is removed, there is considerable support for the view that the requirement of Australian citizenship be a continuing qualification.[41] At present, it is only a requirement of the *Commonwealth Electoral Act* to nominate for an election. Loss of Australian citizenship after being elected does not disqualify the member although it ought to.[42]

Instead of disqualifying those with a foreign allegiance, an alternative approach is to require candidates and members simply to declare any foreign allegiance of which they are aware to a register of interests or on an ad hoc basis. This treats a foreign allegiance as raising just another potential conflict of interest like a pecuniary interest.[43]

States

All of the States[44] (except Victoria) prescribe a disqualification similar to s 44(i) of the Commonwealth Constitution but only in respect of sitting

41 cl 72(1)(c) Parliament of Queensland Bill disqualifies a member who 'stops being an Australian citizen'.

42 The Structure of Government Sub-Committee at the 1985 Australian Constitutional Convention in Brisbane recommended disqualification if the member gives up Australian citizenship but left the matter otherwise to the Parliament to resolve: Vol II recommendation 3 at 1. The Convention itself resolved differently: Official Record of Debates Item No. B7 at 397.

43 This is in effect the recommendation of the NSW Joint Committee on the ICAC: *Inquiry Into Section 13A Constitution Act 1902* at par 5.20.

44 s 13A(b) *Constitution Act* 1902 (NSW); s 7(1) *Legislative Assembly Act* 1867 (Qld), cl 72(1)(h) Parliament of Queensland Bill; s 17(1)(b)(c) and s 31(1)(b)(c) *Constitution Act* 1934 (SA); s 34(b)(c) *Constitution Act* 1934 (Tas); s 38(f) *Constitution Acts Amendment Act* 1899 (WA).

members, not candidates.[45] Typical of the State constitutional provisions is s 13A(b) of the New South Wales Constitution:

> (b) takes any oath or makes any declaration or acknowledgment of allegiance, obedience or adherence to any foreign prince or power or does or concurs in or adopts any act whereby he may become a subject or citizen of any foreign state or power or become entitled to the rights, privileges or immunities of a subject of any foreign state or power.

These State provisions operate to render a member's seat vacant only when the member acts in some way *after* being elected. Hence, they do not disqualify candidates who are Australian citizens with dual citizenship. Consequently they differ from the Commonwealth position in two important respects: (i) some positive act is required on the part of the member after being elected; and (ii) candidates for election are not disqualified by virtue of any foreign allegiance provided they are Australian citizens (or a British subject enrolled to vote prior to 26 January 1984 in all States except Queensland). But if a candidate with dual citizenship is elected and subsequently acts to affirm the foreign citizenship, such as by renewing or applying for a foreign passport, disqualification will be incurred. Only in South Australia is this particular situation expressly avoided.[46] In contrast in Victoria, no disqualification applies to candidates or members who owe or acknowledge a foreign allegiance.

Generally, this ground of disqualification at the State level arises in the same circumstances as those covered by both limbs of s 44(i) discussed earlier. In particular, the same interpretation of 'foreign power' will most likely apply.[47] This raises in all States (except Queensland, South Australia and Victoria) an apparent inconsistency between those

45 But under s 46 of the *Constitution Act* 1934 (SA), candidates may be intended to be disqualified on this ground although the ambiguity of s 46 may lead a court to interpret it otherwise.

46 ss 17(2) and 31(2) *Constitution Act* 1934 (SA).

47 Cf Michael Pryles, 'Nationality Qualifications for Members of Parliament' (1982) 8 *Monash University Law Review* 163 at 184.

provisions which permit British subjects[48] enrolled to vote before 26 January 1984 to stand for election in those States (even though not Australian citizens) and those provisions which disqualify sitting members who act in some way to acknowledge allegiance to a 'foreign power'. Since it was held in *Sue v Hill*[49] that British subjects owe allegiance to a foreign power, it appears that they are qualified to be elected, but cannot later as members acknowledge their British allegiance in any way, such as by renewing their passport.[50] This effectively requires them to take out Australian citizenship to avoid the risk of disqualification.[51]

As noted earlier, the NSW Joint Committee on the ICAC recommended in 1998 to replace this ground of disqualification with a requirement that candidates declare any foreign allegiance prior to nominating.[52] If this approach is adopted, members ought to be under a similar obligation to declare any foreign allegiance they assume after being elected.

Territories

No disqualification arises in the Northern Territory or the ACT on account of any candidate or member having a foreign allegiance.

Conclusion

A comparison of this ground of disqualification at the Commonwealth and State level (at least with five States) reveals two quite different approaches. On the one hand, s 44(i) prevents candidates and members possessing dual citizenship or any other form of foreign allegiance. On the other, five States allow candidates and members these forms of

48 In Tasmania, aliens rather than just British subjects are eligible to vote and be elected if enrolled before 26 January 1984: ss 28(1) and 29(1) *Constitution Act* 1935 (Tas).

49 See above n 2.

50 This form of allegiance incurs no disqualification in South Australia: ss 17(2) and 31(2) *Constitution Act* 1934 (SA).

51 It is unlikely that being allowed to vote as a British subject would exclude the United Kingdom from the interpretation of 'foreign power' in State legislation.

52 See above n 43 at par 5.20.

foreign allegiance but disqualify them if they acknowledge that allegiance after being elected. For this reason, unknown foreign citizenship poses no problem at the State level. This disparity between the Commonwealth and those States may be justified on the ground that the Commonwealth is responsible for the conduct of international affairs and the national interest. Accordingly, foreign citizenship of members of the Commonwealth Parliament charged with those responsibilities is more likely to give the appearance of a conflict of interest.

Nevertheless, there remain considerable difficulties with s 44(i), especially in relation to unknown foreign citizenship. The desirable course, as outlined earlier, is to substitute for this paragraph a provision which adopts a two-pronged approach:

(i) All candidates must declare in their form of nomination any foreign allegiance of which they are aware; and

(ii) Any person who, after nominating for election, acknowledges in any way an allegiance to a foreign power, is incapable of being chosen or of sitting as a member.

Members would also be disqualified under s 45(i) for acknowledging allegiance to a foreign power.

This suggested approach follows that adopted at the State level by allowing candidates with dual Australian and foreign citizenship to nominate for election but only disqualifying them if they act positively after nominating by acknowledging their allegiance to a foreign power. Moreover, it improves on the State approach by requiring the disclosure of foreign allegiances when nominating. Disclosure is often the mechanism adopted where prohibition is considered too draconian. At least it reveals the potentiality of a conflict of interest without imposing unnecessary restrictions on otherwise innocent activities. In this case, it overcomes the difficulties of an unknown foreign citizenship. This benefit appears to outweigh any possible doubt which might arise over the loyalty of those who possess dual citizenship. And whatever doubt might arise is unlikely to undermine public confidence in Parliament to any significant extent.