NATIONALITY QUALIFICATIONS FOR MEMBERS OF PARLIAMENT

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Legislation in Australia specifies qualifications for Members of Parliament at both the Commonwealth and State levels. Some qualifications (or disqualifications) apply to the initial process of electing Members of Parliament and prescribe who may be elected. Other provisions set out circumstances where an existing member may lose his seat. These qualifications generally relate to requirements of minimum age, minimum periods of residence, good character, nationality and financial independence from government. The last of these generally takes the form of exclusionary provisions disqualifying as Members of Parliament those who hold an office of profit under the Crown and those who have a pecuniary interest in governmental contracts. Little attention appears to have focused on the qualifications for Members of Parliament, and most of it has been confined to the financial independence provisions. There is some case law in this regard[1] and the legislative provisions of some of the States are fairly elaborate.[2] In contrast there is virtually no case law and a dearth of academic writings on the various nationality qualifications. But some interesting questions arise in relation to them, particularly on the Commonwealth level.

In 1979 the Senate resolved to refer to its Standing Committee on Constitutional and Legal Affairs the question of the desirability of amending the provisions of the Constitution relating to the qualification and disqualification of Members of Parliament.[3] The Senate Standing Committee sought submissions from the public on the terms of reference. Its report, published in 1981, examined the various qualifications for Members of Parliament

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1 See e.g. *Re Webster* (1975) 132 C.L.R. 270.

2 E.g. *Constitution Act* 1867-1959 (Qld.) ss. 6-7A; *Constitution Act* 1902 (N.S.W.) ss. 13, 138.

3 The original terms of reference were contained in a resolution of 7th March 1979: "That the following matter be referred to the Standing Committee on Constitutional and Legal Affairs:
(a) the desirability of amending s. 44(iv) of the Constitution in the terms proposed by the Constitution Alteration (Holders of Office of Profit) Bill 1978 or otherwise; and
(b) the desirability of changes to other provisions of the Constitution relating to the qualification or disqualification of Members of Parliament."
See Australia, Senate, *Journals*, No. 84, (1978-9), p. 597. Subsequently, the question of whether public servants who wished to nominate for Parliament had to resign before nomination because of s. 44(i) of the Constitution was also included in the terms of reference: see ibid. No. 153 (1978-79-80) p. 1163.

and made a number of recommendations. Of the 100 pages of the report only five are concerned with nationality qualifications.[4]

In this article the situation appertaining to the States will be noted before the Commonwealth provisions are noted. Then the meaning of some common terms employed in both the Commonwealth and State provisions will be discussed.

STATE PARLIAMENTS

Nationality qualifications for Members of Parliament are found in the legislation of all the states. It is also possible that Imperial legislation affects the situation, though the position is not clear. Section 3 of the *Act of Settlement* 1701 (U.K.) provides *inter alia* that

> "no person born out of the kingdoms of England, Scotland, or Ireland, or the dominions thereunto belonging (although he be naturalized or made a denizen, except such as are born of English parents) shall be capable to be of the privy council, or a member of either house of parliament, or to enjoy any office or place of trust, either civil or military."

This provision was amended by section 3(2) of the *British Nationality and Status of Aliens Act* 1914 (U.K.) which provided that "Section three of the Act of Settlement . . . shall have effect as if the words 'naturalized or' were omitted therefrom." The consequence of this amendment was to remove naturalized British subjects born of alien parents from the disqualification in section 3 of the Act of Settlement because section 3(1) of the 1914 Act conferred upon naturalized subjects "all political and other rights, powers, and privileges . . . to which a natural-born British subject is entitled . . ." However there is no exactly corresponding provision in the current *British Nationality Act* 1948 (U.K.) and it is arguable that an alien born of alien parents who is naturalized under the 1948 Act is still within the exclusion in the Act of Settlement.

Section 3(2) of the *British Nationality and Status of Aliens Act* 1914 (U.K.) is contained in Part II of the Act. This Part was expressed not to have effect in Australia unless adopted by the Commonwealth Parliament.[5] It was in fact adopted by section 17 of the *Nationality Act* 1920 (Cth.). The 1920 Act was repealed by section 3 of the *Nationality and Citizenship Act* 1948 (Cth.).[6] It would seem however that the amendment to the Act of Settlement would remain in force by virtue of section 8(a) of the *Acts Interpretation Act* 1901 (Cth.). There still, however, remains a question of the extent of the disqualification effected by the Act of Settlement because of the way in which the amendment is worded. Section 3(1) of the *British*

[4] Senate Standing Committee on Constitutional and Legal Affairs, *Report on the Constitutional Qualifications of Members of Parliament* (1981) pp. 8-12.
[5] *British Nationality and Status of Aliens Act* 1914 (U.K.) s. 9.
[6] This legislation is now termed the *Australian Citizenship Act* 1948 (Cth.).

Nationality and Status of Aliens Act 1914 (U.K.) was mirrored in section 11 of the *Nationality Act* 1920 (Cth.) but as in the case of the current United Kingdom legislation there is no exact counterpart in the present 1948 Australian Act.

The above discussion as to the extent of the disqualification effected by the Act of Settlement is based on the assumption that the Act of Settlement applies to Australia. In *Terrell* v. *Secretary of State for the Colonies*[7] Lord Goddard C.J. held that the provisions of section 3 of the Act of Settlement relating to the tenure of office of judges did not apply to the Straits Settlements and ventured the opinion that it did not apply to "any other colony".[8] It is however by no means certain whether all of section 3 of the Act of Settlement was inapplicable to all British colonies.[9] If section 3 does apply to the Australian States it is still possible to argue that the provision does not impose a nationality qualification for membership of the state Parliaments because the reference to "either House of Parliament" in section 3 could be construed as a reference to the Imperial Parliament. Viewed in this light, section 3 of the Act of Settlement, if it applied to Australia, would say nothing about the qualifications for membership of state Parliaments.

Leaving aside these difficult and complex questions about the Act of Settlement, it is clear that nationality qualifications are imposed on members of state Parliaments by state legislation itself. State legislation commonly requires that a Member of the state Parliament take an oath of allegiance or make an affirmation.[10] Such provisions do not themselves constitute nationality requirements, for it has been held on more than one occasion that an alien can take the oath of allegiance.[11] However, there are express provisions in point directly imposing nationality qualifications on prospective and existing Members of Parliament.

Legislation in all the States deals with both (1) qualifications for persons seeking to be elected to Parliament and (2) acts or events which may result in a Member of Parliament losing his seat. In relation to the former, the Acts of four states provide that only a natural-born or naturalized subject of Her Majesty can be elected to Parliament.[12] However, in the case of South Australia and Queensland it is provided that only a British subject is capable of being elected to Parliament.[13] Under the *Australian Citizenship*

[7] [1953] 2 Q.B. 482.
[8] Ibid. 493.
[9] See generally G. J. Lindell, "Applicability in Australia of Section 3 of the Act of Settlement 1701" (1980) 54 A.L.J. 628.
[10] See e.g. *Constitution Act* 1902 (N.S.W.) s. 12; *Constitution Act* 1975 (Vic.) s. 23; and s. 42 of the Commonwealth Constitution.
[11] *In re Ho* (1975) 10 S.A.S.R. 250, 254; *Kahn* v. *Board of Examiners of Victoria* (1939) 62 C.L.R. 422, 430-4; *Borensztejn* v. *Board of Examiners* [1961] V.R. 209, 211.
[12] *Parliamentary Electorates and Elections Act* 1912 (N.S.W.) ss. 20(1)(a), 79(1), 898(1); *Constitution Act* 1934 (Tas.) s. 14(1)(b); *Constitution Act* 1975 (Vic.) ss. 44(1), 48(1)(a); *Constitution Acts Amendment Act* 1900 (W.A.) ss. 7, 20.
[13] *Constitution Act* 1934 (S.A.) ss. 12(b), 29, 33(1)(b); *Elections Act* 1915 (Qld.)

Act 1948 (Cth.) Australian citizens and citizens of the other member countries of the Commonwealth of Nations are British subjects.[14] In addition, certain Irish citizens have the status of British subjects,[15] and there is a category of persons who have the status of British subjects without citizenship.[16] The interpretations Acts of South Australia and Queensland adopt these meanings and define a British subject as a person who is an Australian citizen or any other person who, under the Commonwealth Act, has the status of a British subject or the status of a British subject without citizenship.[17] In relation to those States which adopt as a nationality qualification that of "a natural-born or naturalized subject of Her Majesty", Peter Hanks has argued that it may have a narrower meaning than that ascribed to "British subject". He says:

> "it could be read as referring to a subject of the Queen of Australia (that is, an Australian citizen) or to a citizen of one of those countries which recognize the same Queen as their head of state . . ."[18]

His first suggested meaning would confine the term to Australian citizens, and his second suggestion would confine the term to Australian citizens and citizens of those Commonwealth countries which acknowledged the Queen as head of state (e.g. the United Kingdom and Canada) but not those Commonwealth countries which are republics (e.g. India). Hanks, however, appears to have overlooked the interpretation Acts of the four states concerned which define "naturalborn or naturalized subject" in a way identical to British subject and as including an Australian citizen and other persons who under the Commonwealth Act have the status of a British subject or British subject without citizenship.[19] In conclusion, therefore, it can be seen that the nationality qualification for election to a state Parliament is in all states that of British subject status. This is wider than Australian citizenship and enables citizens of other Commonwealth countries

ss. 9, 39. Actually, in the case of South Australia, it is provided that either a British subject or a person "legally made a denizen of the State" is capable of being elected a Member of the Legislative Council. The nationality qualification for Members of the House of Assembly is confined to British subjects. However, the procedure of endenization has long ceased to be practised in the states and has been replaced by naturalization under the *Australian Citizenship Act* 1948 (Cth.). See generally M. C. Pryles, *Australian Citizenship Law* (Sydney, Law Book Co., 1981) p. 43. To all intents and purposes, therefore, the only nationality qualification for election to the Upper House is British subject status.

14 The Commonwealth countries are enumerated in s. 7(2) of the *Australian Citizenship Act* and in Regulation 5A of the *Australian Citizenship Regulations*. As to British subject status generally, see Pryles, op. cit. pp. 47-56.

15 *Australian Citizenship Act* 1948 (Cth.) s. 8.

16 Ibid. ss. 26, 26A.

17 *Acts Interpretation Act* 1915 (S.A.) s. 33C(1)(a); *British Subject (Interpretation) Act* 1970 (Qld.) s. 6(a).

18 P. Hanks, *Fajgenbaum and Hanks' Australian Constitutional Law* (2nd ed., Sydney, Butterworths, 1980) pp. 26-7.

19 *Interpretation Act* 1897 (N.S.W.) s. 21A(2)(a); *Acts Interpretation Act* 1931 (Tas.) s. 46A(1)(a); *Acts Interpretation Act* 1958 (Vic.) s. 39(1)(a); *Interpretation Act* 1918 (W.A.) s. 4A(2).

and certain Irish citizens, as well as British subjects without citizenship, to stand for election to state legislatures.

Apart from the initial nationality qualification for election to Parliament, legislation in all the states imposes continuing nationality or allegiance qualifications on existing Members of Parliament. This is generally done by the prescription of events or circumstances which if they occur will result in the disqualification of a member and the vacation of his seat. In regard to continuing nationality and allegiance qualifications of members there is some variation in the pattern of state legislative provisions. The most common provision is also the broadest. An instance is found in section 13A(b) of the *Constitution Act* 1902 (N.S.W.). It provides:

> "If a Member of either House of Parliament . . . 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 . . . his seat as a Member of that House shall thereby become vacant."

Substantially the same provision is found in Queensland,[20] Western Australia[21] and South Australia.[22] The South Australian provision, however, only applies to members of the House of Assembly. Members of the Legislative Council are subject to a more limited disqualification.[23]

It will be seen that the New South Wales provision stipulates three acts or circumstances which will result in the disqualification of a member: (1) the taking of any oath or the making of any declaration or acknowledgment of allegiance, obedience or adherence to any foreign prince or power; (2) the doing or concurring in or adoption of any act whereby the member may become a subject or citizen of any foreign state or power; and (3) the doing or concurring in or adoption of any act whereby the member may become entitled to the rights, privileges or immunities of a subject of any foreign state or power.

It seems clear that under the New South Wales provision a member could become disqualified without actually acquiring a foreign nationality or citizenship and without actually losing his British subject status. The first circumstance, the taking of an oath of allegiance, obedience or adherence to a foreign power refers to something less than the acquisition of foreign nationality or citizenship. As was pointed out previously, under our law an alien can take the oath of allegiance. By so doing he does not *ipso facto* become an Australian citizen or a British subject (unless, of course, he has been granted a certificate of Australian citizenship under the *Australian Citizenship Act*). The second and third circumstances refer to foreign

[20] *Legislative Assembly Act* 1867 (Qld.) s. 7.
[21] *Constitution Acts Amendment Act* 1900 (W.A.) s. 38(4).
[22] *Constitution Act* 1934 (S.A.) ss. 31(b), (c) and (d).
[23] Ibid. ss. 17(b) and (c).

nationality or citizenship. However it seems that to come within either disqualification it is not essential that the member acquire the foreign status. An act of applying for foreign citizenship would presumably constitute the doing of an act "whereby he may become a subject or citizen of any foreign state". The use of the permissive term "may" seems to underscore this. Under the third qualification the performance of a defined act whereby the member may become entitled to the rights and privileges of a foreign national, without actually acquiring the foreign nationality, leads to disqualification.

Even if a Member of Parliament actually acquires a foreign nationality or citizenship, and comes within the disqualification, he still may not lose his British subject status. If the member were an Australian citizen and a British subject, an act of applying for and obtaining foreign nationality while he was in Australia would not result in the loss of his Australian citizenship and British subject status under the *Australian Citizenship Act*,[24] but it would of course result in his disqualification from membership of Parliament. Consequently, while British subject status is a qualification and pre-requisite for election to Parliament, something less than the loss of British subject status may result in the disqualification of the member under a provision like s. 13A(b) of the *Constitution Act* of New South Wales. An act of swearing allegiance to a foreign power or applying for a foreign nationality or concurring in its adoption, will result in the disqualification of a Member of Parliament even though the member retains his British subject status.

It must be emphasized that the disqualification effected by provisions such as section 13A(b) of the *Constitution Act* 1902 (N.S.W.) only extends to acts or circumstances which occur while the person concerned is a Member of Parliament. For the provision is expressly directed to acts concurred in or performed or adopted *by a Member of Parliament*. Thus, for example, the provision would not operate in relation to an oath of allegiance taken to a foreign prince by a person *before* he was elected to Parliament. Such a person, provided he remained a British subject, would be qualified to stand for Parliament under the provisions of sections 20(1), 79(1) and 81B of the *Parliamentary Electorates and Elections Act* 1912 (N.S.W.) and, as was mentioned above, the disqualification provision in section 13A(b) of the *Constitution Act* would be inapplicable. In contrast, the disqualification provisions contained in sections 44(i) and 45(i) of the Commonwealth Constitution, which apply to members of the Commonwealth Parliament, are not similarly limited. They apply to acts or circumstances which occur or exist while a person is a Member of Parliament or previous to his election. These federal provisions are considered below.

Section 13A(b) only operates in relation to oaths and such taken to a "foreign prince or power" and in relation to the adoption of or entitlement

[24] See the *Australian Citizenship Act* 1948 (Cth.) s. 17; and Pryles, op. cit. pp. 121-2.

to the rights of nationality or citizenship of a "foreign state or power". The meaning of "foreign prince, state or power" is also considered below.

Leaving aside the New South Wales provision, which, as mentioned above, has counterparts in Western Australia, Queensland and, in relation to the lower house, South Australia, it is necessary to consider the disqualification provisions in the remaining states. In Tasmania it is provided by section 34(b) and (c) of the *Constitution Act* 1934 that if any member of either House shall "take any oath or make any declaration or act of acknowledgment of allegiance or adherence to any foreign prince or power" or "do, or concur in, or adopt, any act whereby he may become a subject or citizen of any foreign state or power" then "his seat in such House shall thereupon become vacant". Virtually identical provision is made in South Australia in relation to Members of the Legislative Council by section 17 of the *Constitution Act* 1934. These provisions are the same as the first two circumstances of disqualification set out in the New South Wales provision. They do not, however, include the third circumstance set out in the latter whereby it is a ground of disqualification if a member becomes entitled to the rights, privileges or immunities of a subject of any foreign state or power.

It is curious that in the case of South Australia the disqualification for the Lower House is on the New South Wales pattern while the disqualification for the Upper House is on the slightly narrower Tasmanian pattern.

Victoria differs from the other states. Its disqualification provision is expressed in different terms and is much more limited. Its simplicity, and the fact that it corresponds to the initial nationality qualification for election to Parliament, has much to commend it. In Victoria it is provided in section 46 of the *Constitution Act* 1975 that if a member of either House "ceases to be qualified to be elected a Member of the Council or the Assembly . . . his seat in the Council or the Assembly shall become vacant". As British subject status is a qualification for election to Parliament it follows that if a member ceases to be a British subject his seat will become vacant. Loss of British subject status is the only nationality disqualification and the taking of oaths of allegiance and the application for and indeed conferral of foreign nationality or citizenship are irrelevant unless they lead under Australian law to the loss of the member's British subject status.

COMMONWEALTH PARLIAMENT

We can dismiss the possible application of the *Act of Settlement* 1701 (U.K.). Even if that legislation extended to the Australian colonies,[25] it would now be overridden, as far as the Commonwealth Parliament is concerned, by the provisions of the Commonwealth Constitution. These are, of course, contained in a subsequent Act of the United Kingdom Parliament.

[25] This point was discussed above.

The Commonwealth Constitution contains a number of provisions dealing with nationality qualifications for Members of Parliament. Section 34(ii) provides that, "until the Parliament otherwise provides", a Member of the House of Representatives

> "must be a subject of the Queen, either naturalborn or for at least five years naturalized under a law of the United Kingdom, or of a Colony which has become or becomes a State, or of the Commonwealth, or of a State."

This provision, then, enunciated as a qualification, that a member be a subject of the Queen. However, it discriminated against naturalized subjects in two ways. First, only persons naturalized under a law of the United Kingdom or Australia could qualify, and a naturalization effected in another part of the British dominions, such as Canada, would not suffice.[26] Secondly, persons naturalized in the United Kingdom or Australia could only stand for Parliament if they had been naturalized for at least five years.

On its face section 34 only stated the qualifications for membership of the Lower House of Parliament. However, section 16 of the Constitution provides that the qualifications of a Senator are the same as those of a Member of the House of Representatives.

Section 34 of the Constitution no longer specifies the qualifications of Members of Parliament. The provision is expressed only to operate "until the Parliament otherwise provides" and Parliament has made other provision in section 69 of *Commonwealth Electoral Act* 1918 (Cth.). Up to 1981 it established that the nationality qualification was that of British subject status. This of course was determined in accordance with the provisions of the *Australian Citizenship Act* 1948 (Cth.).[27]

The Senate Standing Committee on Constitutional and Legal Affairs concluded that British subject status was no longer an appropriate qualification for Members of the Commonwealth Parliament. After pointing out that the qualification was broad in scope, because there are approximately 1,000 million British subjects, and arbitrary, the Committee continued:

> "We are not aware of any special qualities in British subjects which would make them more suitable to be members of Parliament than non-British subjects. While Australia still has historical ties with Britain and the Commonwealth countries, its trade and foreign policy have become more closely linked with other countries, and there does not appear to be any

[26] In 1920 Australia adopted the "common code" on British nationality by the enactment of the *Nationality Act* 1920 (Cth.). Section 15 provided for the recognition of a certificate of naturalization granted in Britain or in another British possession. Such a certificate was to have "the same force and effect as a certificate of naturalization granted in pursuance of this Act." It is doubtful, however, whether such a provision would be effective to equate, say, a Canadian naturalization with an Australian naturalization for the purposes of s. 34 of the Constitution. In any event, s. 34 has now been over-ridden by Commonwealth legislation. As to the "common code", see Pryles, op. cit. pp. 20-5, 36-9.

[27] *Australian Citizenship Act* 1948 (Cth.) s. 51(1).

pressing social, economic or political reason, for retaining this qualification."[28]

The Committee noted that other criteria could be substituted in the *Commonwealth Electoral Act* instead of the present requirement of British subject status, "for example domicile or nationality" but thought "that a more appropriate method of determining eligibility should be that a Member of Parliament is an Australian citizen".[29] The Committee's reference to "nationality" as a possible alternative qualification for British subject status, Australian citizenship and domicile is a little confusing as it is difficult to see what national status Australians can possess other than British subject status and Australian citizenship. However, there can be little doubt that the Committee's conclusion is sound. Australian citizenship would be the most appropriate qualification. As the Committee noted:

> "This is a status that can be easily ascertained, and obviously is more in accord with the functions of a parliamentarian than the present requirement in s. 69(1)(b). This criterion has been adopted in other countries and perhaps is most evident in the United States Constitution: a Senator must have been a citizen of the United States for not less than nine years (Article 1, Section 3, Clause 3), and a Representative must have been a citizen for not less than seven years (Article 1, Section 2, Clause 2)."[30]

The Committee recommended that Australian citizenship should be embodied in the Constitution as the nationality qualification for Members of Parliament. However, recognizing that constitutional change is extremely difficult to achieve, the Committee recommended as an interim measure that the qualifications of Australian citizenship be implemented immediately in the *Commonwealth Electoral Act* in substitution for the present requirement of British subject status in section 69(1)(b). This recommendation has been implemented by section 34 of the *Statute Law (Miscellaneous Amendments) Act* 1981 which amended section 69(1)(b) of the *Commonwealth Electoral Act*.

The freedom of the Commonwealth Parliament to prescribe what the nationality qualification for membership shall be, is somewhat circumscribed by section 44(i) of the Constitution. It provides that

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

This provision, then, applies at the initial stage of election to Parliament and prescribes certain disqualifications which preclude a person being

[28] Senate Standing Committee *Report*, op. cit. para. 2.10, p. 8. This point is underscored by the fact that today the Commonwealth is not confined to countries which acknowledge the Queen as Head of State, but also includes republics. The links between the Commonwealth countries are therefore tenuous at best.

[29] Ibid. para. 2.11, pp. 8-9.

[30] Ibid.

elected. However the requirements of the provision are given a continuing operation in relation to existing Members of Parliament by section 45(i) of the Constitution. It provides:

> "If a senator or member of the House of Representatives . . . becomes subject to any of the disabilities mentioned in the last preceding section . . . his place shall thereupon become vacant."

Section 45(i) is therefore equivalent to the disqualification provisions which apply to existing Members of state Parliaments under state legislation.[31] However unlike the position in the states, these disqualification provisions also apply at the point of the initial election to Parliament by virtue of section 44(i).

The disqualification effected by sections 44(i) and 45(i) resembles the disqualification imposed by state provisions such as section 13A(b) of the *Constitution Act* 1902 (N.S.W.). Both the federal and state provisions deal with three circumstances: (1) foreign allegiance, obedience or adherence; (2) foreign nationality or citizenship; and (3) entitlement to the rights or privileges of foreign nationality. But the provisions are not identical and they differ in their wording. The New South Wales provision is by its terms primarily concerned with acts. It is the act of taking an oath of allegiance or the taking or concurring in an act leading to the adoption of foreign nationality or citizenship or entitlement to equivalent rights which will bring a member within the disqualification. In contrast, the federal provisions are concerned with the actual existence of foreign allegiance, nationality or equivalent rights. The difference between the provisions is not merely one of semantics. Under the New South Wales provision the taking of an act leading to the adoption of foreign nationality would itself result in the disqualification of a member. However, under the federal provisions, it is not until a person actually acquires foreign nationality or citizenship or equivalent rights that he comes within the constitutional disqualification.

It is possible to think of other differences in the operation of the federal and state provisions on the New South Wales pattern. A Member of Parliament who acquired foreign nationality or citizenship without himself applying for it, and who did not concur in or adopt any act leading to its acquisition, would not under the New South Wales provision become disqualified. On the other hand it would seem that a Member of the Commonwealth Parliament who had foreign nationality thrust upon him without his volition would become disqualified under section 45(i) unless the federal provisions were read down to prevent this undesirable result.

Other differences arise between the federal and state provisions because the federal disqualifications apply at the point of the initial election of the member as well as during his term of office. In contrast, the state disqualification provisions only apply during the term of office of the member. This

[31] See discussion of state legislation, supra.

is particularly significant in relation to the question of dual nationality. The local nationality qualification for election to Parliament is British subject status in the case of the states[32] and Australian citizenship in the case of the Commonwealth. A person who is at the same time a national or citizen of a foreign state is not disqualified for standing for Parliament under the state provisions. It is only if he acquires foreign nationality or citizenship during his tenure as a member that the state disqualification provisions may operate.[33] However, at the Commonwealth level a person who is both an Australian citizen and a national or citizen of a foreign state is disqualified from standing for Parliament in the first place under section 44(i) of the Constitution. And, as in most states, the acquisition of foreign nationality or citizenship during a person's membership of Parliament will lead to disqualification under section 55(i) of the Constitution.

As noted above, the Commonwealth disqualification provisions are not dependent on any act taken or adopted by the person concerned. The disqualification simply operates if the existence of foreign nationality or citizenship is established. Clearly this could work undesirable or unjust results and it seems preferable for the provisions to be formally amended or at least narrowly construed by the courts so as to require that the existence of the foreign status be voluntary on the part of the person concerned. Let us consider two illustrations which will indicate the undesirable operation of the provisions if they are not read down. The first concerns a foreign nationality acquired at birth and therefore prior to the person's attempted election to Parliament (section 44(i)). The second concerns foreign nationality acquired after election to Parliament (section 45(i)).

The first illustration involves a person who was born in Australia and is an Australian citizen by birth and a British subject under the *Australian Citizenship Act*. However his parents were born in a southern European country and under the law of that country his parents could not divest themselves of that nationality and their children also acquired their nationality irrespective of the place of birth. If the rule of the non-divestment of foreign nationality also applied to the Australian born child it would appear to follow that under section 44(i) of the Constitution he could not stand for election to the Commonwealth Parliament. This would be unjust, especially if the person concerned had never attempted to rely on his foreign nationality (such as by applying for a foreign passport) and had always declared himself to be an Australian citizen.

[32] See supra, fn. 12, where the relevant legislation is noted.

[33] But in the case of Victoria the acquisition of foreign nationality or citizenship only leads to disqualification if it results in the loss of the member's British subject status.

The second illustration is even more extreme and well illustrates the absurdities to which the disqualifications could be taken unless the provisions were limited. The situation contemplated is that of the election to Parliament of an Australian-born citizen whose parents were also born in this country. The Member of Parliament is a rabid anti-communist who conducts a vehement anti-Soviet campaign. To neutralize his influence in the Commonwealth Parliament the Soviet Union confers upon him Soviet citizenship. Prima facie it would seem that the member's seat would thereupon become vacant under the provisions of section 45(i) of the Constitution.

Perhaps the easiest way of avoiding the undesirable results posed in these two illustrations is to read into the disqualification provisions a requirement that the foreign nationality be voluntary. Thus, in the case of a person who during his lifetime acquires a foreign nationality (as in the second illustration), the requirement would be that he apply for or somehow concur in or adopt the acquisition of the foreign nationality. In the case of a person who is regarded by a foreign state as one of its citizens from birth (the first illustration) there can obviously be no question of the person concerned applying for the foreign nationality. However, the element of voluntariness can be demonstrated by the person concerned concurring in the possession of the foreign nationality. This can be shown in a number of ways. If the foreign state permits its nationals to divest themselves of their nationality, a failure to do so could demonstrate that the holding of the foreign nationality is voluntary. Even if the foreign state does not acknowledge the possibility of renunciation, the voluntary possession of the foreign nationality could be demonstrated in other ways; for example, by the person concerned applying for a foreign passport or describing himself as a national of the foreign state, in any official form, or seeking the aid and protection of the foreign state through its diplomatic or consular officials.

It may be possible to achieve like results without reading down sections 44(i) and 45(i) and simply by declining to recognize the foreign national status in cases such as those illustrated above. However, to do so would require the establishment of new exceptions to the rule of private international law that the possession of a foreign nationality is determined in accordance with the law of the foreign country concerned.[34]

The Senate Standing Committee on Constitutional and Legal Affairs in its 1981 report considered it unlikely that a court would construe section 44(i) of the Constitution as being confined to cases where a person voluntarily retained his formal allegiance to his previous country.[35] It considered that the present position was unsatisfactory and that the involuntary possession

[34] See E. J. Sykes & M. C. Pryles, *Australian Private International Law* (2nd ed., Sydney, Law Book Co., 1979) pp. 269-70.
[35] Senate Standing Committee *Report*, op. cit. para. 2.15, p. 10.

of a foreign nationality should not disqualify an Australian citizen from entry into the Commonwealth Parliament:

> "The fact that an Australian citizen is also a national of another country ought not in itself to be a bar to entry into the Commonwealth Parliament, unless it had been voluntarily acquired, or appropriate steps have not been taken to relinquish the non-Australian nationality so far as the candidate is able. In this respect, the minimum requirement ought to be the giving up of any rights or privileges available or accruing to the person by reason of [his] other nationality. To be an Australian citizen is to owe allegiance to the Commonwealth of Australia, either naturally or by explicit choice. An Australian citizen should not have his right to take the fullest part in our representative democracy impaired by the ascribing to him of a status by a foreign system of law, when it is shown that that system does not permit him to voluntarily relinquish that status."[36]

and:

> "'It is highly desirable that Australian citizens with unsought dual nationality should be free to participate in the highest levels of political life in the Australian democractic system. To deny them this right of citizenship on the basis of a determination by a foreign system of law, which for every other purpose has no application in the municipal law of Australia, would be most invidious."[37]

But the Committee did not go so far as to agree with the submission of Professor Sawer that the disqualification be completely abolished on the ground that nationality is to be regarded as at best a matter for the electorate to consider. The Committee said:

> "We take the view that s. 44(i) should be deleted. Simple abolition of s. 44(i) without more would remove an important safeguard from the institution of Parliament which may not necessarily be compensated by electoral choice. It would not cover the situation of a member who after election was found to have an active allegiance to a foreign power, or to be exercising the rights and privileges of a citizen of a foreign power in circumstances which would inevitably compromise his position in Parliament. For example, a member may be in receipt of a pension, allowance, or *ex gratia* payment from a foreign government and, while the payment may be of an innocent nature, it could lead to the possibility of improper influence being exercised. Perhaps a more sinister area of influence could occur where a foreign government was in a position to deal favourably or unfavourably with other dual national members of the parliamentarian's family on their visiting the country of their non-Australian nationality. As a general principle we are of the opinion that a member of Parliament should not receive any rights, privileges or entitlements as a result of the possession of another nationality. Although we considered whether there should be any exceptions to this general rule, for example repatriation or pension payments, we concluded that it was important that members of Parliament should avoid being placed in a situation where even a

[36] Ibid. para. 2.16, p. 10.
[37] Ibid. para. 2.18, p. 11.

suspicion of undue influence could arise. We are loath to create any opportunity for foreign governments to meddle in Australia's affairs, especially when it concerns the institution of Parliament. There is then, in our view, a need for some formal safeguards to cover at least part of the grounds originally intended to be covered by s. 44(i)."[38]

The Committee concluded that the safeguards in section 44(i) which were worth preserving without disqualifying dual nationals could easily be embodied in a procedural provision. It recommended that a new provision be inserted in the *Commonwealth Electoral Act* along the following lines:

"73A. (1) A person shall declare at the time of nomination whether, to his knowledge, he holds a non-Australian nationality.

(2) If the declaration made pursuant to sub-section (1) is in the affirmative, he shall further state:

(a) that he has taken every step reasonably open to him to divest himself of the non-Australian nationality; and

(b) that for the duration of any service in the Commonwealth Parliament, he will not accept, or take conscious advantage of, any rights, privileges or entitlements conferred by his possession of the unsought nationality."[39]

Two reservations can be expressed in relation to the Committee's recommendation. In the first place it does not deal with the situation of a person who is not formally a national or citizen of a foreign country but is under an acknowledgement of allegiance, obedience or adherence to a foreign power[40] or is entitled to the rights and privileges of the foreign citizenship *and* voluntarily retains the allegiance or rights and privileges. Secondly, it does not deal with the situation contemplated by section 45(i) of the Constitution, namely that of a person who at the time of his nomination is not a foreign citizen but who after his election acquires foreign nationality. At least where such acquisition is voluntary it should result in the disqualification of the member.

MEANING OF TERMS

The disqualification provisions in the Commonwealth Constitution and in some state Acts employ common terms which require definition. Their meaning, of course, directly affects the extent of the disqualification which the provisions impose.

1. Allegiance, Obedience or Adherence

These terms are used in all the disqualification provisions except that of Victoria. In South Australia it is used in the disqualification provision of the Lower House but in relation to the Upper House the terms "acknowledgment or allegiance" are used.

[38] Ibid. para. 2.19, p. 11.
[39] Ibid. para. 2.20, p. 12.
[40] These terms are discussed in the Section on "Meaning of Terms", infra.

In Anglo-Australian law allegiance is the duty owed to the Crown by persons who enjoy its protection. The primary category of persons who owed allegiance were British subjects (either natural-born or naturalized). Such persons owed allegiance whether they were within the realm or outside and the Crown claimed the right to protect them within and without the realm. However, the common law also recognized a category of local allegiance which was owed by aliens while they were within the realm. Being within the realm they enjoyed the protection of the Crown and owed a corresponding allegiance while they were so resident.[41] Of course once an alien left the realm he ceased to owe allegiance, unless he claimed the protection of the Crown by, for example, travelling on a British passport.[42]

In Australia it has recently been held by a state court that the concept of allegiance which at common law was dependent on British subject status (other than local allegiance) should henceforth for the purpose of Australian law be predicated on the possession of Australian citizenship status.[43] The court reasoned that Australia has attained the status of an independent sovereign nation and that for the purposes of Australian law, allegiance to the Crown of the United Kingdom has been superseded by allegiance to the Queen in her capacity as Queen of Australia, at least to the extent that allegiance connotes the correlative duty of protection by the Crown. It therefore follows that allegiance is now dependent on the possession of Australian citizenship rather than British subject status.

Of course, the above discussion relates to the meaning of allegiance in our domestic law, whereas the term "allegiance" in the disqualification provisions refers to allegiance to a foreign power. However we can extrapolate from the above that a person would owe allegiance to a foreign power within section 44(i) of the Constitution if he were a national or citizen of a foreign power. But this can not be the only meaning or operation of the term: if it were, it would be rendered otiose by the later reference in section 44(i) to the disqualification of people who were subjects or citizens of a foreign power. Certainly the state provisions go further, for they refer to an oath of allegiance. A person who takes an oath of allegiance to a foreign power comes within the state disqualification provisions even if he is not formally a foreign subject or citizen. It is submitted that the federal provision extends this far. Section 44(i) refers to "any acknowledgment of allegiance" and this would include not merely the acquisition of foreign nationality or citizenship but the taking of an oath of allegiance and other acts which constitute adherence to a foreign power or enjoyment of its protection, such as the holding of a foreign passport or perhaps serving in foreign armed forces. This is reinforced by the fact that section 44(i) extends to any acknowledgment of "obedience, or adherence" as well as "allegiance".

[41] See e.g. *De Jager* v. *Attorney-General of Natal* [1907] A.C. 326 (P.C.).
[42] *Joyce* v. *Director of Public Prosecutions* [1946] A.C. 347 (H.L.).
[43] *McM.* v. *C. (No. 2)* [1980] 1 N.S.W.L.R. 27.

However it is submitted that the owing of local allegiance to a foreign power by temporary residence in a foreign state is not of itself sufficient to bring a person within the disqualifications in section 44(i) and 45(i) of the Constitution. It would be absurd to suppose that a member of a Commonwealth Parliament who resided in a foreign country for a few weeks during a parliamentary recess thereby vacated his seat. He would certainly lack the intention to adhere to another sovereign and it is suggested that he would not by mere temporary residence in the foreign country be under "any acknowledgment of allegiance, obedience, or adherence" within sections 44(i) and 45(i). It is also suggested that a member would not under the state provisions make an acknowledgment of allegiance simply by temporarily residing in a foreign country.

2. Entitled to the Rights or Privileges of a Subject or Citizen of a Foreign Power

Under the Commonwealth provisions and the state provisions on the New South Wales pattern the disqualification extends not only to persons who acquire foreign nationality or citizenship but also to those who are entitled to its rights or privileges. The New South Wales provision is a little broader than section 44(i) of the Commonwealth Constitution in that it refers to entitlement to the "rights, privileges or immunities", the latter term not being used in the federal provision. On the other hand the New South Wales provision refers to entitlement to the rights, privileges or immunity "of a subject of any foreign state" while the Commonwealth provision refers to entitlement to the rights of a foreign "subject or citizen". The difference is probably not of any consequence, though curiously the New South Wales provision uses the terms "subject or citizen" in relation to the disqualification of persons who actually become nationals of a foreign state.

As Quick and Garran note the term "subject" was traditionally used to denote a person who was a national of a monarchy while the term "citizen" was generally employed by republics.[44] Since 1948, however, both terms have been employed in British and Australian law. The term "subject" refers to the common status of a British subject, shared by the member nations of the Commonwealth of Nations; while the term "citizen" is used in relation to the local national status which each Commonwealth country employs.[45]

The use of the terms "subject or citizen" in one part of the New South Wales provision and the term "subject" alone in the other part was probably not intended to have a substantive effect. It certainly would be surprising if the object was to disqualify Members of Parliament who acquired the nationality of a foreign monarchy or republic but, in relation to entitlement

[44] J. Quick & R. R. Garran, *The Annotated Constitution of the Australian Commonwealth* (Sydney, Angus & Robertson, 1901).
[45] See Pryles, *Australian Citizenship Law*, op. cit. pp. 25-8.

to the rights of foreign nationality, only to extend the disqualification to foreign monarchies.

The situation contemplated by the disqualification occurs where a person is entitled to the rights or privileges of a foreign subject or citizen even though he does not hold the foreign nationality. Of course if the person was actually a national of the foreign state (a subject or citizen thereof) he would come within the earlier part of the disqualification. The disqualification under consideration clearly applies where the person is not a national of the foreign state but is entitled to equivalent rights.

It might be thought that a person would be entitled to the rights or privileges of a foreign national if under the law of a foreign country he had a right to acquire its nationality. On closer consideration, however, the situation is probably otherwise and it would be unjust to equate the right to acquire a foreign nationality with the enjoyment of the right or privileges of such nationality. A few examples will illustrate this point. First, a child is born in Australia of parents who are foreign nationals. Under the law of the foreign country concerned the child is not a national thereof because it was born outside its borders. However, because of its parents' allegiance, the child has a right to acquire their nationality at any time by a process of registration at any consulate of that country. The child chooses not to exercise that right and prefers to remain an Australian citizen alone. Equating the right to acquire a foreign nationality with the enjoyment of the rights or privileges of such nationality would mean that the child would be forever precluded from standing for election to the Commonwealth Parliament under section 44(i) of the Constitution. The child would not, however, come within the New South Wales exclusion for that only applies if a Member of Parliament "does or concurs in or adopts any act" whereby he might become entitled to the rights or privileges of a foreign national.

Moreover, were the suggested interpretation to be adopted, it could result in the exclusion from eligibility to the Commonwealth Parliament of whole categories of people. Thus, for example, people of the Jewish faith may have a right under Israeli law to acquire Israeli citizenship. All such people would be disqualified from becoming federal parliamentarians under the suggested interpretation.

It is submitted that a right to acquire the nationality of a foreign state does not *ipso facto* constitute an entitlement to the rights or privileges of such nationality. A person who can become a national of a foreign state is not necessarily treated as a national of the foreign state until he takes up the foreign nationality. Thus an Australian-born person of the Jewish faith who may possess the right to acquire Israeli citizenship is not necessarily treated as possessing the rights and privileges of an Israeli until he takes up such citizenship. Until then he will be required to have a visa when he enters Israel and will from a legal viewpoint be accorded the rights appertaining to a foreigner rather than those possessed by Israeli citizens.

It is suggested that the disqualification only operates where a person *presently* enjoys the rights or privileges of a foreign national. A right to acquire a foreign nationality, unless it carries with it the present enjoyment of such benefits, is no more than the right to enjoy the benefits of the foreign nationality at some time in the future (once the foreign nationality is taken up). It would seem that a person may be presently entitled to the rights or benefits of foreign nationality in one and possibly two situations: first where a person is actually accorded rights or privileges appertaining to its nationality by the law of a foreign state, even though the person is not under that law formally a subject or citizen thereof; and secondly, where a person is a national of the foreign state under its law but where for some reason the possession of the foreign nationality is not recognized under Australian law.

The second situation is, however, more doubtful. It could arise, for instance, where a person who was formerly a national of a foreign state acquires Australian citizenship by grant. The oath or affirmation of allegiance which a naturalized Australian citizen is required to take includes a declaration renouncing all other allegiance.[46] It is arguable therefore that by taking this oath the person would no longer be considered under Australian law to be a national of the foreign state even if the foreign state does not permit its citizens to renounce their nationality.[47] But even if the foreign nationality is no longer recognized, though it persists under the law of the foreign state, would the person concerned be aptly described as one who was entitled to the rights or privileges of the foreign nationality? In fact he would enjoy such rights (at least outside Australia) for he would still under the law of the foreign state be one of its citizens. On the other hand it seems unfair that such a person who has taken up Australian citizenship and renounced his former allegiance should be excluded from eligibility to membership of the Commonwealth Parliament. Perhaps the answer is that if the foreign nationality is no longer recognized under Australian law, then the existence of rights and privileges attaching to such nationality is also no longer recognized for the purposes of Australian law.

3. Foreign Prince, Power or State

These terms are used in the New South Wales provision while section 44(i) of the Commonwealth Constitution simply refers to "foreign power". The words "prince", "power" and "state" are largely interchangeable terms to denote a sovereignty. "Prince" is perhaps only properly used in relation to a monarchy while "power" or "state" could be used for either a monarchy or a republic. The emphasis is on the word "foreign" and the intent of these terms is only to bring a person within the disqualification if he

[46] *Australian Citizenship Act* 1948 (Cth.), Schedule 2.

[47] See in this regard the views of Lord Denning M.R. in *Oppenheimer* v. *Cattermole (Inspector of Taxes)* [1973] Ch. 264, 267-72; but cf. the views of the House of Lords, [1976] A.C. 249. See generally M. C. Pryles, *Conflicts in Matrimonial Law* (Sydney, Butterworths, 1975) pp. 96-107.

acknowledges allegiance to or acquires the nationality (or equivalent rights) of a foreign sovereignty. Obviously allegiance to the local sovereign or the possession of the local nationality is not a ground for disqualification and is on the contrary a necessary qualification for election to Parliament.

There can be little doubt that when the Commonwealth Constitution was framed and when the Commonwealth was established at the turn of the century the United Kingdom and the various British possessions would not have been considered foreign to each other and would have constituted the one sovereignty. The theory of the indivisibility of the Crown was no mere fiction and had political and legal substance. The inhabitants of the British possessions had a common nationality (British subject status)[48] and there was no separate nationality for the component parts. The British subjects throughout the British possessions shared a common allegiance to the Crown of the United Kingdom.

Since 1901, however, much has changed. The indivisibility of the Crown is no longer a fact and Australia and the other British dominions have emerged as separate international sovereignties. As Barwick C.J. said in *Bonser* v. *La Maccia*:[49]

> "The passing of the *Commonwealth of Australia Constitution Act* (63 & 64 Vict. c. 12) by the British Parliament in 1900 did not make Australia either a nation internationally or independent, though clearly it was a major step towards each. At some point at or since the passage of the *Statute of Westminster* (Imp.) in 1931 implementing the Balfour Declaration, Australia did become an independent nation state. Though it is difficult to pinpoint precisely the time at which this occurred, it is certain that Australia was such a nation state at the time of the making of the Convention on the Territorial Sea and the Contiguous Zone."

The emergence of Australia's international personality has been matched by domestic legal developments including the creation of a distinct Australian national status—that of Australian citizenship. This led McLelland J. to decide in *McM.* v. *C. (No. 2)*[50] that for the purposes of Australian law, allegiance to the Crown of the United Kingdom had been superseded by allegiance to the Queen in her capacity as Queen of Australia. The reasoning of McLelland J. is interesting and it is desirable to set it out at some length. The Supreme Court of New South Wales was concerned with its prerogative jurisdiction to protect infants. When the court was established in 1824, and at the establishment of the Commonwealth in 1901, the court's jurisdiction extended to the protection of any infant who owed allegiance to the Crown of the United Kingdom, for at those times there still remained a common allegiance throughout the British Empire to the Crown of the United Kingdom and a common British nationality. McLelland J. continued:

[48] There were, however some variations in the definition of British subjects between the various British possessions: see Pryles, *Australian Citizenship Law*, op. cit. pp. 7-8.
[49] (1969) 122 C.L.R. 177, 189.
[50] [1980] 1 N.S.W.L.R. 27.

"Since that time the position has altered, in that Australia has, by an evolutionary process, attained the status of an independent sovereign nation, which status has been recognized or implemented, although not effected, by legislation [such as the *Statute of Westminster*, 1931 (Imp), the *Statute of Westminster Adoption Act* 1942 (Cth), the *Australian Citizenship Act* 1948 (Cth), the *Diplomatic Immunities Act* 1952 (Cth), replaced by the *Diplomatic Privileges and Immunities Act* 1967 (Cth) and the *Royal Style and Titles Act* 1953 (Cth), replaced by the *Royal Style and Titles Act* 1973 ((Cth)]. The courts take judicial notice of this development, and the common law adjusts to accommodate it. As in other matters of this kind, 'the law followed the facts at a respectful distance': R T E Latham's *The Law and the Commonwealth* in *Survey of British Commonwealth Affairs* (1937) vol 1, at p 515, and see *Bonser* v. *La Macchia* (1969) 122 C.L.R. 177 at 223, per Windeyer J. It is a [sic] example of 'the adaptability of the common law (of which the prerogative of the Crown forms a part) to new circumstances and conditions': *Jolley* v. *Mainka* (1933) 49 C.L.R. 242 at 281 per Evatt J. Recognition of the effect upon Australian domestic law of the attainment of national sovereign status is illustrated by such cases as *Bonser* v. *La Macchia, supra, Barton* v. *Commonwealth* (1974) 131 C.L.R. 477 and *New South Wales* v. *Commonwealth* and is referred to in *China Ocean Shipping Co.* v. *South Australia* (1979) 27 A.L.R. 1.

The aspect of this development which is of present significance is that, for the purposes of Australian law, allegiance to the Crown of the United Kingdom has been superseded by allegiance to the Queen in her capacity as Queen of Australia, at least to the extent that allegiance connotes the correlative duty of protection by the Crown. In this respect the dilemma in relation to 'Australian nationals' discussed by Latham CJ in *R* v. *Burgess; Ex parte Henry* (1936) 55 C.L.R. 608 at 647-51 has been resolved by the provisions of the *Australian Citizenship Act* 1948 (Cth). The form of oath of allegiance prescribed by s. 15(1)(a) of that Act is not without significance in the present context. It is as follows: 'I, A.B., renouncing all other allegiance, swear by Almighty God that I will be faithful and bear true allegiance to Her Majesty Elizabeth the Second, Queen of Australia, Her heirs and successors according to law, and that I will faithfully observe the laws of Australia and fulfil my duties as an Australian citizen.'

It is to be noticed that, by s. 71(1), the Act preserves what is described as 'the status of a British subject' for Australian citizens and, by s. 7(2), the citizens of thirty two other specified countries, of which sixteen are republics and five have indigenous monarchs: see de Smith, *Constitutional and Administrative Law*, 2nd ed., at p. 100. It seems clear that preservation of the status of British subject by this means was intended as an acknowledgment of the symbolic title of the Queen as 'Head of the Commonwealth' (ie the British Commonwealth). This is consistent with the provisions of s. 1(2) of the *British Nationality Act*, 1948 (Imp) whereby the expressions 'British subject' and 'Commonwealth citizen' are given the same meaning as each other. The position of the Queen as 'Head of the Commonwealth' involves the exercise of no constitutional or governmental powers, duties or functions: see de Smith, op cit, at pp 100, 665-666; Wade & Phillips, *Constitutional and Administrative Law*, 9th ed., pp 398-399, and cannot, therefore, have any bearing on allegiance as the correlative of a duty of protection.

> For these reasons, I am of opinion that the prerogative jurisdiction of this Court is available in respect of any minor who is an Australian citizen within the meaning of the *Australian Citizenship Act*, wherever he may be."[51]

McLelland J. noted a number of factors which attest to independent sovereign status which Australia has now attained. There is the distinct national status for Australian citizens created by the *Australian Citizenship Act* 1948 (Cth.) and the *Royal Style and Titles Act* 1973 (Cth.) which creates for the Queen the royal style and title of, inter alia, "Queen of Australia".[52] In relation to the latter Act, however, it would not be effective to change the references to the Crown of the United Kingdom in the preamble and in section 2 of the Constitution Act.[53]

These developments may be of great significance in determining the meaning of "a foreign state or power". Now that Australia is an independent sovereignty it is hardly an extravagant construction to interpret the terms "foreign State or power" as referring to a sovereignty other than Australia. They clearly refer to a sovereignty other than the domestic sovereignty. In 1901 there was no Australian sovereignty and the domestic sovereignty was that of the British Empire; but today the domestic sovereignty is that of Australia. The practical difference is considerable. In 1901 a person who was born in Canada or the United Kingdom and who was a British subject by virtue of his birth in Canada or the United Kingdom would not have come within the disqualification in section 44(i) of the Commonwealth Constitution. In 1981 a person born in Canada or the United Kingdom would, on the suggested construction, be a subject or citizen of a foreign power and therefore within the disqualification.

Is it legitimate to construe the Constitution in the light of present day circumstances (the emergence of Australia's international personality) or must it be construed as it was when enacted in 1900? We can find authority for the latter proposition.[54] On the other hand there is abundant authority (mainly in the context of the Commonwealth's legislative powers) for the proposition that the Constitution is an instrument meant to endure and is

[51] Ibid. 43-5.

[52] On the implications of this Act for the states see R. D. Lumb, *The Constitutions of the Australian States* (4th ed. University of Queensland Press, 1979) p. 94.

[53] The preamble to the *Commonwealth of Australia Constitution Act* 1900 (U.K.), which of course contains the Australian Constitution, recites that the people of the Australian states "have agreed to unite in one indissoluble Federal Commonwealth under the Crown of the United Kingdom of Great Britain and Ireland." Section 2 provides that "the provisions of this Act referring to the Queen shall extend to Her Majesty's heirs and successors in the sovereignty of the United Kingdom." It is, however, arguable that these references to the Crown of the United Kingdom only serve to identify the Crown at the time of federation and do not mean that the nature of the sovereignty created by the Act cannot evolve into the Crown of Australia.

[54] See e.g. *Attorney-General for the State of New South Wales* v. *Brewery Employees Union of New South Wales* (1908) 6 C.L.R. 469.

expressed in general propositions wide enough to be capable of flexible application to changing circumstances.[55] Professor Lane has concluded that:

> "in short, the meaning of constitutional terms is not fixed for all eternity by the Constitution of 1900, although the meaning was certainly then given a general direction. Rather, that organic instrument even with its basic meaning still intended a meaning relative to present context."[56]

It is certainly arguable that the basic meaning or connotation of "foreign power" means a sovereignty other than the local or domestic sovereignty and that its application or denotation in 1900 referred to countries outside the British Empire, while its present application or denotation includes all countries other than Australia.

While it is quite possible to argue that section 44(i) of the Commonwealth Constitution should have an ambulatory operation and be construed in the light of current facts and realities, it is more difficult to maintain a similar argument with respect to the state Acts. The reference to "foreign state or power" in some of the state legislation (such as that of New South Wales) dates from the early part of the century. At that time the reference was almost certainly to a non-Commonwealth country. The argument that the state provisions should be given an ambulatory operation such as that which the Commonwealth provision may bear becomes more tenuous when it is remembered that the state provisions are contained in ordinary state legislation. Except where there is a restrictive or entrenching provision, the legislation is capable of amendment by a simple Act of Parliament. There is therefore not the same rigidity as in the case of the Commonwealth Constitution and the argument for an ambulatory operation is less compelling.

CONCLUSION

The provisions establishing nationality qualifications (and disqualifications) for Members of Parliament in Australia raise a number of interesting questions, particularly on the Commonwealth level. One may wonder whether in recent years some Members of the Commonwealth Parliament have wrongfully sat in the Parliament in contravention of section 44(i) of the Constitution, if an ambulatory construction of that provision be accepted as correct.

The recommendations of the Senate Standing Committee on Constitutional and Legal Affairs suggest that the time is ready for reform. The suggested new nationality qualification, that of Australian citizenship, has already been implemented. But in relation to disqualifications the proposed new section 73A of the *Commonwealth Electoral Act*, which is intended to

[55] *Australian National Airways Pty Ltd* v. *The Commonwealth* (1945) 71 C.L.R. 29, 81; *R.* v. *Brislan; ex parte Williams* (1935) 54 C.L.R. 262, 282.
[56] P. Lane, *The Australian Federal System* (2nd ed., Sydney, Law Book Co., 1979) p. 1120.

replace section 44(i), and therefore also section 45(i), of the Constitution, does not go far enough.

On the state level there is certainly room for amendment to the relevant provisions both to remove obscurities and to make the qualifications accord with the legal-political realities of the last decades of the twentieth century. At the least, consideration should be given to replacing British subject status as the nationality qualification (for the reasons outlined by the Senate Standing Committee) with that of Australian citizenship.