THEME 10

PUBLIC SERVANTS AND ELECTIONS

HIGH COURT OF AUSTRALIA

MASON C J
BRENNAN, DEANE, DAWSON, TOOHEY, GAUDRON AND McHUGH JJ

IAN GRANT SYKES **PETITIONER**

AND

PHILIP RONALD CLEARLY AND OTHERS
RESPONDENTS

[NO.2]

ORDER

Answer the questions reserved for the consideration of the Full Court as follows:

(a) Was the first respondent duly elected at the election?

Answer: No.

(b) If no to (a), was the election absolutely void?

Answer: Yes.

(c) If no to (b), was any and which candidate duly elected who was not returned as elected?

Answer: Does not arise.

(d) Who should pay the costs of the petition?

Answer: By consent there should be no order for costs.

25 November 1992
F.C.92/046

Solicitors for the Petitioner:	*Minter Ellison Morris Fletcher*
Solicitors for the First Respondent	*Maurice Blackburn & Co*
Solicitors for the Third Respondent	*Holding Redlich*
Solicitors for the Fifth Respondent	*Freehill Hollingdale & Page*
Solicitors for the Intervener:	*Australian Government Solicitor*

Elections *– eligibility of candidate – holding any office of profit under the crown – whether candidate in state teaching service as employee on unpaid leave was disqualified – resigning from public service before declaration of poll – candidate of foreign birth – effect of failure to reasonable steps to renounce foreign nationality – the Constitution (Cth) section 44 (1)(iv).*

Background facts
This was a case stated by Dawson J pursuant to section 18 of the Judiciary Act 1903 (Cth). The case was out of a by-election for the Electoral Division of Wills in the House of Representatives, as a result of which the first respondent, Philip Ronald Cleary, was declared to be elected. The case was stated in proceeding commenced by petition by Ian Grant Sykes (petitioner) invoking the jurisdiction of the Court (sitting as the Court of Disputed Returns). The petitioner disputed the poll on the ground that the first respondent held on office of the Education Department of Victoria and was therefore incapable of being elected under section 44(iv) of the Constitution. The petitioner also alleged that other candidates, the second, third and fourth respondents, were ineligible for election. The petitioner claimed that each of the second and third respondents, though a naturalised Australian citizen, was a subject or citizen or entitled to the rights or privileges of a subject or citizen of a foreign power and was therefore under acknowledgement of allegiance to a foreign power within the meaning of section 44(i) of the Constitution.

Held *(by majority): that the first respondent was not duly elected at the election and the election was void.*

Cases cited in the Judgement
Grealy v *Commissioner of Taxation (1989) 24 F.C.R. 405*
In re Wood (1988) 167 C.L.R. 145
Liechtenstein v *Guatemala [1955] 1 C.J.4*
Joyce v *Director of Public Prosecutor [1946] A.C. 347*
Openheimer v *Cathermole [1976] A.C. 249*
In re Webster [1975] 132 C.L.R. 270
Harford v *Linkey [1899] 1 Q.B. 852*

MASON C J, TOOHEY AND McHUGH J J

This is a case stated by Dawson J pursuant to section 18 of the *Judiciary Act 1903* (Cth). The cases arises out of a by-election for the Electoral Division of Wills in the House of Representatives, as a result of which the first respondent, Philip Ronald Cleary, was declared to be elected. The case was stated in proceedings commenced by petition by Ian Grant Sykes ("the petitioner") invoking the jurisdiction of this Court sitting as the Court of Disputed Returns under the *Commonwealth Electoral Act* 1918 (Cth) ("the Electoral Act"). The petitioner disputed the poll on the ground that the first respondent held an office of profit under the Crown by reason, *inter alia*, of his being an officer of the Education Department of Victoria ("the Education Department") and therefore was incapable of being elected under section 44 (iv) of the Constitution. The petitioner also alleged that other candidates, the second, third and fourth respondents, were ineligible for election. The petitioner claimed that each of the second and third respondents, though a naturalised Australian citizen, was a subject or citizen of a foreign power and was therefore under acknowledgment of allegiance to a foreign power within the meaning of section 44(i) of the Constitution. It is not necessary to consider the eligibility of the fourth respondent as no argument in support of ineligibility was presented to the Court.

According to the facts recited in the case stated, a writ for the by-election was issued and the following dates were specified in it for the purposes of the election:

For the CLOSE OF THE ROLLS:	16 March 1992
For NOMINATION:	20 March 1992
For TAKING THE POLL:	11 April 1992
For the RETURN OF THE WRIT:	on or before 17 June 1992

The first respondent lodged his nomination on 20 March 1992. It was accepted by the Acting Divisional Returning Officer for the Electoral Division of Wills on that day. The poll was held on 11 April 1992. The total number of first preference votes cast in favour of the candidates in the election was follows:

SAVAGE, Katheryne Jeanette	1, 660
KARDAMITSIS, Bill (the third respondent)	18,784
KUHNE, Otto Ernst August	35
PHILLIPS, Richard Frank	136
KAPPHANM Wilhelm	34
RAWSON, Geraldine Mae (the fourth respondent)	453
DELACRETAZ, John Charles (the second respondent)	17,582
POULOS, Patricia	61
DROULERS, Julien Paul	68
FRENCH, William Leonard	90
POTTER, Felicia Cecilia	30

MURRAY, John	54
VASSIS, Chrisostomos	43
CLEARY, Philip Ronald	21,391
FERRARO, Salvatore	221
GERMAINE, Stanley Arthur	280
WALKER, Angela Howard	577
MACKAY, David Ewan	1,383
LEWIS, Robert John	216
SYKES, Ian Grant	364
KYROU, Kon	81
MURGATROYD, Cecil Godfrey	258
TOTAL	63,801

After the distribution of the preference votes of all of the candidates except those of the first and third respondents, the first respondent had an absolute majority of votes, having a total of 41,708 votes (65.7 per cent). The third respondent had a total of 21,772 votes (34.3 per cent). Without a special count, it is not known what number of second and subsequent preference votes were cast in favour of the other candidates by voters who cast their first preference vote in favour of the first or the third respondent. Further, without a special count, it is not known what number of subsequent preference votes were cast in favour of any candidate other than the first or third respondent and their second preference vote in favour of the first or third respondent.

The questions reserved in the case stated are:

(a) was the first respondent duly elected at the election?

(b) If no to (a), was the election absolutely void?

(c) If no to (b), was any and which candidate duly elected who was not returned as elected?

(d) who should pay the costs of the petition?

Question (a): Was the first respondent duly elected at the election?

Section 44 of the Constitution relevantly provides:

"Any person who –

......

(iv) Holds any office of profit under the Crown, or any pension payable during the pleasure of the Crown out of any of the revenues of the Commonwealth:

......

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

But sub-section iv. does not apply to the office of any of the queen's Ministers of State for the Commonwealth, or of any of the Queen's Ministers for a State."

Before considering the meaning of this section and its application to the first respondent, it is necessary to consider the history of his service with the Education Department.

The history of the first respondent's service with the Education Department

The first respondent was appointed to the teaching service as a teacher in the Education Department by the Teachers' Tribunal pursuant to section 46 of the *Teaching Service Act 1958* (Vict.) ("the 1958 Act") on 1 January 1975. He thereupon became entitled to a salary and conditions of work determined pursuant to that Act. The 1958 Act was replaced by the *Education Service Act 1981* (Vict.) ("the 1981 Act") which in turn was amended and renamed the *Teaching Service Act 1981* (Vict.) by the *Teaching Service Act 1983* (Vict.) ("the 1983 Act"). At all times from his appointment on 1 January 1975 until his resignation was tendered and accepted as effective on 16 April 1992, the first respondent was an officer in the teaching service. That service was known as the education service during the currency of the 1981 Act before it was amended by the 1983 Act. His appointment was as a permanent teacher. He was not appointed for a specific term; nor was he appointed on probation. He served as a secondary teacher.

Persons employed in the teaching service pursuant to section 3 of the 1981 Act in the classification held by the first respondent are not attached or appointed to any particular position. They have no entitlement to remain in any particular position.

From 1 February 1990 to 27 January 1992 inclusive, the first respondent was granted leave without pay by the Director-General of Education (1) pursuant to section 35 of the 1981 Act. On 28 and 29 January 1992, he performed the duties of a teacher in the teaching service at Hoppers Crossing Secondary College and was paid $290.17. On 30 January 1992, he commenced leave without pay for the remainder of the school year, that is, until 24 January 1993. This leave ceased on 16 April 1992 when his resignation became effective. At no time on or after 30 January 1992 was he attached to, nor did he have any entitlement to, any particular or designated position. During this time, he was described by the employer as an "unattached" but "allocated" officer.

Some time during April 1992 but prior to 11 April 1992, he applied for long service leave with full pay for the fourth term of the school year from 5 October 1992 to 18 December 1992 pursuant to section 37 of the 1981 Act. This application was cancelled when he resigned from the teaching service. The Ministry of Education subsequently forwarded to him payment in lieu

of long service leave pursuant to section 38 of the 1981 Act. The Ministry of Education does not permit permanent teachers to take long service leave while on leave without pay. The leave without pay must first be terminated.

Interpretation of section 44 (iv)

The disqualification of a person who holds an office of profit under the Crown has its origins in the law which developed in England in relation to disqualification of the members of the House of Commons. Section 44 (iv) is modelled on a provision of the *Act of Settlement 1701 (2),* which was repealed (3) and replaced by provisions of the *Succession to the Crown Act 1707 (4).* It has been said that the English provisions give effect to three main considerations of policies. They are (5):

(1) the incompatibility of certain non-ministerial offices under the Crown with membership in the House of Commons (here, membership must be taken to cover questions of a member's relations with, and duties to, his or her constituents);

(2) the need to limit the control or influence of the executive government over the House by means of an undue proportion of office-holders being members of the House; and

(3) the essential condition of a certain number of Ministers being members of the House for the purpose of ensuring control of the executive by Parliament.

The meaning of the expression "office of profit under the Crown" is obscure. Blackstone defined an "offence" as "a right to exercise a public or private employment" and to take the "fees and emoluments thereunto belonging" (6). Blackstone had in mind offices to which particular duties were attached and which entitled the holder charge and retain fees for the performance of the services rendered by the office-holder.

It has been accepted in England that the disqualification of the holder of an "office of profit under the Crown "excludes permanent public servants, being officers of the departments of government, from membership of the House of Commons (7). Likewise, it has been accepted in Australia that a provision for disqualification expressed in the same terms excludes public servants, who are officers of the departments of government, from membership of the legislature (8). The exclusion of public servants from membership of the House contributes to their exclusion from active and public participation in party politics (9). In this way, the disqualification played an important part in the development of the old tradition of a politically neutral public service.

The exclusion of permanent officers of the executive government from the House was a recognition of the incompatibility of a person at the one time holding such an office and being a member of the House. There are three factors that give rise to that incompatibility. First,

performance by a public servant of his or her public service duties of a member of the House. Secondly, there is a very considerable risk that a public servant would share the political opinions of the Minister of his or her department and would not bring to bear as a member of the House a free and independent judgement (10). Thirdly, membership of the House would detract from the performance of the relevant public service duty.

The first respondent contends that the objects sought to be achieved by the disqualification of the holder of an "office of profit under the Crown" would sufficiently be served by confining the category of office-holders disqualified to that consisting of those who hold important or senior positions in government. History provides no support for this interpretation which would, in any event, fail to give effect to all the considerations or policies said to underlie the disqualification. In order to give effect to those considerations, the disqualification must be understood as embracing at least those persons who are permanently employed by government.

The first respondent seeks to find support for the interpretation for which he contends in judicial decisions relating to the word "office" in the context of revenue legislation. Thus, in *Grealy* v *Commissioner of Taxation* (11), the Full Court of the Federal Court said the word:

> "usually connotes a position of defined authority in an organisation, such as director of a company or tertiary educational body, president of a club or holder of a position with statutory powers".

In order cases, it has been held that the word signifies a subsisting permanent substantive position which exists independently of the person who fills it from time to time (12). However, the meaning of "office" turns largely on the context in which it is found and, in the light of the principal mischief which section 44(iv) and its predecessors were directed at eliminating or reducing, namely, Crown or executive influence over the House, such a restricted meaning cannot be given to "office" in section 44 (iv).

Although a teacher is not an instance of the archetypal public servant at whom the disqualification was primarily aimed, a permanent public servant who is a teacher falls within the categories of public servants whose public service duties are incompatible, or the three grounds mentioned previously, with the duties of a member of the House of Representatives or a senator. In this respect, the first respondent was a person who came within the statutory definition of "teachers", i.e. "permanent officers employed in the [teaching] service" (13). As such, a permanent officer in the teaching service, he held an "office" (14). So much may be deduced from the statutory definitions of "officer" and "employee", the latter connoting a temporary employee. Indeed, this was conceded in argument by counsel for the first respondent.

Where an office in the teaching service is abolished, the holder of the office becomes an "unattached officer" and shall be deployed by the Chief General Manager (15) to any other office which the Chief General Manager deems appropriate (16) but, because "officer" is defined as

meaning any person who holds and office, this does not mean that an "unattached" officer holds no office. And, even if the effect of the legislation is that an unattached officer ceases to hold an office within the meaning of the 1981 Act, the officer nonetheless remains a permanent employee of the Crown and is, for the purposes of section 44 (iv), the holder of an office of profit under the Crown.

The taking of leave without pay by a person who holds an office of profit under the Crown does not alter the character of the office which he or she holds. The person remains the holder of an office, notwithstanding that he or she is not in receipt of pay during the period of leave (17).

Application to office of profit under the Crown in right of a State

The reference in section 44(iv) to "*any office* of profit under the Crown" (emphasis added) is apt to include an office of profit under the Crown in right of a state. Not only are words wide enough to achieve this result but also the last paragraph of the section proceeds on the footing that, but for that paragraph, a State Minister would hold an office of profit under the Crown in right of a state and be disqualified. If such an office of profit in a state stood outside section 44 (iv), there would have been no need to exclude State Ministers from the disqualification. The Convention Debates reveal that the exclusion of State Ministers from the disqualification was put forward because it was believed that State Ministers otherwise would be disqualified because each of them was relevantly the holder of an office of profit under the Crown (18). The exclusion of State Ministers from the disqualification was designed to ensure their availability for election at the inception of the Commonwealth Parliament. The exclusion in the last paragraph of section 44 of those receiving certain payments as officers or members of the Queen's navy or army proceeded likewise on the footing that otherwise section 44 (iv) would disqualify such persons. Both the text of section 44(iv) and the reason for the inclusion of the last paragraph in the section support the opinion of the commentators that the disqualification extends to state officers (19).

Moreover, the long-standing reasons for disqualifying Commonwealth public servants from membership of the Houses of Parliament have similar force in relation to state public servants. The risk of a conflict between their obligations to their state and their duties as members of the House to which they belong is a further incident of the incompatibility of being, at the same time, a state public servant and a member of the Parliament.

It follows that the first respondent, as the holder of an office of profit under the Crown, fell within section 44 (iv) until he resigned that office on 16 April 1992.

At what time does the disqualification operate?

The case for disqualification rests on that part of section 44 which provides that any person who falls within par.(iv) "shall be incapable of being chosen.....as a...... member of the House of Representatives". The petitioner submits that the word "chosen" extends to incorporate all the procedural steps necessarily involving the candidate in the electoral process so that the disqualification precludes participation in that process, including the step of nomination. On the other hand, the first respondent and the Attorney-General submit that a member is "chosen" when the member is declared to be elected, that is, when the poll is declared. On this interpretation of the provision, a candidate is disqualified only in the event that the disqualifying characteristic is in existence when the poll is declared. If this interpretation is accepted, the first respondent was not disqualified because his resignation took effect on 16 April 1992, before the declaration of the poll on 22 April 1992.

However, this interpretation must be rejected. As a matter of language, the disqualifying characteristics set out in section 44 are related to "being chosen". Whether those words refer to the act of choice or the process of being chosen is a question to be determined. Even on the narrower of the alternatives, namely, that the words refer to the act of choice, the outcome would be unfavourable to the first respondent. The people exercise their choice by voting (2)), so that it is the polling day rather than the day on which the poll is declared that marks the time when a candidate is chosen by the people. Of course, an absentee or postal vote may be cast before the polling day and, in a situation of emergency, arrangements may be made for the casting of votes after the polling day (21). But, these characteristics of the polling do not justify the conclusion that the declaration of the poll, which is the formal announcement of the result of the poll, amounts to, or even coincides with, the choosing by the electors of the member for the relevant electoral division. The declaration of the poll is the announcement of the choice made; it is not the making of the choice.

The interpretation just rejected would, if it were upheld, enable a public servant who falls within par. (iv) in section 44 to avoid disqualification by resigning from the relevant office of profit after the polling day but before the declaration of the poll. The public servant could be nominated and stand for election and, if he or she secured a majority of votes, have an option to resign and be declared elected or not to resign and be disqualified. The adverse consequences this would have for the electoral process are an additional reason for rejecting the suggest interpretation. The inclusion in the list of candidates on polling day of candidate who may opt for disqualification may well constitute an additional and unnecessary complication in the making by the electors of their choice. Furthermore, it is hardly conducive to certainty and speed in the ascertainment of the result of the election that it should depend upon a decision to be made by a candidate on or after polling day. Speed and certainty in the ascertainment of the result of the first election to the Parliament of the Commonwealth were enhanced by the fact that in 1901, in all the Australian colonies other than Queensland and parts of Tasmania, the "first past the post" system of electoral voting prevailed in lower House elections (22).

Reflection on these considerations persuades us that the words "shall be incapable of being chosen" refer to the process of being chosen, of which nomination is an essential part (23). That interpretation is supported by section 43 of the constitution which provides:

> "A Member of either House of the Parliament shall be incapable of being chosen or of sitting as a member of the other House".

In that context, the words "shall be incapable of being chosen" must refer to the *process* of being chosen. It can scarcely have been intended that a member of Parliament could, while holding that office, stand for election for the other House of Parliament and, after the counting of the votes but before the declaration of the poll, resign the office which he or she then held, thereby ensuring his or her eligibility to be declared elected as a member of the other House.

It is to be noted that, under the Electoral Act, if only one candidate is nominated, the Divisional Returning Officer is required by the Electoral Act to declare that candidate duly elected (24) and that declaration may be made in advance of the polling day. The fact that, in such a case, the "choice" is made by reference to the state of affairs existing on nomination day may well be a reason for concluding that, if a candidate is not qualified on nomination day, he or she is incapable of being chosen. However, as section 44 of the Constitution does not necessarily require that, in such a case, the 'choice' be made in the manner dictated by section 179(2), the question may be put to one side (25).

This interpretation of section 44 (iv), because it has the effect of discouraging public servants from standing for election to the Parliament, has been criticised. There is force in the view that the field of potential candidates for election should be as wide as possible, having due regard to the provisions of section 44. However once it is accepted, as in our view it must be, that nomination is an essential element in the process of choice that is the electoral process, the answer to the question becomes inevitable.

It follows that the first respondent was incapable of being chosen as a member of the House of Representatives.

Question (b): If no to (a), was the election absolutely void?

Counsel for the third respond submits that the Court should order a special count to be taken so that the preference votes on the elimination of the first respondent may be distributed. The decision in *In re Wood* (26), so it is said, supports this approach. That case decided that the election and return of an unqualified candidate are wholly ineffective to fill a vacant Senate place, that the election is not completed when an unqualified candidate is returned and that the purpose of the poll is to choose preferred candidates. In particular, *In re Wood* decided that a primary vote for an unqualified candidate does not destroy the voter's indication of his or her subsequent

preference (27). Although an indication of a voter's preference for an unqualified candidate is a nullify and the indication of preference for that candidate cannot be treated as effective, the ballot paper is not informal. It was held that "[t]he vote is valid except to the extent that the want of qualification makes the particular indication of preference a nullify" (28) and that there is no reason for disregarding the other indications of the voter's preference (29). The Court likened the position to that which arises when the candidate dies. Then, pursuant to section 273 (27) of the Electoral Act, a vote indicated on the ballot paper for the deceased candidate is counted to the candidate next in the voter's indicated order of preference and the numbers indicating subsequent preferences are treated as altered accordingly. In these circumstances, the situation in *In re Wood* was such as to warrant the conclusion that the special count would reflect the voters' "true legal intent" (30). Furthermore, in the light of the group system of voting which applies in Senate elections, it was highly probable, if not virtually certain, that a person who voted for Mr. Wood would have vote for another member of his group, had the voter known that Mr Wood has ineligible. The same comment cannot be made in the present case. Here a special count could result in a distortion of the voters' real intentions because the voters' preferences were expressed within the framework of a larger field of candidates presented to the voters by reason of the inclusion of the first respondent.

As Mr Rose Q.C. for the Australian Electoral Commission points out, the Electoral Act draws a distinction between House of Representatives and Senate elections in the case of the death of a candidate. Section 180 (2) provides that, if a candidate in a House of Representatives election dies between the declaration of the nominations and polling day, the election wholly fails, whereas, in the case of the death of a candidate in a Senate election between those days, section 273 (27) provides that the votes should be counted with the preferences adjusted accordingly. The reasons which lie behind the drawing of that distinction have equal application to the drawing of a like distinction between the election to the House of Representatives and to the Senate of candidates who are disqualified under section 44.

Accordingly, we would declare the election void and refuse to order a special count.

Question (c): If no to (b), was any and which candidates duly elected who was not returned as elected?

As the second and third respondents may wish to stand for the next election for the Electoral Division of Wills, the Court should answer this question. The eligibility of the two respondents turns on that part of section 44 which provides:

> "Any person who
> (i) Is under any acknowledgment of allegiance, obedience, or adherence to a foreign power, or it 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"

Second respondent: facts

The second respondent, Mr Delacretaz, was born in Switzerland on 15 December 1923 and, from the time of his birth, was a Swiss citizen. He migrated to Australia on 13 June 1951 and has lived in Australia since then. On 20 April 1960 he became naturalised as an Australian citizen pursuant to Div. 3 of Pt III of the *Nationality and Citizenship Act 1948 (Cth).* In so doing, he renounced all allegiance to any sovereign or State of whom or of which he was a subject or citizen, and took an oath of allegiance to Her Majesty the Queen, by which he swore to "be faithful and bear true allegiance to Her Majesty Queen Elizabeth the Second, her heirs and successors according to Law" and "faithfully [to] observe the laws of Australia and fulfill [his] duties as an Australian citizen".

However, he did not at any time make application to the Government of Switzerland to renounce or otherwise terminate his Swiss citizenship. He has held an Australian passport since 1960 and it is still current. He holds no other passport.

Under the law of Switzerland, a Swiss citizen will be released from his or her citizenship upon his or her demand if he or she has no residence in Switzerland and has acquired another nationality. The second respondent has made no such demand and is and was at all material times under the law of Switzerland a Swiss citizen and entitled to a Swiss passport to enter Switzerland without restriction and to reside in that country.

Third respondent: facts

The third respondent, Mr Kardamitsis, was born in Greece on 2 July 1952 and, from the time of his birth, was a Greek citizen. He came to Australia in 1969 as a migrant sponsored by his brother and has lived in Australia since then.

On 12 March 1975, he became an Australian citizen pursuant to Div.2 of Pt III of the *Australian Citizenship Act 1948* (Cth). In so doing, he renounced all other allegiance and swore the oath of allegiance in a form similar to, but not identical with, that sworn by the second respondent. He did not at any time make application to the Government of Greece to discharge his Greek nationality.

When he became an Australian citizen, he surrendered a Greek passport which he then held. It had expired one or two years after he had migrated to Australia. Between 1969 and 1978, he did not travel out of Australia. He was issued with an Australian passport on 24 April 1978, which

was valid for five years, and a further Australian passport on 21 May 1987, which was valid for ten years and is still current. He entered Greece on his Australian passport for a holiday in 1978 and in 1987, and for the funeral of his mother in 1979 and of his father in 1990.

He has never received any social security or other like benefits from the Government of Greece. He has never stood for office in Greece or voted or been recorded as a voter in an election in Greece.

Since leaving Greece, he has not, to his knowledge, done any act, made any statement or acted in any manner which would place him under any acknowledgement of allegiance, obedience or adherence to Greece or any other foreign power. In becoming an Australian citizen, he took a conscious and serious step which he believed involved his breaking his bond of allegiance with Greece and his establishing a new bond of allegiance with Australia. He has habitually resided in Australia since leaving Greece. The centre of his interests is Australia, not Greece. His principal family ties are with Australia, not Greece. He has participated in public life in Australia and seeks further such participation. He has had no such participation in Greece and seeks none. He has a bond of attachment with Australia and not with Greece (except that Greece is part of his personal history), and he has inculcated the same bond in his children. Save that he has visited Greece on several occasions and that he has some family and friends in Greece, he has severed his links with Greece to the extent that any citizen of Greece can without applying to discharge his or her Greek citizenship.

Under the law of Greece, a Greek national will have his or her Greek nationality discharged if (a) he or she has acquired the nationality of another country with the permission of the appropriate Greek Minister; or (b) he or she has acquired the nationality of another country and later obtains the approval of the appropriate Greek Minister for the discharge of his or her Greek nationality. In the latter case, the discharge of Greek nationality becomes effective as from the date of the Greek Minister's approval and not from the date of the acquisition of foreign nationality. The third respondent had not sought to have his Greek nationality discharged and, accordingly, under the law of Greece, he is and was at all material times a Greek national. As a result, he is and was at all material times entitled to apply for a Greek passport and, using that passport, to enter Greece and stay in Greece without time restrictions and without permission.

It was first brought to the attention of the third respondent that he might not be qualified to be a member of the House of Representatives by reason of section 44(i) of the Constitution after he was nominated. Until then, he did not know that he might not be so qualified, despite being an Australian citizen, and that he might, according to the laws of Greece, still be a citizen of that country. He did not know that there were procedures available in Greece by which Greek nationals can terminate their Greek nationality until he was so informed after the petition was issued.

In 1972, he and his wife, a naturalised Australian citizen, were married in Melbourne. They have three children, who were born in Australia and are Australian citizens.

He was elected a councillor for the Coburg City Council in 1989 and 1991 pursuant to Pt 3 of the *Local Government Act* 1989 (Vict.). Following each of these elections, he took an oath of allegiance as a councillor pursuant to section 63 of the *Local Government Act.* He resigned from his position as a councillor effective as from 18 March 1992.

On or about 5 July 1990, he was appointed as a Justice of the Peace for the State of Victoria pursuant to P III of the *Magistrates Courts Act* 1971 (Vict.). On July 1990, he swore an oath of office and an oath of allegiance pursuant to section 12 and Sched. 2 of the *Magistrates' Courts Act.* By virtue of Div. 1 of Pt 6 of that Act, he continues to be a Justice of the Peace for the State of Victoria.

Interpretation of section 44(i)

The petitioner submits that each of the second and third respondents is "a subject or citizen or is entitled to the privileges of a subject or citizen of a foreign power" within the meaning of section 44(i). In support of this submission, the petitioner argues that the respondents' assumption of Australian citizenship did not entail a renunciation of their antecedent citizenship or nationality and that, in order to achieve such a renunciation, it was necessary for them to comply with the requirements with respect to renunciation of citizenship or nationality of the law of Switzerland or Greece, as the case may be.

The common law recognises the concept of dual nationality, so that, for example, it may regard a person as being at the same time a citizen or national of both Australia and Germany (31). At common law, the question of whether a person is a citizen or national of a particular foreign State is determined according to the law of that foreign State (32). This latter principle is, in part, a recognition of the principle of international law, restated in the *Nottebohm Case (33),* that:

> "It is for every sovereign State..... to settle by its own legislation the rules relating to the acquisition of its nationality, and to confer that nationality by naturalization granted its own organs in accordance with that legislation".

This rule finds expression in Art. 2 of the Hague Convention of 1930 (34), to which Australia is a party:

> "Any question as to whether a person possesses the nationality of a particular State shall be determined in accordance with the law of that State."

And Art.3 of that Convention acknowledges that a person having two or more nationalities may be regarded as its national by each of the States whose nationality he or she possess.

In the *Nottebohm Case,* Liechtenstein sought to exercise its right of diplomatic protection (35) in respect of acts of Guatemala with respect to the person and property of Nottebohm, a naturalised Liechtenstein citizen. The question considered was whether the naturalisation conferred on Nottebohm by and under the law of Liechtenstein could successfully be invoked against Guatemala. The International Court of Justice pointed out that, where the question had arisen with regard to the exercise of diplomatic protection, international arbitrators had recognised the "real and effective nationality, that which accorded with the facts, that based on stronger factual ties between the person concerned and one of the States whose nationality is involved" as that which gave rise to a right to exercise diplomatic protection. The majority went on to say that, in determining the real and effective nationality (36):

> "[N]ationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence interests and sentiments, together with the existence of reciprocal rights and duties. It may be said to constitute the juridical expression of the fact that the individual upon whom it is conferred either directly by the law or upon whom it is conferred, either directly by the or as result of an act of the authorities, is in fact more closely connected with the population of the State conferring nationality than that with that of any other State. Conferred by a State, it only entitles that State to exercise protection vis-à-vis another State, if it constitutes a translation into juridical terms of the individual's connection with the State which has made him its national."

However, the critical words in section 44 (i) do not permit this court to adopt the approach which has been taken by international law. Here the question is different: is the candidate a subject or citizen or entitled to the rights or privileges of a subject or citizen of a foreign power? And, as already stated, at common law, as in international law, that question is to be determined according to the law of the foreign State concerned.

But, there is no reason why section 44(i) should be read as if it were intended to give unqualified effect to that rule of international law. To do so might well result in the disqualification of Australian citizens on whom there was imposed involuntarily by operation of foreign law a continuing foreign nationality, notwithstanding that they had taken reasonable steps to renounce that foreign nationality. It would be wrong to interpret the constitutional provision in such a way as to disbar an Australian citizen who had taken all reasonable steps to divest himself or herself of any conflicting allegiance. It has been said (38) the provision was designed to ensure:

> "that members of Parliament did not have a split allegiance and were, not, as far as possible, subject to any improper influence from foreign governments".

What is more, section 44 (i) finds its place in a Constitution which was enacted at a time, like the present, when a high proportion of Australians, though born overseas, had adopted this country as their home. In that setting, it could scarcely have been intended to disqualify an Australian citizen for election to Parliament on account of his or her continuing to possess a foreign nationality, notwithstanding that he or she had taken reasonable steps to renounce that nationality. In this respect, it is significant that section 42 of the Constitution requires a member of Parliament to take an oath or affirmation of allegiance in the form set out in the schedule to the Constitution.

What amounts to the taking of reasonable steps to renounce foreign nationality must depend upon the circumstances of the particular case. What is reasonable will turn on the situation of the individual, the requirements of the foreign law and the extent of the connection between the individual and the foreign State of which he or she is alleged to be a subject or citizen. And it is relevant to bear in mind that a person who has participated in an Australian naturalisation ceremony in which he or she has expressly renounced his or her foreign allegiance may well believe that, by becoming an Australian citizen, he or she has effectively renounced any foreign nationality.

Application of section 44(i) to the second respondent

The second respondent omitted to make a demand for release form Swiss citizenship which would have been granted automatically as he has no residence in Switzerland and has been an Australian citizen for thirty-two years. Because he has failed to make such a demand, it cannot be said that he has taken reasonable steps to divest himself of Swiss citizenship and the rights and privileges of such a citizen.

Application of section 44(i) to the third respondent

The third respondent has omitted to seek the approval of the appropriate Greek Minister for the discharge of his Greek nationality. Whether the grant of that approval is a matter of discretion or is automatic is not altogether clear. Presumably it is the former. But, in the absence of an application for the exercise of the discretion in favour of releasing the third rspondent from his Greek citizenship, it cannot be said that he has taken reasonable steps to divest himself of Greek citizenship and the rights and privileges of such a citizen.

We would answer the questions reserved for the consideration of the full Court as follows:

(a) No.

(b) Yes.

(c) Does not arise.

(d) By consent there should be no order for costs.

What is more, section 44 (i) finds its place in a Constitution which was enacted at a time, like the present, when a high proportion of Australians, though born overseas, had adopted this country as their home. In that setting, it could scarcely have been intended to disqualify an Australian citizen for election to Parliament on account of his or her continuing to possess a foreign nationality, notwithstanding that he or she had taken reasonable steps to renounce that nationality. In this respect, it is significant that section 42 of the Constitution requires a member of Parliament to take an oath or affirmation of allegiance in the form set out in the schedule to the Constitution.

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We would answer the questions reserved for the consideration of the full Court as follows:

(a) No.

(b) Yes.

(c) Does not arise.

(d) By consent there should be no order for costs.

BRENNAN J For the reasons stated by Mason C J, Toohey and McHugh JJ, I agree that section 44 (iv) of the Constitution rendered the first respondent incapable of being chosen as a member of the House of Representatives. Accordingly, I agree that he was not duly elected. I agree also with their Honours' reasons for concluding that the election was void and that a special count should not be ordered.

There remains the challenge based on section 44 (i) of the Constitution to the respective capacities of the second and the third respondents to be chosen as a member of the House of Representatives. Section 44 (i) reads as follows:

> "Any person who –
> (i) Is under any acknowledgement 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."

The purpose of this sub-section is to ensure that no candidate, senator or member of the House of Representatives owes allegiance or obedience to a foreign power or adheres to a foreign power. Putting acknowledgement of adherence to a foreign power to one side, the sub-section contains three categories of disqualification, each of them being descriptive of a source of a duty of allegiance or obedience to a foreign power. The first category covers the case where such a duty arises from an acknowledgement of the duty by the candidate senator or member. The second category covers the case where the duty is reciprocal to the status conferred by the law of a foreign power. The third category covers the case where the duty is reciprocal to the rights or privileges conferred by the law of a foreign power.

The second category refers to subjects or citizens of a foreign power – subject being a term appropriate when the foreign power is a monarch of feudal origin; citizen when the foreign power is a republic (39). In the United Kingdom, by the common law, allegiance is owed to the Sovereign "by ... natural born subjects [and] by those who, being aliens, become.... subjects by denization of naturalization", as Lord Jowitt L.C. said in *Joyce* v *Director of Public Prosecutions* (40). At common law, the status of a subject was coincident with the owing of allegiance (41). A similar rule is adopted by other legal systems with respect to their nationals. In the *Nottebohm Case* (42), the judgement of the International Court of Justice noted that:

> "Nationality serves above all to determine that the person upon whom it is conferred enjoys the rights *and is bound by the obligations* which the law of the State in question grants to or imposes on its nationals." (Emphasis added.)

Nationality has sometimes been regarded as an international law attribute of subjects or citizens (43) but, for the purposes of construing section 44(i), it is not necessary to draw any distinction between a person who is a national of a foreign power and a person who is a subject or citizen of a foreign power (44). The second category covers persons who, by reason of their status as subjects or citizens (or nationals) of a foreign power, owe a duty of allegiance or obedience to the foreign power according to the law of the foreign power.

The third category mentioned in section 44(i) covers those who, though not foreign nationals, are under the protection of a foreign power as though they were subjects or citizens of the foreign power. Where non-nationals are under the protection of a foreign power, they may owe a duty of allegiance or obedience to the foreign power by the Law of that power. Thus, in *Joyce* v *Director of Public Prosecutions,* it was held that a non-subject owed allegiance to the Sovereign by reason of the protection afforded him by the issue of a British passport.

The first category applies when, as a matter of fact, the person has acknowledged allegiance, obedience or adherence to a foreign power. The second and the third categories apply when, under the law of a foreign power, the person owes allegiance or obedience to the foreign power by reason of his or her status, rights or privileges. Although section 44 (i) is part of the municipal law of Australia, the status, rights or privileges mentioned in the second and third categories are generally ascertained by reference to the municipal law of the foreign power. Lord Cross of Chelsea in *Oppenheimer* v *Cattermole* (45) stated the law in these terms:

> "Our law is, of course, familiar with the concept of dual nationality... and the English law which is to be applied in deciding whether or not Mr. Oppenheimer was a German national at the relevant time is not simply our municipal law but includes the rule which refers the question whether a man is a German national to the municipal law of Germany."

Our law runs parallel with the law of England in this respect (46). *Nottebohm's* case, though it was invoked to avoid this conclusion, in truth confirms it. The International Court of Justice had to determine whether Guatemala was obliged by international law to recognise that Liechtenstein had conferred nationality on Notterbohm so as to entitle Liechtenstein to assert the right of diplomatic protection of Nottebohm by taking international judicial proceedings against Guatemala (47). The Court acknowledged that nationality is to be settled for the purposes of each State by its own municipal law (48). However, the Court was not determining an issue under municipal law. Liechtenstein's entitlement to exercise protection had to be determined by international law. In that context, the Court observed that international tribunals, when confronted with competing claims made under the respective municipal laws of two States –

> "have given their preference to the real and effective nationality, that which accorded with the facts, that based on stronger factual ties between the person concerned and one of the States whose nationality is involved. Different factors

> are taken into consideration, and their importance will vary from one case to the next: the habitual residence of the individual concerned is an important factor, but there are other factors such as the centre of his interests, his family ties, his participation in public life, attachment shown by him for a given country and inculcated in his children, etc."(49)

The doctrine of "real and effective nationality" is a doctoring of international law, not municipal law, though it may be imported into municipal law when an issue in the municipal courts makes it necessary to choose between the competing claims of two *other* States asserting the nationality of an individual (50). The opinion of the International Court in *Nottebohm's case* accords with the provisions of the Convention on Certain Questions Relating to the Conflict of Nationality Laws (51), which read relevantly as follows:

> Article 1.
>
> "
>
> It is for each State to determine under its own law who are its nationals. this law shall be recognised by other States in so far as it is consistent with international conventions, international custom, and the principles of law generally recognised with regard to nationality.
>
> Article 2.
>
> Any question as to whether a person possesses the nationality of a particular State shall be determined in accordance with the law of that State.
>
> Article 3.
>
> Subject to the provisions of the present Convention, a person having two or more nationalities may be regarded as its national by each of the States whose nationality he possesses."

When the issue in an Australian court is simply whether an individual is a national of a foreign power, that issue is ordinarily determined by reference to the municipal law of the foreign power (52). The general rule, however, is subject to qualifications, one of which is stated by Lord Cross in *Oppenheimer* v *Cattermole (53):*

> "If a foreign country purported to confer the benefit of its protection on and to exact a duty of allegiance from persons who had no connection or only a very slender connection with it our courts would be entitled to pay no regard to such legislation on the ground that the country in question was acting beyond the bounds of any jurisdiction in matters of nationality which international law would recognise. In this respect I think that our law is the same as that of the United

> States as stated by the circuit Court of Appeals, Second Circuit, in *United States ex rel. Schwarzkopf v Uhl* (54)."

That qualification has no application either to the second or to the third respondent. Each was born and grew up as a citizen of a foreign power before coming to live in Australia. Each, by the respective laws of those foreign powers, remains a citizen of that power. Each, by those respective laws, owes allegiance to a foreign power. True, it is that each purported to renounce his citizenship of, and allegiance to, his native country when he became an Australian citizen but that renunciation was ineffective to alter his status and obligations under the law of his native country. There is no reason to hold that the application of the laws of the second and third respondents' respective native countries exceeds the jurisdiction in matters of nationality which international law would recognise.

However, recognition by our municipal law of the effect of foreign law on status and allegiance is subject to a further qualifications. In times of war, common law courts have refused to recognise changes in the status either of British subject (55) or of enemy aliens (56) under the law of the foreign hostile power. In these cases, non-recognition has been justified on the ground of public policy (57). But there is no reason why the doctrine of public status, rights or privileges under foreign law would extend the operation of section 44(i) of the Constitution to cases which it was not intended to cover, that section should be construed as requiring recognition of foreign law only in those situations where recognition fulfils the purpose of section 44(1). To take an extreme example, if a foreign power were mischievously to confer its nationality on members of the Parliament so as to disqualify them all, it would be absurd to recognise the foreign law conferring foreign nationality. Section 44 (i) if concerned to ensure that foreign powers command no allegiance from or obedience by candidates, senators and members of the House of Representatives; it is not concerned with the operation of foreign law that is incapable in fact of creating any sense of duty, or of enforcing any duty, of allegiance or obedience to a foreign power. It accords both with public policy and with the proper construction of section 44(i) to deny recognition to foreign law in these situations. If foreign law were recognised in these situations, some Australian citizens would be needlessly deprived of the capacity to seek election to the Parliament and other Australians would be needlessly deprived of the right to choose the disqualified citizens to represent them. However, there are few situations in which a foreign law, conferring foreign nationality or the rights and privileges of a foreign national, is incapable in fact of creating a sense of duty, or is incapable of enforcing a duty, of allegiance or obedience to a foreign power. One such situation does occur when the foreign law, purporting to affect nationality of persons who have had no connection or only a very slender connection with the foreign power, exceeds the jurisdiction recognised by international law. That is the situation described by Lord Cross (58) in which international law does not recognise the jurisdiction of the foreign power. A second situation occurs when an Australian citizen has done all that lies reasonably within his or her power (i) to renounce the status or the rights or privileges conferred by the foreign law carrying a reciprocal duty of allegiance or obedience to the foreign power and (ii) to obtain a release from any such duty. It is not sufficient, in the second situation, for a

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

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

I agree with the answers proposed by Mason C J, Toohey and McHugh J J to the questions in the stated case.

DEANE J This is a case stated in proceedings instituted in the court as the Court of Disputed Returns under the *Commonwealth Electoral Act* 1918 (Cth) ("the Electoral Act"). The petitioner, Mr Sykes, challenges the validity of the declaration on 23 April 1992 of the poll for a by-election held to elect the member of the Commonwealth House of Representatives for the Electoral Division of wills int he State of Victoria ("the by-election"). The first respondent, Mr Cleary, is the person who was declared to be the successful candidate in that by-election. There were twenty-one unsuccessful candidates. They included the petitioner, the second respondent (Mr Delacretaz), the third respondent (Mr Kardamitsis) and the fourth respondent (Ms Rawson). The fifth respondent, the Australian Electoral Commission, was given leave to appear and is deemed to be a respondent under section 359 of the Electoral Act.

In the petition, the petitioner challenged the validity of the declaration of the poll on the ground that he and the first four respondents had each been "incapable of being chosen" as a member of the House of Representatives. The substantive questions raised for the opinion of the Full Court are:

"(a) Was the First Respondent duly elected at the [by-election]?
(b) If no to (a), was the [by-election] absolutely void?
(c) If no to (b), was any and which candidate duly elected who was not returned as elected?"

The argument of those questions has been confined to the status of Mr Cleary, Mr Delacretaz and Mr. Kardamitsis. It has been argued, on behalf of the petitioner, that those three candidates had each been disqualified from being chosen as a member of the House of Representatives by the provisions of section 44 of the Constitution and that, since they were the three candidates who had obtained the highest number of first preference votes (more than ninety per cent between them), the appropriate order to be made is that the by-election was absolutely void.

The Constitution

Section 44 of the Constitution provides:

"Any person who –

(i) Is under any acknowledgment of allegiance, obedience or adherence to a foreign power, or is a subject or a citizen or entitled to the rights or privileges of a subject or a citizen of a foreign power: or

(ii) Is attainted of treason, or has been convicted and is under sentence, or subject to be sentenced, for any offence punishable under the law of the Commonwealth or of-a State by imprisonment for one year or longer:

or

(iii) Is an undischarged bankrupt or insolvent: or

(iv) Holds any office of profit under the Crown or any pension payable during the pleasure of the Crown out of any of the revenues of the Commonwealth: or

(v) Has any direct or indirect pecuniary interest in any agreement with the Public Service of the Commonwealth otherwise than as a member and in common with the other members of an incorporated company consisting of more than twenty-five persons:

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

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

Section 44 should be read in the context of section 46 which provides:

"Until the Parliament otherwise provides, any person declared by this Constitution to be incapable of sitting as a senator or as a member of the House of Representatives shall, for every day on which he so sits, be liable to pay the sum of one hundred pounds to any person who sues for it in any court of competent jurisdiction."

That constitutional provision, which has now been effectively replaced by a similar but less harsh statutory provision (59), added penal consequences to disregard of section 44's declaration that a person is "incapable of .....sitting". In *In re Webster* (60), Barwick C J, speaking of par. (v) of section 44, said that the effect of those penal consequences was that "the paragraph should receive a strict construction". I respectfully agree with that comment. It is true that those penal consequences only attach if the person concerned purports to sit as a member of the Parliament. As the present case demonstrates, however, the question whether the person is "incapable of ... sitting" will commonly depend upon whether he or she was "incapable of being chosen" by reason of the provisions of section 44.

The Status of Mr. Cleary

The basis of the argument that Mr. Cleary was disqualified is the fact that, up until 16 April 1992, he held a permanent appointment as a teacher with the Education Department of Victoria. The petitioner contends that, by reason of that appointment, Mr. Cleary was, at relevant times, the holder of an "office of profit under the Crown" for the purposes of section 44(iv) and was accordingly "incapable of being chosen" as a member of the House of Representatives. Counsel for Mr. Cleary sought to meet that argument at three distinct levels. First, it was submitted that, in all the circumstances of the case, Mr. Cleary had not held an office of profit under the Crown at any relevant time. Next, it was submitted that, even if Mr. Cleary had held an office of profit under the Crown, section 44 (iv) of the Constitution should be construed as referring only to an office of profit held under the Crown in right of the Commonwealth whereas any office of profit held by Mr. Cleary had been under the Crown in right of the State of Victoria. Finally, it was submitted that any office of profit under the Crown held by Mr. Cleary had been relinquished by the time that he was, for the purposes of section 44 (iv), "chosen......as... a member of the House of Representatives". It is convenient to consider those submissions in the order in which I have mentioned them.

Was Mr. Cleary's appointment as a teacher an office of profit under the Crown?

It is not disputed that Mr. Cleary held a permanent appointment as a teacher with the Education Department of Victoria for a number of years prior to his resignation with effect from 16 April 1992. He had, however, been "on leave without pay" from 30 January 1992, which was before the issue of the writ for the by-election. During that period of leave without pay, Mr. Cleary received no salary or allowances and, while formally allocated to Hoppers Crossing Secondary College, did not hold any particular or designated position in the Department. Nor was that period of leave without pay counted as service for the purposes of calculating long service leave, sick leave or recreation leave. During it, neither Mr. Cleary nor the Department made any contributions to the relevant superannuation fund for his benefit.

Mr. Cleary's permanent appointment as a teacher existed under the provisions of the *Teaching Service Act* 1981 (Vict.) ("the 1981 Act"). An examination of those provisions makes clear that the appointment continued while Mr. Cleary was on leave without pay and that it was and remained, for so long as it subsisted, an office of profit under the Crown. Section 2 defines "[t]eachers" as "permanent *officers* employed in the teaching service for teaching in State schools"(61). Section 3 provides that "there shall be *employed by Her Majesty in the teaching service* teachers and principals and such other persons as are necessary for the purposes of this Act" (62). The 1981 Act refers, on a number of occasions (63), to persons in the position of Mr. Cleary (i.e. without any particular of designated position) as *"unattached officer[s]"* (64). It also expressly refers to "[f]orfeiture of office in certain cases" none of which was applicable to him (65). Clearly, the permanent appointment as a teacher under the 1981 Act which Mr. Cleary

continued to hold while on leave without pay was "an office ... under the Crown". Equally clearly, in a context where the conditions applying generally to the office of teacher included entitlement to remuneration (66), the fact that the holder of such an office is temporarily on leave without pay or other emoluments does not deprive the office itself of its character as an office of profit (67).

It follows that the submission that Mr. Cleary did not, while he was on leave without pay, hold an office of profit under the Crown must be rejected.

Does section 44(iv) of the Constitution refer only to an office of profit under the Crown in right of the Commonwealth?

At the time of the adoption of the Constitution, the British Crown was generally perceived to be one and indivisible (68). This perception was reflected in section 2 of the *Commonwealth of Australia Constitution Act* 1900 (Imp.) which expressly provided that the "provisions of this Act" – which included a section (69) setting out the Constitution – "shall extend to Her Majesty's heirs and successors in the sovereignty of the United Kingdom." In the context of that perception of the unity and indivisibility of the British Crown, the phrase "office of profit under the Crown" in section 44 (iv) of the Constitution would have been understood, at the time of the establishment of the Commonwealth, as referring to any office of profit under the British Crown regardless of geographical location or distinctions between different governments within the then British Empire.

The words of par. (iv) of section 44 and of the final qualifying paragraph of the section (which relates to par. 44 (iv)) confirmed that the reference to "the Crown" was intended to be understood in that broad general sense. If, for example, the reference to "the Crown" in section 44 (iv) was intended to be read as a reference to the Crown in right of the Commonwealth only, the words "out of any of the revenues of the Commonwealth" in the sub-section would be surplusage. More important, the express provision in the final paragraph that par. (iv) "does not apply to the office of any of the Queen's Ministers of State for the Commonwealth, or of any of the Queen's Ministers for a State" makes plain that the relevant words of par. (iv) were intended to be construed as *prima facie* applicable to an office of profit under the Crown regardless of whether the office in question related to the government of the Commonwealth or to the government of a State.

The development of the full independence and sovereignty of nations such as Australia, Canada and New Zealand which maintained their allegiance to the personal embodiment of the Crown of the United Kingdom made it inevitable that the common law recognise that the British Crown has a "distinct and independent" capacity in each of its relationships with the different polities which make up the Commonwealth (70). That development also compels the adjustment of the content of operation of some of the provisions of the Constitution so that they accord with the realities

of contemporary national sovereignty and international relationships (71). It is, however, unnecessary to pursue that subject for the purposes of the present case since it is apparent that no such adjustment could legitimately transform section 44 (iv) from a provision which was clearly intended to encompass the holding of an office of profit under the Crown in right of either the Commonwealth or a State into one which applied only to the holding of an office of profit under the Crown in right of the Commonwealth.

Accordingly, the second submission advanced on behalf of Mr Cleary fails.

Did Mr. Cleary hold an office of profit at the relevant time?

The writ for the by-election was issued by the Speaker of the House of Representatives (72) of 9 March 1992. Its command was addressed to Brian Field Cox, the Electoral Commission (73), and specified the following dates:

For the CLOSE OF THE ROLLS:	16 March 1992
For NOMINATION:	20 March 1992
For TAKING THE POLL:	11 April 1992
For the RETURN OF THE WRIT:	on or before 17 June 1992

In the event, those dates were all observed. The scrutiny and counting of votes commenced after the close of the poll on 11 April 1992. The counting of votes was completed on 22 April 1992 with the distribution of preferences to the stage where all candidates other than Mr. Cleary and Mr. Kardamitsis had been excluded (74). At that stage, Mr. Cleary had a total of 41,708 votes which represented 65.7% of the total number of unrejected or valid ballot-papers. On 23 April 1992, the Acting Divisional Returning Officer declared Mr. Cleary to be elected as the member of the House of Representatives for the Division of Wills (75). On the same day, the Acting Electoral Commissioner certified in writing on the writ the name of Mr. Cleary as the elected candidate and returned the writ to the Speaker (76).

As has been mentioned, Mr. Cleary resigned from the Victorian Education Department effective as from 16 April 1992. That means that he held an office of profit under the Crown at the time the writ for the by-election was issued, at the time he was nominated as a candidate and at the times when voting in the by-election took place, when the poll closed and when the scrutiny and counting of votes commenced. On the other hand, he had relinquished any office of profit under the Crown a week before counting was completed by the distribution of preferences. The question arises whether, in those circumstances, section 44 (iv)'s provision that a person who holds an office of profit under the Crown "shall be incapable of being chosen" as a member of the House of Representatives precluded Mr. Cleary from being validly declared to be elected as such a member.

It is argued on behalf of the petitioner that the process of "being chosen" to which section 44 (iv) refers is an on-going one which when all votes have been cast on the day the poll is held or when the result of an election is declared and the writ is returned. Disqualification is incurred, so the argument proceeds, if a person holds an office of profit under the Crown at any time during the course of that process. In contrast, it is argued on behalf of Mr. Cleary that the words "being chosen" are, in their context in section 44, synonymous with "being elected" and that, for the purposes of the section, a person is chosen or elected as a member of the House of Representatives only when counting is completed, the poll declared and the writ returned. Obviously, there is considerable force in each of those contending arguments. Ultimately, I have come to the conclusion that the words "incapable of being chose" in section 44 should be construed as meaning not capable of becoming the chosen member by being declared elected at the termination of the election process. I turn to explain my reasons for that conclusion.

As a matter of mere language, the words "being chosen" are clearly capable of referring to the whole process of election commencing with nomination and finishing with either the declaration of the poll or the return of the writ ("the wide construction"). They are, however, also capable of being construed as referring to the declaration of the poll which represents the final step in the procedure for choosing the particular member of the Parliament ("the narrow construction"). Until that stage is reached and that final step is taken, events can intervene which preclude the candidate who will, when counting is completed and preferences are (to the extent necessary) distributed, have an absolute majority of votes from ever being actually elected as a member of the House of Representatives. Most obviously, he or she can die. Alternatively, if a disqualifying event under section 44 of the Constitution intervenes, the disqualified person cannot be validly declared duly elected at a time when he or she is disqualified (77).

Considerations of content and of context seem to me to favour the narrow construction. The provisions of section 44 do not represent a code determining which citizens are and which citizens are not qualified to be elected to the Parliament. Legislative power to determine the qualifications of members of the Parliament is conferred upon the Parliament itself by virtue of the combined operation of sections 34, 51 (xxxvi) and 16 of the Constitution. what section 44 does is to impose an overring disqualification of any person who comes within its terms regardless of whether the Parliament thinks (or seeks to enact), in the context of contemporary circumstances and standards, that disqualification is unjustified. Such an overriding disqualification provision should, in my view, be construed as depriving a citizen of the democratic right to seek to participate directly in the deliberations and decisions of the national parliament only to the extent that its words clearly and unambiguously require.

Moreover, in the construction of a constitutional provision such as section 44, "the purpose it seeks to attain must always be kept in mind" (78). That purpose is essentially to ensure that the composition of the Parliament is appropriate for the discharge in the national interest of its functions as the legislature of a free and independent nation under a constitution which adopts the Cabinet or Westminster system of parliamentary democracy but is otherwise structured upon the

doctoring of a separation of legislative, executive and judicial powers. As one would expect in the Constitution of a country whose population consisted (by 1900) largely of immigrants or the descendants of immigrants, the disqualification provisions of section 44 look solely to present allegiance, status and interests. Subject to one exception, the verbs of the section are all in the present tense: "is", "holds", "has", "does not". The exception is the critical verbal phrase which is in the future tense: "shall be incapable". Clearly, the section is directed to the imposition of minimum requirements which, regardless of the views of the Parliament, a citizen must satisfy during the period in which he or she is actually a senator or a member of the House of Representatives.

The rationale of the disqualification of a person from membership of the Commonwealth Parliament by reason of the holding of an office of profit under the Crown itself supports the narrow construction of the relevant words of section 44(iv). That rationale is that, subject to the important qualifications flowing from the adoption of the Cabinet system of government (79)???, it is undesirable that a person be subjected to the possible conflicting responsibilities and loyalties and the potential for abuse of power or opportunity which may be involved in, or flow from, concurrent membership of the national Parliament and the holding of an office of profit under the Crown. Implicit in it is a perception of the need to preserve the freedom and independence of the Parliament and to limit the control or influence of the executive government (80). None of those potential disadvantages or dangers arises until a person actually holds both positions, that is to say, until after he or she is declared elected as a member of the Parliament.

There are, of course, practical considerations which favour the preclusion of a person who is disqualified from becoming or sitting as a member of the Parliament from nominating as a candidate or having his or her name included on the ballot paper. It is however, arguable in relation to some of the disqualifying provisions of section 44, that the preferable approach would be to permit nomination or even participation in the poll at least in circumstances where it is plain, or where it lies within the competence of the particular person to ensure, that a candidate will not be disqualified from being chosen as a member of the Parliament at the time when he or she will, if successful on the poll, be declared to be elected. Thus, as regards disqualification under section 44 by reason of the holding of an office of profit under the Crown, it has long been recognised that it would be against the national interest and unfair if the comparatively large percentage of the total employed population employed in the Commonwealth or State Public Services[81] were able to stand as candidates for election to the national Parliament only if they completely forfeit the security and seniority of their respective appointments. According, one finds provision in both Commonwealth and State legislation aimed at enabling a public servant to resign his or her office to stand for Parliament while being assured that, in the event of not being elected, he or she will be entitled to[82], or entitled to seek[83], full reinstatement. There is surely much to be said for the view that a procedure such as the taking of leave without pay or other emoluments followed by resignation when it is apparent that the person concerned will ultimately be elected is a preferable one to the rather devious procedure of an ostensible termination of appointment in the context of a persisting relationship and entitlement to resume

the appointment if unsuccessful at the poll[84]. Certainly, it appears to me that, within the context of section 44's disqualification of a person actually becoming, or sitting as, a member of the Parliament while holding and office of profit under the Crown, it should be competent for the Parliament to determine whether, and if so on what terms, a person holding such an office should be allowed to participate at all as a candidate in the electoral process. In that regard, it is relevant to note that the first Parliament of the Commonwealth considered it to be its function to address and determine the question whether a candidate should, at the time of nomination, be qualified under the Constitution to be actually elected as a member of the Parliament. Sections 94 and 95 of the *Commonwealth Electoral Act* of 1902 provided:

> "94. No person shall be capable of being elected as a Senator or a Member of the House of Representatives unless duly nominated.
>
> 95. To enable a person to be nominated as a Senator or a member of the House of Representatives he must be qualified under the Constitution to be elected as a Senator or a Member of the House of Representatives."

Section 162 of the current Electoral Act reproduces the old section 94. The old section 95 is not reproduced in the current legislation.

It should be mentioned that counsel for the petitioner placed considerable reliance upon the decision of the Queen's Bench Division (Wright and Bruce JJ) in *Harford* v *Linskey*[85]. That case concerned a local election under the *Municipal Corporations Act* 1882 (UK) which provided in section 12 that a person interested in a contract with the corporation of borough "shall be disqualified for being elected and for being a councillor". After the candidates had been nominated, and before the polling day, an objection was lodged to the petitioner's nomination on the grounds that he was interested in such a contract. Notwithstanding the fact that the petitioner could have assigned his interest in the contract to a third party before polling day, the court upheld the objection and subsequent disqualification, declaring that it was "safest to hold" that "a person, who at the time of nomination is disqualified for election .... is disqualified also for nomination"[86].

The decision in *Harford* v *Linskey* seems to me, however, to be remote from, and quite persuasive in relation to, the question of the proper construction of section 44 of the Australian Constitution. For one thing, the relevant words of section 44(iv) differ from those which were in issue in the English case. For another, the wording of section 44 was settled by the framers of the Constitution before the decision of the English Divisional Court and was adopted by the people of five of the six Australian Colonies before any report of that decision would have been available in this country. More important, "no real analogy"[87] can be drawn between the purpose and intended operation of a provision such as section 44 of the Australian Constitution and a statutory provision, such as that involved in *Harford* v *Linskey,* intended to regulate the conduct of a local government election. As Sedgwick pointed out in his classic text on constitutional construction[88]:

> "Another consideration will impress itself still more forcibly on the minds of those who are called to consider questions connected with the interpretation of constitutional law. Statutes can and do enter into the details of our daily transactions; they can and do prescribe minute directions for the control of those affected by them. Constitutions, on the other hand, from the nature and necessity of the case, in many instances go little beyond the mere enunciation of general principles; and it is impossible, and would lead to endless absurdity, to endeavour to apply to a declaration of principles the same rules of construction that are proper in regard to an enactment of details. In regard to a statute, the general duty of the judge is that of a subordinate power, to ascertain and to obey the will of superior; in regard to a Constitution, his functions are those of a co-ordinate authority, to ascertain the spirit of the fundamental law, and so to carry it out as to avoid a sacrifice of those interests which it is designed to protect."

A local government provision such as that involved in *Harford* v *Linskey* performs the function of prescribing the detailed procedures to be followed in respect of the local elections to which it applies. In contrast, section 44 is, as has been mentioned, an overriding disqualification provision in a national Constitution which envisages and empowers the future enactment by the Parliament of legislation and empowers the future enactment by the Parliament of legislation settling such detailed procedures[89]. The considerations of practical convenience and of what is "safest" which influenced the English Divisional Court in *Harford* v *Linskey* are appropriate to be taken into account by the Parliament in enacting, and by the courts in construing, such legislation. They do not, however, provide any basis whatever for an expansive construction of an overriding constitutional provision whose operation is effectively to confine the democratic rights of many citizens and to restrict the legislative powers of the Parliament.

It follows from what has been said above that section 44 (iv)'s provision that a person who holds an office of profit under the Crown shall be incapable of being chosen as a member of the House of Representatives should be construed as applicable only to the case where a person holds such an office at the time when he or she becomes elected by the declaration of the poll. Otherwise, the extent, if at all, to which the holding of an office of profit under the Crown should preclude a citizen from being nominated or participating as a candidate in the electoral process is a matter for the Parliament. That being so, Mr. Cleary was not disqualified by the operation of section 44 of the Constitution.

The Electoral Act, sections 162 and 170 (1)

No direct reference was made in the argument of the present case to the provisions of either sections 162 or 170(1) of the Electoral Act. It appears to me, however, that the question whether Mr. Cleary was "duly elected" cannot be answered without reference to them. Relevantly, they provide:

"162. No person shall be capable of being elected as a Senator or a Member of the House of Representatives unless duly nominated.

...

170. (1) A nomination is not valid unless, in the nomination paper, the person nominated:

...

(b) declares that:

(1) the person is qualified under the Constitution... to be elected as....a member of the House of Representatives". (Emphasis added)

The case stated does not set out the details of what appear in Mr. Cleary's nomination paper. Presumably, at the time of nomination, he believed that he was qualified under the Constitution to be elected as a member of the House of Representatives and declared to that effect in the nomination paper. The effect of what has been written above, however, is that he was not so qualified until he resigned his permanent appointment with the Education Department. In these circumstances, a question obviously arises whether he was "duly nominated" for the purposes of section 162. The answer to that question would seem to depend upon whether the provisions of section 170(1) are formal only, in the sense that their requirements will be satisfied and a person will be "duly nominated" for the purposes of section 162 if the nomination papers contain the necessary declaration notwithstanding that, by reason of innocent mistake, the declaration is erroneous.

If the outcome of the case depended upon my conclusion about whether Mr. Cleary's election was invalidated by the combined operation of sections 162 and 170(1) of the Electoral Act, I should have thought it necessary to extend to the parties the opportunity of making submissions about the effect of those provisions in the circumstances of this case. A majority of the Court is, however, of the view that Mr. Cleary was disqualified by the direct operation of section 44(iv) of the Constitution in any event. In these circumstances, it would obviously be a waste of time and money to invite such submissions. It would, however, be appropriate for me to express a conclusion about the effect of sections 162 and 170(1) in circumstances where that particular question was not addressed in the argument of the case.

The Status of Mr. Delacretaz and Mr. Kardamistsis

The question whether Mr. Delacretaz and Mr. Kardamitsis were disqualified by section 44 of the Constitution only arises if the question whether Mr. Cleary was disqualified is answered in the affirmative. If Mr. Cleary was not disqualified, the fact that either or both of Mr. Delacretaz and Mr. Kardamitsis were would not have the effect that Mr. Cleary's election was invalidated. However, in a context where my conclusion that Mr. Cleary was not disqualified is subject to the possible effect of sections 162 and 170(1) of the Electoral Act and is, in any event, a dissenting

one, it is appropriate that I indicate my views in relation to the status of Mr. Delacretaz and Mr. Kardamitsis.

The petitioner contends that Mr. Delacretaz and Mr. Kardamitsis each came, at relevant times, within section 44(i)'s disqualification of any person who "is a subject or a citizen or entitled to the rights or privileges of a subject or a citizen of a foreign power." Obviously, and this was not disputed, those words must be read down to some extent. Otherwise, to take an extreme hypothetical example, it would lie within the power of a foreign nation to disqualify the whole of the Australian Parliament by unilaterally conferring upon all of its members the rights and privileges of a citizen of that nation. The reason why that is so is that section 44(i) refers only to being "entitled" to the rights or privileges of a subject or a citizen of a foreign power and not to the assertion of acceptance of those rights. The real question on this aspect of the case is how the words of the sub-election should be read down to avoid such obviously objectionable and unintended consequences.

Section 44 (i)'s whole purpose is to prevent persons with foreign loyalties or obligations from being members of the Australian Parliament. The first limb of the sub-section (i.e. "is under any acknowledgement of allegiance, obedience, or adherence to a foreign power") involves an element of acceptance or at least acquiescence on the part of the relevant person (90). In conformity with the purpose of the sub-section, the second limb (i.e. "is a subject or a citizen or entitled to the rights or privileges of a subject or citizen of a foreign power") should, in my view, be construed as impliedly containing a similar mental element with the result that it applies only to cases where the relevant status, rights or privileges have been sought, accepted, asserted or acquiesced in my the person concerned. The effect of that construction of the sub-section is that an Australian-born citizen is not disqualified by reason of the second limb of section 44(i) unless he or she has established, asserted, accepted, or acquiesced in, the relevant relationship with the foreign power. The position is more difficult in a case such as the present where the relationship with the foreign power existed before the acquisition (or re-acquisition) of Australian citizenship. In such a case, what will be involved is not the acquisition or establishment, for the purposes of section 44, of the relevant relationship with the foreign power but the relinquishment or extinguishment of it. It does, however, seem to me that the purpose which section 44 seeks to attain and which "must always be kept in mind" (91) would not have included the permanent exclusion from participation at the highest level in the political life of the nation of any Australian citizen whose origins lay in, or who has had some past association with, some foreign country which asserts an entitlement to refuse to allow or recognise his or her genuine and unconditional renunciation of past allegiance or citizenship.

Accordingly, and notwithstanding that citizenship of a country is ordinarily a matter determined by the law of that country (92), the qualifying element which must be read into the second limb of section 44(i) extends not only to the acquisition of the disqualifying relationship by a person who is already an Australian citizen but also to the retention of that relationship by a person who has subsequently become and Australian citizen. A person who becomes an Australian citizen will

not be within the second limb of section 44(i) if he or she has done all that can reasonably be expected of him or her to extinguish any former relationship with a foreign country to the extent that it involves the status, rights or privileges referred to in the sub-section.

Mr. Kardamitsis has been an Australian citizen since 12 March 1975 upon which day he surrendered his Greek passport to the Australian Government and took an oath of allegiance that included the words "renouncing all other allegiance". Since then, he has taken three further oaths of allegiance of this country, twice as a councillor and once as a Justice of the Peace. Nonetheless, he remains a Greek national under the law of Greece. Under that law, his Greek nationality will only be discharged if, in the words of the case stated, "he obtains the approval of the appropriate Greek Minister". The case has been argued on the basis that, apart from applying for that "approval", Mr. Kardamitsis had, at relevant times, done all that he could do to relinquish and extinguish his Greek nationality and allegiance and the rights and privileges flowing from such nationality and allegiance.

The formal ceremony which culminated in the grant of Australian citizenship of Mr. Kardamitsis included, as has been indicated, a public renunciation of allegiance to any country other than Australia and an oath of allegiance to the Sovereign of this country. Involved in it was a clear representation by the Australian Government and people that, provided it was made genuinely and without reservation, that public renunciation and oath of allegiance constituted, for the purposes of the Constitution and other laws of this country, the final severing of formal national ties and the compliance with whatever requirements were necessary to become a full and equal member of this nation. In the context of that clear representation and of Mr. Kardamitsis' subsequent years of Australian Citizenship, it would not be reasonable to expect him now to make an application to a Greek Minister for the exercise of what would appear to be a discretionary power to approve or disapprove the discharge of the Greek nationality which he had unreservedly renounced in the manner specified by this country at the time he became an Australian citizen. Implicit in such an application would be an assertion of the continued existence of that Greek nationality and, more importantly, an acknowledgement of, and submission to, the discretionary authority of the relevant Greek Minister to decide whether it should or should not be discharged. In my view, Mr. Kardamitsis had, on the material before the Court, done all that he could reasonably be expected to do for the purposes of the Constitution and laws of this country to renounce and extinguish his Greek nationality and any rights or privileges flowing from it. Accordingly, on that material, he had, for the purposes of section 44(i) of the Constitution, relinquished and extinguished his relationship with Greece to the extent that it would represent a cause of disqualification.

The status of Mr. Delacretaz is more difficult. If the matter had been for me alone, I would have preferred to refrain from expressing a concluded view about it in circumstances where the material before the Court is somewhat sketchy and where Mr. Delacretaz was not represented at the hearing. Since the other members of the Court have dealt with the question, however, it is desirable that I indicate that, in a context where the onus of establishing that an Australian citizen

is disqualified by section 44(i) from full participation in the national government clearly rests on the person who asserts it, I do not think that the material before the Court is adequate to found a conclusion that Mr. Delacretaz has taken all reasonable steps to extinguish his Swiss citizenship and allegiance and to renounce any rights and privileges flowing from that citizenship.

Mr. Delacretaz was now been a Australian citizen for more than thirty years. It is not suggested that, in all that time, he has done anything which constituted in assertion or acknowledgement of Swiss citizenship or allegiance or that he has been otherwise than completely and solely loyal to Australia. Nor, subject to the qualification mentioned below, is it suggested that he has not done all that he could reasonably be expected to do to extinguish Swiss citizenship and allegiance and to renounce any rights or privileges flowing therefrom. The qualification is that, under Swiss law, Mr. Delacretaz remains a Swiss citizen. He must make a formal demand or request to the Swiss Government before his citizenship will be released or terminated under that law. This he has failed to do.

The case of Mr. Delacretaz differs from that of Mr. Kardamitsis in that the material before the Court indicates that Mr. Delacretaz is, under Swiss law, entitled to be released from Swiss citizenship if, as is the case, he has not had residence in Switzerland and has acquired another nationality. There is no ministerial discretion involved. That material does not, however, disclose the precise procedure to be followed in making the relevant demand or request for extinguishment of Swiss citizenship or whether that demand or request involves, as one would expect it to, an at least implicit assertion or acknowledgement of the continued existence of the obligations of that citizenship. Such an assertion or acknowledgement would, in my view, be inconsistent with the public and unqualified renunciation of allegiance to any country other than Australia which Mr. Delacretaz made as part of the formal ceremony pursuant to which he became an Australian citizen.

It must be stressed that the question whether Mr. Delacretaz has taken all reasonable steps to terminate Swiss citizenship and allegiance is not being asked for the purposes of Swiss law. It is being asked for the purposes of the Australian Constitution. Nonetheless, if Mr. Delacretaz had become an Australian citizen only yesterday, I would have been of the view that it was reasonable to expect that he take the formal steps necessary to terminate his Swiss citizenship under Swiss law. However, in a context where more than thirty years of Australian citizenship have followed a public renunciation of allegiance to any country other than Australia and the swearing of an unqualified oath of allegiance to the Sovereign of this country in full compliance with the procedures required by the Australian authorities, it appears to me that it would be quite wrong to conclude that, for the purposes of our law, Mr. Delacretaz should now be expected to assert or acknowledge the existence of Swiss citizenship so that it can be terminated for the purposes of Swiss law. On the material before the Court, Mr. Delacretaz had, by the time of the by-election, done all that could reasonably by expected of him, for the purposes of the law of this country, to terminate any ties with any country other than Australia. Accordingly, he was not disqualified by section 44(i) of the Constitution.

Conclusion

I would answer question (a) of the case stated as follows:

> Subject to the possible effect of ss.162 and 170(1) of the *Commonwealth Electoral Act* 1918 (Cth), the first respondent was duly elected at the by-election.

In view of the answer which I would give to question (a), it is agreed that inappropriate that I answer questions (b) and (c). The parties are agreed that question (d), which relates to costs, should not be answered.

DAWSON J I agree with Mason, C J, Toohey and McHugh J J, for the reasons which they give, that the first respondent was, until he resigned his position as a teacher in the Victorian teaching service, the holder of an office of profit under the Crown within the meaning of section44(iv) of the Constitution and that he was, therefore, incapable of being chosen as a member of the House of Representatives in the by-election for the Electoral Division of Wills. I also agree with Mason C J, Toohey and McHugh J J, for the reasons which they give, that, as a result, the by-election should be declared absolutely void under section 360(1) (vii) of the *Commonwealth Electoral Act* 1918 (Cth).

I desire only to add some comments on the position of the second and third respondents.

At common law, whether or not a person is a subject of citizen of a foreign state is a question that is generally to be determined by reference to the municipal law of that foreign states (93). The International Court of Justice held in the *Nottebohm Case* (94) that where there are competing claims made under different municipal laws, the nationality to be attribute to a person as a matter of international law is his "real and effective nationality", this being determined by the "stronger factual ties between the person concerned and one of the States whose nationality is involved"(95). The test under international law does not, however, assist in the present case which involves the proper construction of section 44 (i) of the Constitution. I agree with Mason C J, Toohey and McHugh J J, and with Brennan J, that section 44(i) should not be given a construction that would unreasonably result in some Australian citizens being irremediably incapable of being elected to either House of the Commonwealth Parliament.

Putting to one side extreme examples of foreign nationality or citizenship being foisted upon persons against their will, a person who is a subject or citizen of a foreign state by virtue of the municipal law of that state will not be incapable of being chosen or of sitting as a senator or a member of the House of Representatives if he has taken all steps that could reasonably be taken to renounce that foreign nationality or citizenship. What is reasonable will depend upon the circumstances of the case. It will depend upon such matters as the requirements of the foreign law for the renunciation of the foreign nationality, the person's knowledge of his foreign nationality and the circumstances in which the foreign authority to exercise a discretion to allow a person to relinquish his foreign nationality need not necessarily preclude the person from being capable of being chosen or of sitting as a senator or a member of the House of Representatives. Further, if the foreign law does not permit a person to relinquish his foreign nationality then there are obviously no steps, save for unilateral renunciation, which that person can reasonably take to do so and, therefore, that person will not be precluded by reason only of that foreign nationality from being capable of being chosen or of sitting as a member of either House of the Commonwealth Parliament.

There is no dispute that, under Swiss law, the second respondent was at all relevant times a citizen of Switzerland or that, under Greek law, the third respondent was at all relevant times a Greek national. When the second and third respondents became Australian citizens they renounced their

allegiance to their former countries but this did not result in their foreign nationality being relinquished under the law of those countries. There were steps which both the second and third respondents could reasonably have taken under the laws of those countries in order to relinquish their foreign nationality in accordance with those laws. I agree, therefore, that the second and third respondents were incapable of being chosen as members of the House of Representatives in the Wills by-election.

For these reasons I would answer the questions reserved in the manner proposed by Mason C J, Toohey and McHugh J J.

GAUDRON J I agree with Mason C J, Toohey and McHugh J J, for the reasons that their Honours give, that the first respondent was incapable of being chosen as a member of the House of Representatives in the 1992 Wills by-election and that that by-election should be declared absolutely void. Accordingly, I would answer the questions reserved in the case stated in the manner proposed by their Honours.

It is appropriate that I stated my views as to section 44(i) of the Constitution in its application to the second and third respondents. That sub-section prevents the election to either House of the Parliament of "[a]ny person who ....[i]s 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". It is said that the second and third respondents are, respectively, citizens of Switzerland and of Greece or entitled to the rights and privileges of citizens of those countries because their laws recognise them as their citizens.

The facts concerning the second and third respondents are set out in the joint judgement of Mason C J, Toohey and McHugh J J. It is necessary only to observe that they are Australian citizens, each having been naturalised after migrating from the country of his birth: the second respondent, Mr. Delacretaz, was naturalised on 20 April 1960 pursuant to the *Nationality and Citizenship Act* 1948 (Cth) ("the 1948 Act") as it then stood; Mr. Kardamitsis, the third respondent, was naturalised on 12 March 1975 pursuant to the *Australian Citizenship Act* 1948 (Cth) ("the Citizenship Act") as the 1948 Act had then become.

It is convenient to turn first to the position of Mr. Kardamitsis. In 1975, when he was naturalised, the citizenship Act provided for the acquisition of Australian citizenship by naturalisation, taking effect, in the case of those who were required to take an oath or make an affirmation of allegiance, from the taking of that oath or the making of that affirmation and, in other cases, from the date on which the Minister granted a certificate of Australian citizenship (96). Mr. Kardamitsis fell into the first category and he swore or affirmed his allegiance – it is not clear which – as then required by the Citizenship Act.

When Mr. Kardamitsis was naturalised, the oath of allegiance was to be sworn or the affirmation made "in the manner provided......and in accordance with the form contained in Schedule 2" (97). Nothing presently turns on the requirements as to the manner of taking the oath or making the affirmation. The oath and affirmation set out in Sched.2 (98), commenced with these words:

> "I, A.B., renouncing all other allegiance, swear/solemnly and sincerely promise and declare......".

The form of oath and affirmation required by the Citizenship Act, as it stood in 1975, was introduced in 1966 when section 11 of the *Nationality and Citizenship Act* 1966 (Cth) ("the 1966 Act") amended the Second Schedule to the 1948 Act "by inserting after the letters 'A.B.'... the words 'renouncing all other allegiance'". At the same time, section 12 of the 1966 Act introduced

the Third Schedule containing the form of oath and affirmation required in the case of women wishing to be registered as British subjects without citizenship (99). That also involved the renunciation of all other allegiance. The second and Third Schedules which were then enacted were substantially re-enacted as Sched.2 and Sched.3 in 1973 when extensive amendments resulted in the transformation of the 1948 Act into the Citizenship Act. Schedule 3 was repealed in 1984 (100). The renunciation of all other allegiance remained part of the oath and affirmation required for naturalisation until 1986 (101).

As at 1975 – indeed, from the enactment of the 1948 Act – the Citizenship Act made provision for the renunciation of Australian citizenship (102). However, apart from the forms of oath and affirmation introduced in 1966 and substantially re-enacted in 1973, it was silent, as it had been since 1948, with respect to the renunciation by an Australian citizen of his or her allegiance to a foreign country.

One other feature should be observed with respect to the Citizenship Act as it stood in 1975. It provided, in section 17, that:

> "An Australian citizen of full capacity, who, whilst outside Australia and New Guinea, by some voluntary and formal act, other than marriage, acquires the nationality or citizenship of a country other than Australia, shall thereupon cease to be an Australian citizen."

The current position is much as it was in 1975, although it is not restricted to acts done outside Australia (103). And there has been provision to the same general effect at least since 1920 when the *Nationality Act* 1920 (Cth) provided, in section 21, that:

> "A British subject who, in any foreign state and not under disability, by obtaining a certificate of naturalization or by any other voluntary and formal act, becomes naturalized therein, shall thenceforth be deemed to have ceased to be a British subject."

It is generally accepted that, at common law, a person could have dual citizenship or allegiance (104). Of course, the common law has been modified to the extent that statute law now provides and, at least since 1920, has provided for the loss of Australian citizenship (in which I include the status of British subject which we had prior to citizenship) by the acquisition of foreign citizenship.

It is also generally accepted that, at common law, the question whether, for the purposes of municipal law, a person is a citizen or subject of a foreign country (more precisely, whether he or she is to be treated as such) is, as a general rule, to be answered by reference to the law of the country concerned (105). That approach is understandable if foreign citizenship has no consequences for citizenship of the country whose courts are considering the matter or for the

rights ordinarily attaching to citizenship of that country. But our legal system is not of that kind. As has been seen, it has been the case, at least since 1920, that Australian citizenship can be lost by the acquisition of foreign citizenship. And as appears from this case, it has been the position since 1901 that an Australian citizen (including a British subject as we used to be) has been incapable of being chosen or of sitting as a member of either House of the Parliament if he or she is citizen of a foreign country or otherwise comes within section 44(i) of the Constitution.

There is nothing novel in the proposition that a municipal court may, on grounds of public policy, refuse to apply the law of another country, even in cases where, according to the municipal law, the matter in issue is governed by the law of that other country (106). Thus, it has been said, for example, that a court will not apply a foreign citizenship law which does not conform with established international norms (107) or which involves gross violation of human rights (108). And if the question be whether Australian citizenship has been lost or the rights ordinarily attaching to Australian citizenship have been excluded, every consideration of public policy and commonsense tells against the automatic recognition and application of foreign law as the sole determinant of that matter. However, that need not be considered in the case of Mr. Kardamitsis. His position, in my view, is governed by the Citizenship Act, as it stood in 1975.

It cannot be supposed that, in enacting the form of oath and affirmation introduced in 1966 and in substantially re-enacting it in 1973, the Parliament intended that the formal renunciation of all other allegiance, notwithstanding that it was solemnly sworn or affirmed, should be entirely devoid of legal effect. Particularly is that so in a statutory context in which real limits were imposed on dual citizenship and a right to renounce Australian citizenship – albeit one that was circumscribed (109) – was expressly recognised.

Of course, an Australian naturalisation law providing for the renunciation of foreign citizenship could not, of itself, affect the position of a naturalised Australian under the law of the country whose citizenship he or she renounced. And a section 44 (i) of the constitution may impose limits on the power to legislate with respect of foreign citizenship. But putting the constitutional question aside for the moment, the Parliament could enact a law to the effect that foreign law should not be decisive of the question whether, for the purposes of Australian law, a naturalised Australian should be treated as a citizen of another country.

In a context in which the Citizenship Act, as it stood in 1975, made provision for the automatic loss of Australian citizenship on the acquisition of foreign citizenship in the circumstances set out in section 17 and for the effective renunciation of Australian citizenship, the requirement that an oath be sworn or an affirmation made renouncing all other allegiance necessarily carried, in my view, the implication that foreign law was not to be decisive of the question whether a naturalised Australian who had renounced foreign citizenship was to be treated as a citizen or as entitled to the rights and privileges of a citizen of the country then renounced. And, in my view, that same context disclosed, also as a matter of necessary implication, the extent to which regard was to be had to the law of that country if that question should arise.

Section 17 of the Citizenship Act, as it stood in 1975, placed real limits on, but by no means constituted a complete bar to, dual citizenship. It did not, for example, operate by reference to citizenship acquired by birth. There was, thus, nothing to preclude Mr. Kardamitsis from being a Greek citizen by birth and an Australian citizen by naturalisation. In that context and on the basis that the renunciation of his allegiance to Greece was intended to have some legal effect, the effect of the Citizenship Act, as it then stood, could only have been that the question of his Greek citizenship or his entitlement to the rights and privileges of a Greek citizen, if it arose under Australian law, was to be determined by reference to Greek law if, after renouncing that allegiance, he, in some way, reasserted citizenship of Greece, but otherwise was to be answered on the basis that it had been effectively renounced. Unless approached in that way, the oath and affirmation required by the Citizenship Act in 1975 (indeed, from 1966 to 1986) and which operated to confer Australian citizenship, was, to the extent that it involved renunciation of all other allegiance, but an empty gesture.

It is necessary to deal with two matters to which some reference has already been made. The first is the question whether, in the light of section 44(i) of the Constitution, Parliament may validly legislate to the effect that I have said is necessarily to be implied from the terms of the Citizenship Act, as it stood in 1975. It cannot be the case that, for the purpose of section 44 (i), the question of foreign citizenship or entitlement to the rights and privileges of foreign citizenship is one that is invariably to be answered by the application of foreign law for, as Deane J points out in that event a foreign power would disable the Parliament by conferring citizenship on all its members. But, in my view, the solution is not to be found in reading down section 44 (i), rather, it lies in examination of the circumstances in which foreign law should be applied to determine questions arising under the sub-section. And, on the same basis, the question of legislative power is one which requires identification of the circumstances in which foreign law may be disregarded. Whatever limits on legislative power are imported by section 44(i), it does not, in my view, limit the power of Parliament to provide to the effect that, if prior foreign citizenship has been renounced in compliance with Australian law, the law of the country concerned should not be applied for any purpose connected with Australian law, including the determination of any question arising under section 44(i) itself, unless that prior citizenship has been reasserted.

The second matter concerns the amendment of Sched. 2 in 1986 (110), removing the renunciation of other allegiance from the oath and affirmation of allegiance required for naturalisation. Once it is accepted that the Citizenship Act, as it stood in 1975, involved in the directive to the effect already indicated, it follows that, for all purposes of Australian law, Mr. Kardamitsis had a right to have any question of his Greek citizenship or his entitlement to the rights and privileges of a Greek citizen determined on the basis that that citizenship was effectively renounced and that, only if he reasserted it in some way, would the question be answered by reference to Greek law. By virtue of section 8(c) (III) of the *Acts Interpretation Act* 1901 (Cth) that right was not affected by the amendment of Sched. 2 in 1986.

The material does not reveal anything which suggests that Mr. Kardamitsis has, in any way, reasserted citizenship of Greece. Given that what is at stake is the right to participate in the democratic process as a member of Parliament – a right ordinarily attaching to citizenship – the onus of establishing that he did anything of that kind must lie on the party asserting it [112]. That being so, for the purpose of section 44(i) of the Constitution, Mr. Kardamitsis is neither a Greek citizen nor a person entitled to the rights and privileges of a Greek citizen.

The provisions of the 1948 Act under which Mr. Delacretaz was naturalised were different in a number of respects from those in the Citizenship Act, as it stood in 1975. Importantly, and as already indicated, the oath or affirmation of allegiance required by the 1948 Act, as it stood in 1960, did not involved the renunciation of prior allegiance. Despite this, Mr. Delacretaz, in fact, formally renounced all other allegiance as preliminary to taking the oath which resulted in his naturalisation[113].

It appears from the second reading speech for the *Nationality and Citizenship Act* 1966 (Cth) (which introduced the form of oath and affirmation involving renunciation of all other allegiance) that, for some time past, there had been a "practice of requiring applicants ... to renounce allegiance to their former countries" in "a prominent and separate part of the naturalisation ceremony"[(114)]. It is clear from Mr. Delacretaz' naturalisation certificate that that is what happened in his case.

As already indicated, the issue that arises with respect to section 44(i) is, in my view, whether and to what extent foreign law should determine its effect in any particular situation. Given its terms and purpose, regard must, I think, be had to foreign law in any case where nothing has been done to renounce foreign citizenship or if renounced, it has, in some way, been reasserted. But, again because of its terms and purpose, regard should not be had to foreign law if reasonable steps have been taken to renounce other allegiance, save, of course, where reasserted. Leaving reassertion aside, where reasonable steps have been taken to renounce foreign allegiance, questions arising under section 44(i) should, in my view, be answered on the basis that those steps achieved their purpose. That approach involves no reading down of section 44(i), although it may have the same result: rather, it is to spell out the process involved in determining its effect in a particular case.

Whether section 44(i) be read down or whether it be approached in the way that I favour, the question whether reasonable steps have been taken is a question for Australian law. It may involve some consideration of the content of the law of the country whose citizenship is in question, but the main consideration must be the circumstances of the person concerned.

As has already been mentioned, Mr. Delacretaz formally renounced all other allegiance, having been required to do so as a condition of naturalisation. Whether that condition was authorized by the 1948 Act, as it stood in 1960, need not be considered; it must be presumed that, in complying with that condition, Mr. Delacretaz thought he was engaging in a meaningful act in the sense that, at least for the purposes of Australian law, that act would achieve its object. What

he might have thought with respect to his position under Swiss law is not material, for this case is concerned only with his position under Australian law.

The material reveals that, under Swiss law, Mr. Delacretaz will be released from Swiss citizenship if he so demands and if, as is the case, he has no residence in Switzerland and has acquired another nationality. The materials do not disclose whether that has always been the position. Nor do they reveal what, if anything, Mr. Declaretaz knew or believed the position to be. But, even assuming that he could at any stage obtain an automatic release from his Swiss citizenship and that he knew that to be the case, it does not seem to me to be reasonable to expect him to seek release from his Swiss citizenship and that he knew that to be the case, it does not seem to me to be reasonable to expect him to seek release when it necessarily involves acknowledgement of citizenship that has already been formally renounced. That being so, Mr. Delacretaz, by formally renouncing all their allegiance as a preliminary to naturalisation and as part of the naturalisation ceremony, must be held to have taken reasonable steps to renounce his Swiss citizenship.

There is nothing to suggest that Mr. Delacretaz has done anything to reassert Swiss citizenship. That being so and having regard to what was said in relation to Mr. Kardamatsis with respect to the onus of proof, Mr. Delacretaz is neither a Swiss citizen nor entitled to the rights and privileges of a Swiss citizen for the purposes of section 44 (i) of the Constitution.

Footnotes

(1) *From 26 November 1991, the Chief Manager, Department of School Education: see Teaching Service (Further Amendment) Act 1991 (Vict.) ("the 1991 Act"), s. 6 (1)(b)*

(2) *12 & 13 Wm. III c.2*

(3) *4 & 5 Anne c. 20, s. 28*

(4) *6 Anne c. 41, ss. 24 and 25*

(5) *Report from the Select Committee on Office or Places of Profit under the Crown, House of Commons, (1941), par. 19, pp. xiii–xiv; Erskine May, Treatise on the Law, Privileges, Proceedings and Usage of Parliament, 16th ed. (1957), p 200*

(6) *Commentaries, 1st ed. (1966), vol.2, p 36*

(7) *Maitland, The Constitutional History of England, (1955), p 369; Report from the Select Committee, op. cit., par.29, p.xx; Erskine May, op. cit.,p. 206*

(8) *Inquiry into the conduct of the 1987 Federal Election and 1988 Referendums, Report No. 3 of the Joint Standing Committee on Electoral Matters, (May 1989), par. 3. 53; cf Cleydesdale v Hughes (1934) 36 W.A.L.R. 73*

(9) *Erskine May, op. cit., p 206*

(10) *ibid*

(11) *(1989) 24 F.C.R. 405, at p. 411*

(12) *Great Western Railway Co. v Bater [1922] 2 A.C. 1. At first instance, Rowlatt J distinguished occupancy of an office from the case of a person engaged to do any duties which may be assigned to him or her: Great Western Railway Co. v Bater [1920] 3 K.B. 266, at p 274. See also Mitchell and Edon v Ross [1960] Ch. 498, at pp 522–523, 532*

(13) *The 1981 Act, s. 2*

(14) *"officer" means any person holding an office in the teaching service: see the 1981 Act, s.2 and the 1983 Act, ss. 6(1), 7 (3) and 7(4). By an instrument dated 22 February 1984, the Minister of Education determined, in accordance with s. 6(1) of the 1983 Act, that the office of teacher in the education service was to be an office in the teaching service. On the commencement of s. 7 of the 1983 Act, this determination tool effect (s.7(3) (a) of the 1983 Act) and all persons who, immediately before that time, had held the office of teacher in the education service were deemed to be officers in the teaching service (s.7 (4) of the 1983 Act)*

(15) *Formerly the Director-General: see the 1991 Act, s. 6 (1) (b)*

(16) *The 1981 Act, s. 4 (4)*

(17) *Erskine May, op. cit., pp 214–215; Harvey's Case House of Commons Parliamentary Debates (Hansard), 15 February 1839, cols 446–466; ibid., 21 February 1839, cols 715–720*

(18) *Official Report of the National Australian Convention Debates, Adelaide, 22 April 1897, p. 1198; Melbourne, 7 March 1898, pp 1941–1942*

(19) *Quick and Garran, Annotated Constitution of the Australian Commonwealth, (1901), pp 492–493; Harrison Moore, The Constitution of the Commonwealth of Australia, 2nd ed. (1910), p 128*

(20) *So much is implied from s. 24 of the Constitution, read in conjunction with ss. 7, 30 and 41*

(21) *The Electoral Act, s. 241*

(22) *See Constitution, s. 31, which provided for the application of state laws in relation to the election of members of the House of Representatives*

(23) *See Harford v Linskey [1899] 1 Q.B. 852, at p 858*

(24) *s. 179 (2)*

(25) *However, a provisions corresponding to s. 179 (2) of the Electoral Act was in force in England and in each of the Australian colonies prior to federation – England: Ballot Act 1872 (35 & 36 Vict. c. 33), s. 1; New South Wales: Parliamentary Electorates and Elections Act 1893 (56 Vict. No. 38), s. 66; Queensland: Elections Act 1885 (49 Vict. No. 13), s. 52; South Australia: Electoral Code 1896 (59 & 60 Vict.No.667), s. 97; Tasmania: Electoral Act 1896 (60 Vict. No. 49), s. 91; Victoria: Constitution Act Amendment Act 1890 (54 Vict.No. 1075), s. 224 (re-enacting Electoral Act 1865 (29 Vict. No. 279), s. 86); Western Australia: Electoral Act 1899 (63 Vict.No.20), s. 83 – and was present in the Commonwealth Electoral Act 1902 (Cth), s. 106*

(26) *(1988) 167 C.L.R. 145*

(27) *ibid., at pp 165–166*

(28) *ibid., at p 166*

(29) *ibid., at pp 165–166*

(30) *ibid*

(31) *Oppenheimer v Cattermole [1975] A.C. 249, at pp 263–264, 278*

(32) *R. v Burgess; Ex parte Henry (1936) 55 C.L.R. 608, per Latham C J at p 673*

(33) *(Liechtenstein v Guatemala) [1955] I.C.J. 4, at p 20*

(34) *Convention on Certain Questions Relating to the Conflict of Nationality Laws, 12 April 1930, 179 League of Nations Treaty Series 89*

(35) *That is, the right of a State, a national of which has suffered a wrong at the hands of another state, to bring a claim before an international tribunal in respect of that wrong: see Brownlie, Principles of Public International Law, 4th ed. (1990), pp 480–494, and see generally pp 381–420*

(36) *[1955] I.C.J., at p 22*

(37) *ibid., at p 23*

(38) *The Constitutional Qualifications of Members of Parliament, Report by the Senate Standing Committee on Constitutional and Legal Affairs, (1981), par. 2. 14*

(39) *Quick and Garran, The Annotated Constitution of the Australian Commonwealth, (1901), par. 144, pp 491–492*

(40) *[1946] . A.C. 347, at p 366*

(41) *Reg. v Immigration Officer; Ex parte Thakrar [1974] Q.B. 684, at pp 709–710*

(42) *[1955] I.C.J. 4, at p 20*

(43) *See Iran-United States Claims Tribunal: Decision in Case No. A/18 (6 April 1984) 23 I.L.M. 489, at p 494*

(44) *See per Latham C J in R. v Burgess; Ex parte Henry (1936) 55 C.L.R. 608, at pp 648, 649*

(45) *[1976] A.C. 249, at pp 278–279; see also pp 261, 263–264, 267*

(46) *R. v Burgess; Ex parte Henry (19936) 55 C.L.R., at pp 649, 673*

(47) *[1955] I.C. J., at pp 13, 17*

(48) *ibid, at p 20*

(49) *ibid, at p 22*

(50) *ibid*

(51) *Signed at The Hague, 12 April 1930, 179 League of Nations Treaty Series 89, at pp 99, 101*

(52) *R. v Burgess; Ex parte Henry (1936) 55 C.L.R., p 649*

(53) *[1976] A.C., at p 277*

(54) *(1943) 137 F. 2d. 898*

(55) *See R. v Lynch [1903] 1 K.B. 444*

(56) *R. v The Home Secretary; Ex parte L. [1945] K.B. 7; Lowenthal v Attorney-General [1948] 1 All E.R. 295*

(57) *Oppenheimer v Cattermole [1976] A.C., at p 275*

(58) *supra, fn. (53)*

(59) *See Common Informers (Parliamentary Disqualifications) Act 1975 (Cth), ss.3, 4*

(60) *(1975) 132 C.L.R. 270, at p 279*

(61) *Emphasis added*

(62) *Emphasis added*

(63) *See, e.g. ss. 4(4), 8 A (3) (b), 12, 36(2), 62A(3)*

(64) *Emphasis added*

(65) *See the heading to s. 75 which is made part of the Act by s. 36(1) of the Interpretation of Legislation Act 1984 (Vict.)*

(66) *See Teachers (Government Teaching Service) Award (No.1 of 1990), Pt. 2, Div. 1 and Sched. 1, as amended by Teachers (Government Teaching Service) Award (No. 2 of 1991)*

(67) *See, e.g. In re The Warrego Election Petition (Bowman v. Hood) (1899) 9 Q.L.J. 272, at p. 278; Delane v Hillcoat (1829) 9 B. & C. 310, at p 313 [109 E.R. 115, at p 116]; Erskine May, Treatise on the Law, Privileges, Proceedings and Usage of Parliament, 16th ed. (1957), p 214*

(68) *See, e.g. Amalgamated Society of Engineers v Adelaide Steamship Co. Ltd. ("the Engineers' Case") (1920) 28 C.L.R. 129, at p 152*

(69) *s. 9*

(70) *See. e.g. R. v Foreign Secretary; Ex parte Indian Association of Alberta [1982] Q.B. 892, at pp. 928–935*

(71) *See, e.g. Nolan v Minister for Immigration and Ethnic Affairs (1988) 165 C.L.R.178, at pp 185–186; Street v Queenland Bar Association (1989) 168 C.L>R. 461, at pp 505, 525, 541, 554, 572*

(72) *See Constitution, s. 33.*

(73) *See the Electoral Act, ss. 18, 21*

(74) *See, generally, ibid, s. 274 (7)*

(75) *ibid, s. 284*

(76) *See ibid, s. 284 (4)*

(77) *See, e.g. Quick and Garran, The Annotated Constitution of the Australian Commonwealth, (1901), at p 491*

(78) *In re Webster (1975) 132 C.L.R., per Barwick C J at p 278*

(79) *See Constitution, s. 64*

(80) *See, e.g. Erskine May, op.cit., pp 200–202*

(81) *Currently, more than 10%: See Australian Bureau of Statistics, Canberra, March quarter 1992, ABS Catalogue Nos 3101.0, 6248.0*

(82) *See, e.g. Public Service Act 1922 (Cth), ss. 47C, 82B*

(83) *See, e.g. The Constitution Act Amendment Act 1958 (Vict.), s .49*

(84) *A procedure such as the latter one is arguably more objectionable in a case where the entitlement to resume the appointment is, as in the case of the Victorian legislation, subject to a government discretion.*

(85) *[1899] 1 Q.B. 852*

(86) *ibid., at p 858*

(87) *See In re Webster (1975) 132 C.L.R., per Barwick C J at pp 278–279*

(88) *The Interpretation and Construction of Statutory and Constitutional Law, 2nd ed. (1980), p 417*

(89) *See, e.g. Constitution, ss. 29, 30, 31, 34*

(90) *See Nive v Wood (1988) 167 C.L.R. 133, at p 140*

(91) *In re Webster (1975) 132 C.L.R., at p 278*

(92) *See. e.g. R. v Burgess; Ex parte Henry (1936) 55 C.L.R. 608, at pp 649, 673*

(93) *See R .v Burgess; Ex parte Henry (1936) 55 C.L.R. 608, per Latham C J at p 649, Dixon J. at p 673; Oppenheirmer v Cattermole [1976] A.c. 249, per Lord Hailsham of St. Marylebone at pp 261–262, Lord Pearson at p 265, Lord Cross of Chelsea at p 267, Lord Salmon at p 282, Stoeck v Public Trustee [1921] 2 Ch. 67, per Russell J at p 82. See also the Nottebohm Case (Liechtenstein v Guatemala) [1955] I.C.J., 4, at pp 20, 23; Art.2 of the Convention on Certain Questions Relating to the Conflict of Nationality Laws, 12 April 1930, 179 League of Nations Treaty Series 89*

(94) *[1955] I.C.J., at pp 22–24*

(95) *ibid, at p 22*

(96) *Section 15(1). The persons who were not required to take an oath or make an affirmation comprised children included on the certificate naturalisation of a parent or guardian, persons who were under sixteen years of age and those falling within s. 14(2), namely persons whose parents were Australian citizens*

(97) *s. 15(1) of the Citizenship Act*

(98) *Note that, by s. 13(2) of the Acts Interpretation Act 1901 (Cth), the Schedule is deemed to form part of the Act*

(99) *Section 9 of that Act introduced s. 26A which provided for the registration as a British subject without citizenship of the wife of such a subject*

(100) *S. 37 of the Australian Citizenship Amendment Act 1984 (Cth)*

(101) *S. 11 of the Australian Citizenship Amendment Act 1986 (Cth)*

(102) *Section 18 provided for declarations renouncing Australian citizenship to be made in the following situations: where the person was a foreign national and that nationality was acquired at birth, before a particular age or by marriage (s.18(1)); where the person became an Australian citizen by reason of the inclusion of his or her name in the certificate of Australian citizenship of his or her parents or guardian (s.18(2)); where a woman acquired the foreign nationality of her husband after he had ceased to be an Australian citizen (s.18(3); where a person was born or ordinarily resident in a foreign country*

and was not entitled under the law of that country to its citizenship by reason of his or her Australian citizenship (s.18 (3A)). Subject to exceptions during wartime and to prevent statelessness (s.18(5), (6), the Minister had to register a declaration and thereupon the person making it ceased to be an Australian citizen (s.18(4)). Section 18 of the 1948 Act was to similar effect. Section 18 of the Citizenship Act as it currently stands provides for a declaration of renunciation of citizenship where an Australian citizen over the age of 18 is also a foreign national or was born or is ordinarily resident in a foreign country and is not entitled under the law of that country to acquire its citizenship by reason of his or her Australian citizenship (s.18(1)). The Minister must, subject to sub-sections (5), (5A) and (6), register the declaration (s. 18(4)). Sub-section 5A provides that the Minister shall not register the declaration if she or he considers that it would not be in the best interests of Australia to do so.

(103) *See s. 17 of the Citizenship Act as it currently stands*

(104) *See, with respect to the common law of England, Oppenheimer v Cattermole [1976] A.C. 249, at pp 263–264, 278–279; Kramer v Attorney-General (1923) A.C. 528, at p 537*

(105) *See, as to the position in Australia, R. v Burgess; Ex parte Henry (1936) 55 C.L.R. 608, at pp 649, 673; Ex parte Korten (1941) 59 W.N. (N.S.W.)b 29, at p 30. See, as to the position in the United Kingdom, Oppenheimer v Cattermole [1976] A.C., at pp 261–262, 266–267, 282; Stoeck v Public Trustee [1921] 2 Ch. 67, at p 82*

(106) *See, generally, Attorney-General (United Kingdom) v Heinemann Publishers Australia Pty. Ltd. (1988) 165 C.L.R. 30, at pp 49–50; Vervaeke v Smith [1983] 1 A.C. 145, at p 164; Settebello Ltd. v Banco Totta and Acores [1985] 1 W.L.R. 1050, at pp 1056–1057; Williams & Humbert Ltd. v W. & H. Trade Marks (Jersey) Ltd. [1986] A.C. 368, at p 434*

(107) *Oppenheimer v Cattermole [1976] A.C., at p. 277*

(108) *ibid, at pp 278, 282–283. See also, as to the circumstances in which a municipal court may refuse to apply a foreign citizenship law during wartime on the grounds of public policy, T. v The Home Secretary; Ex parte L [1945] K.B. 7, at p 10; Lowenthal v Attorney-General [1948] 1 All E.R. 295, at p 299*

(109) *See, supra, fn. (102)*

(110) *See, supra, fn. (101)*

(111) *Section 8 (c) provides that "[w]here an Act repeals in the whole or in part a former Act, then unless the contrary intention appears the repeal shall not..... affect any right, privilege, obligation or liability acquired accrued or incurred under any Act so repealed". Also note that by s. 13 (2) the Schedule is deemed to be part of the Act*

(112) *See, with respect to the onus and standard of proof in United States denaturalisation proceedings, Schneideman v United States (1943) 320 U.S. 118; Klapprott v United States (1949) 335 U.S. 601; Kungys v United States (1988) 485 U.S. 759*

(113) *Under s. 16 (1) of the 1948 Act, as it stood in 1960, naturalisation took place as from the date of taking the oath or affirmation in the case of persons over the age of sixteen, unless they had been included on the naturalisation certificate of a parent or guardian*

(114) *House of Representatives, Parliamentary Debates (Hansard), 31 March 1966, p 833*